

REVISION OF 1860,

CONTAINING ALL THE

STATUTES OF A GENERAL NATURE

OF THE

S T A T E O F I O W A ,

WHICH ARE NOW IN FORCE, OR TO BE IN FORCE, AS THE  
RESULT OF THE LEGISLATION

OF THE

EIGHTH GENERAL ASSEMBLY.

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ASSEMBLY OF THE STATE OF IOWA.

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# P R E F A C E .

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THE Seventh General Assembly of the State of Iowa, about the first day of February, 1858, passed the following Joint Resolution :

*“ Resolved, the Senate concurring, that WM. SMITH, of Linn county, W. T. BARKER, of Dubuque county, and CHARLES BEN DARWIN, of Des Moines county, be and are hereby appointed Commissioners to draft and report to the Judiciary Committee of the two houses a Code of Civil and Criminal procedure ; and also to report such changes as may seem necessary to harmonize existing laws and adapt them to the new constitution ; and said Commissioners to Revise and Codify the General Laws of the State so far as practicable, and report the same in the several parts through the Judiciary Committees to the legislature as speedily as practicable ; and that after the same shall have been enacted as laws by the General Assembly, that said Commissioners shall arrange and index all of the General Laws into one volume, to be published by order of the General Assembly ; said volume to contain all General Laws in force in the State.”*

The gentlemen named in the above resolution entered at once upon their appointed labors, but soon becoming better advised of the magnitude of the undertaking, they reported to the Legislature the impossibility of completing the work during the session. It resulted that on the 11th day of March, 1858, the following Act was passed :

*“An Act providing for a Revision of the Laws of Iowa, and the preparation of a Code of Civil and Criminal Procedure.*

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa, That the Commissioners appointed by the Legislature to conform the Laws of the State to the Constitution and perform other duties, are hereby directed to prepare a Code of Civil and Criminal procedure, and Revise and Codify the Laws of the State and have their report ready for publication by the first day of September, 1858.*

SEC. 2. *Immediately after the filing of their report by said Commissioners, the Secretary of State shall procure to be printed 500 copies of said report, and one month previous to the next session of the General Assembly whether the same be an extra or regular one, shall mail to each member thereof one copy of such printed report and shall retain the residue for the use of the General Assembly.”*

To the Eighth Session in January, 1860, this Commission presented a Code of Civil Practice, designed as a substitute for Part Third of the Code of 1851. It became law with a few changes and constitutes that portion of this book known as PART THIRD. The Commission also presented at same session a Code of Criminal Practice, designed to supersede and stand for all of Titles 24 and 25 of the Code of 1851, except the Chapter 187, concerning the government of the Penitentiary, which subject was not included in the new Criminal Code. The act with little change became law, and constitutes the Code of Criminal Practice found herein.

At the same session the Commission also presented a Revision of the Laws, together with the following Report thereon :

The Commission to whom the Seventh General Assembly of the State of Iowa, assigned the duty, among other things, to "Revise and Codify the Laws of the State." herewith tender their report thereon.

There occurred to us in the outset of this branch of the work, a question as to the extent of our duty—namely, whether it intended a mere revision, such as would be met by a compilation and arrangement in proper order of the existing laws, without change, or a codification which would imply not only the former, but also a creation of new law, such as we might deem demanded by our conditions as a people. We concluded that the first, the mere revision, was intended.

And such a revision do we now present. We will give the reasons which led us to this conclusion. 1. We were attendant during the last session when this branch of the work was discussed and expressed in the act defining our duty, and we well remember such to have been the accepted understanding of its intention. 2. This conclusion comports with our view of the actual wants of the State.

To *codify the law*, is to state in a system, not only the law in force by statute, but also that announced in decisions, as well as that not yet so announced, but remaining thus far the grand fund of common law, out of which new decisions are daily made. Such codification would be very desirable, but is not to be attained without the painful labor of many minds working in concert for many years. This was accomplished, as to *part* of the law under the inspiration of the great Napoleon, in the Code which bears his name, and which will live when Marengo and Austerlitz are forgotten. The attempt to *codify* all the law, is being seriously urged in England, and has been actually entered upon in New York by a commission appointed for the term of seven years. The systems called Codes, as of Tennessee, Alabama, Virginia, North Carolina, Iowa, &c., are not codifications, in the sense in which the word is here used, except to a very limited extent. These are *revisions* of the statute law, with a further announcement of a few provisions of general law which have heretofore been expressed only in decisions. Codification aims to leave no law unexpressed in statute, to the end that the law may be read and known of all men, and the *ex post facto* result of judge-made law, may thus be averted.

There is a part of the law of every State, which is peculiar to such State. It may exist elsewhere, but has not, for that reason, been adopted—but, on the contrary, has been adopted, because such State, elected to enact it as adapted to its condition. Such is called political, police, or administrative law. There is, also, much other law which is not enacted, but is appropriated, as the occasion arises, from that fountain of municipal justice, which we call the common law, and which has not been by such State expressly enacted. Our Code and its cognates, include only the former kind of law, with a few of the principles which have heretofore been of the other kind.

We think that this State is not ready for a codification of the former kind of law—its resources have not been yet sufficiently developed—its population has not yet become sufficiently compact. The wants met by such a kind of legislation are yet fluctuating, and though rapidly developing, they are yet unfixd.

This assertion might be predicated, a priori, upon a knowledge of the uneven diffusion of our population, and upon its steady and rapid growth, and the assumption is verified by the modifications suggested and made at each session of the General Assembly. We think that as these men, who come biennially from each neighborhood in the State, yet fail in that kind of legislation, to make such laws as remain long acceptable to the whole, we, but three men, without remarkable opportunities of observation, should more signally fail to recommend a system of this kind of law which would be wisely so adapted. The day for such a work will be when Iowa shall have much more fully expressed her legislative will in her statutes, and such statutes will form the basis of such a codification, which should be but their revision. It is true regarding such law as we are speaking of, that it should *grow*, or to speak less poetically, but more logically, it should be suggested by a well defined existing public want, and be exactly shaped to respond to it. To the codification of the other kind of law, the same objection does not obtain. For it is that kind of law which does not owe its fitness to the accidents of time and place, but rests on relations and rights, which are not qualified by the census, the population or depopulation of a state, or the rise or fall of a sovereignty. The objection to its codification is the enormous labor and time required, and the fact that it is being attempted by older and better qualified States, whose labors or experience may, in the future, be a guide to us, in this comparatively untried field. Such reasons deterred us from embarking in the endeavor of codification.

Codification, in such department of law, to a limited extent, after the manner in which the same was very sparingly attempted in the Code of Iowa, of 1851, we deem not only practicable, but highly desirable. The subject of promissory notes,—bills of exchange,—bailment,—agency,—co-partnership,—insurance,—contracts,—landlord and tenant,—suretyship,—husband and wife,—infants,—guardian and ward,—administration,—guaranty, is such, as without extraordinary labor, might be codified. Such codification would consist in a statement in one statute of that law which is now only to be found scattered through the decisions reported in many thousand volumes. It would dispose of the evil of conflicting decisions—compact the law into portable and cheap and easily obtainable shape, and avert the thousand evils of non-statute law.

But, we have not attempted even this kind of codification, because, had we deemed our powers sufficiently ample, our time has been all occupied, either in imperative private affairs, or in the preparation of the reports presented.

The method of arrangement chosen in this revision, is not the alphabetical one, which might have been chosen, had no method been imposed by the Code of 1851; but that method is so good, and so well understood, that a change would neither be sustained by reason, nor by the approval of the people. The method or classification of the Code has very illustrious prototypes, and among the States there are several Codes which use the same method, as for example, those of Virginia, Alabama, Delaware, etc.

This revision which we offer you, does not need to be enacted, as it is the law as it exists already. We add nothing to the law—subtract nothing therefrom—make no change of word or phrase—merely of the arrangement of the existing law. We simply put into one chapter what we think belongs to one chapter. We indicate what act and section thereof, each section comes from—the book where it was formerly found, and when it was passed and took effect.

The old sections of the Code, and of the subsequent acts, are intended to be indicated by the old numbers, and the whole work is intended to be sectioned from one upwards, after the manner of the Code of 1851. Whether it is all the law depends upon the fidelity of the revision, and any one disputing its rectitude, in any instance, may go for himself in that instance to the sources whence it is drawn, and may also obtain the decision of the courts thereon.

Any revision making changes, even of words, and so needing to be enacted, would also need to be printed, and would take a very long session to get itself enacted by so slow paced a body as a legislature; and so it has occurred, that this kind of revision is a very frequent and popular one. Sometimes such revision has been made purely as a private enterprise, and at other times under the direction of the State, in which latter case, the work of revision has been committed to one or more men, and then approved by a simple order that it be published, or otherwise. Among such revisions are those of Florida, Georgia, California, New Hampshire, 1853,—Connecticut, 1854,—Arkansas, 1858,—Minnesota, 1859,—Michigan, 1857,—Illinois, etc.

If verbal changes are needed in the laws included in this revision, they are not worth the expense which would attend the making of them in the revision. If these are to be made, let them be all stated in one amendatory act, and after its passage, incorporated into the proper place in the revision.

But the truth is, taking the Code of 1851 as a basis of law and classification, it is much more easy and cheap to provide a fair revision, than if nothing had been done by the State towards methodizing its laws. We would recommend that the laws of this session be also incorporated with the revision, as soon as the same shall adjourn, and that such completed revision, containing all the laws of Iowa, shall be ordered to be printed and bound in one volume. \* \* \* \* \*

During the last days of the Session, Acts were passed providing that Mr. DARWIN revise the General Laws of that Session into the Revision about to be published, and also place under each chapter a synopsis of prior laws upon the subject of such chapter, giving also references to decisions of the Supreme Court, made thereon, and furnishing notes and references to the Code of Civil Practice, from States having similar Codes.

As to the execution of the work, this may be said. The Laws have been carefully compared with the Archives, by Dr. ROBERT I. THOMAS, (the gentleman who has acted as Clerk of the Commission and of the Revisor, and to whom I am

indebted for many and varied services;) the endeavor has been to publish them just as they are therein found; no attempt has been made to correct any thing which seemed a mistake, except in a perfectly clear case of mere punctuational or grammatical error. To have done otherwise would have been to *make* and not merely to publish the law. The references to the decisions of the Supreme Court of this State, are in most cases mere *references*. Sometimes on a specially important subject the substance of the decision has been given. But they will be generally found mere intimations of the subject of the decision, rather than statements of its substance. More than this could not be done within the limits of the work as predetermined by the law. In this matter I have received great aid from DILLON'S Digest; indeed, nearly all the unpublished decisions found cited herein are taken therefrom. The haste with which the work needed to be done would not have allowed me to give such decisions at all had they not been attainable in that work.

With regard to the decisions illustrating the Civil Code, the substance has been given in all cases, for as the books containing the same are not easily found in Iowa, to have given references would have been of little value. Nor have the selections been confined to the "*highest courts*." But others of recognized authority have also been given. In this matter I have received great guidance from HOWARD'S and from VOORHIES' New York Codes; also from MONELL, VAN SANTVOORDS, and WHITTAKER, and from STANTON'S Kentucky Code.

The plan of the book, with the method of its chapters and sections, was pointed out by the act before mentioned, and has been followed.

The sections of the *New Codes* as in the original acts are not given, because it could subserve no valuable purpose, and would in those cases, which cases are numerous, where the old sections of the Code are retained, have cumbered the first line with figures.

It is due to myself to say, that what has been done since the last session of the Legislature, has been done under the pressure of very great and necessary haste, which fact will, I hope, be taken into account by those who may criticise its many imperfections.

CHARLES BEN DARWIN.

SEPTEMBER, 1860.

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### EXPLANATION OF ABBREVIATIONS, &c.

*M. D.* means Michigan Digest of 1833.

*W. and Wis.*, Wisconsin.

*I. T.*, Iowa Territory.

*Sess.*, or Session, without saying of what, means session of the State Legislature.

*Rep.*, or Reprint, means the Blue Book or Revision of 1843.

"*Code*," means Code of 1851.

The figures in brackets are those of the Code of 1851, or of the Acts wherein found. The figures found in the references to decisions placed at the foot of the Chapters, mean sections of the Code of 1851, unless it is otherwise indicated.

*W. L. M.*, means Western Law Monthly of Cleveland, Ohio.

In citing Stanton's Ky. Code, no page is given; let the inquirer turn to the same subject as all the new Codes are similar in their arrangement.

# PART FIRST.

OF THE STATE AND ITS DIVISIONS, OFFICERS AND POLICE, THE GENERAL ASSEMBLY AND THE STATUTES.

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## TITLE I.

OF THE SOVEREIGNTY AND JURISDICTION OF THE STATE, THE GENERAL ASSEMBLY, AND THE STATUTES.

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### CHAPTER 1.

THE SOVEREIGNTY AND JURISDICTION OF THE STATE.

[Code—Chapter 1.]

SECTION 1. (1.) The boundaries of the State of Iowa are defined in the first article of the constitution. Boundaries of the state.

SEC. 2. (2.) The state possesses sovereignty co-extensive with the boundaries referred to in the preceding section, subject to such rights as may at any time exist in the United States, in relation to the public lands, or to any military or naval establishment within the above limits. Sovereignty.

SEC. 3. (3.) The state has concurrent jurisdiction on the waters of any river or lake which forms a common boundary between this and any other state. Its concurrent jurisdiction.

PRIOR LAWS. 1. "An act to define the jurisdiction of the several counties in this territory that front upon the Mississippi river," passed July 24, 1840, took effect July 30, 1840; I. T., 2d sess. extra, chap. 9, p. 9; also, in reprint of 1843, p. 300.

2. "An act in relation to that portion of country which is attached to the several organized counties in this territory for judicial purposes," passed and took effect July 28, 1840; I. T., 2d sess. extra, chap. 22, p. 15; also in reprint of 1843, p. 130.

3. "An act to prevent the exercise of foreign jurisdiction within the limits of the territory of Iowa," passed and took effect July 31, 1840; I. T., 2d sess. extra, chap. 35, p. 48; also reprint of 1843, p. 301.

4. "An act to attach the country ceded to the United States by the Sac and Fox Indians, 1842, to the adjacent counties," passed and took effect June 11, 1845; I. T., 7th sess., chap. 29, p. 50.

5. "An act to authorize the governor of Iowa territory to employ counsel in cases growing out of the disputed boundary between this territory and the state of Missouri," passed and took effect Jan. 17, 1846; I. T., 8th sess., chap. 23, p. 22.

6. "An act concerning the southern boundary of Iowa," passed Jan. 16, 1847, 1st sess., chap. 3, p. 20.

7. "An act to complete the change from a territorial to a state government," passed Feb. 23, took effect March 17, 1847; 1st sess., chap. 78, p. 94.

DECISIONS. The riparian proprietor on the Mississippi owns only to the ordinary water mark. 3 Iowa, 26; see also *Sayer et al. v. Lyons City*, Dec. term, 1859.

## CHAPTER 2.

## THE GENERAL ASSEMBLY.

[Code—Chapter 2.]

## ARTICLE 1.

[SECTIONS (4), (5), and (6), *repealed by Sec. 12, and substituted by Article 2.*]

SEC. 4. (7.) The persons so appearing to be members shall then proceed to elect such other officers as may be requisite for the time being; and, when so temporarily organized, shall choose a committee of five by ballot, or viva voce, as those present may determine, which committee shall examine and report upon the credentials of the persons claiming to be members.

Permanent or-  
ganization.

SEC. 5. (8.) When the above committee has reported, those who are reported as holding certificates of election from the proper authority, shall proceed to the permanent organization of their respective houses by the election of officers.

Freedom of  
speech

SEC. 6. (9.) No member of the general assembly shall be questioned in any other place for any speech or debate in either house.

Members may ad-  
minister oaths.

SEC. 7. (10.) Any member is authorized to administer oaths in the house of which he is a member, and while acting on a committee he may administer oaths upon the business of such committee.

(11.) [*Repealed by section 17.*]

Contempt.

SEC. 8. (12.) Each house of the general assembly has authority to punish as a contempt, by fine and imprisonment, or either of them, the offense of knowingly arresting a member in violation of his privilege; of assaulting or threatening to assault a member, or threatening to do any harm to the person or property of a member, for anything by him said or done in either house as a member thereof; of attempting, by menace or other corrupt means, to control or influence a member in giving his vote, or to prevent his giving it; of disorderly or contemptuous conduct tending to disturb its proceedings; of refusing to attend, or to be sworn, or to be examined, as a witness before either house or a committee when duly summoned; of assaulting or preventing any person going to either house, or its committee by order thereof, knowing the same; of rescuing or attempting to rescue any person arrested by order of either house, knowing such arrest; and of knowingly impeding any officer of either house in the discharge of his duties as such.

Imprisonment.

SEC. 9. (13.) Imprisonment for contempt of either house shall not extend beyond the session at which it is ordered, and shall be in the jail of the county in which the general assembly may then be sitting, or, if there be no jail, then in one of the nearest county jails.

SEC. 10. (14.) Fines and imprisonment for contempt shall be only by virtue of an order of the proper house, entered on its journals, stating the grounds thereof. Imprisonment shall be effected by a warrant under the hand of the presiding officer for the time being of the house ordering it, countersigned by the secretary of the house, running in the name of the state, and directed to the sheriff or jailor of the proper county; and under such warrant the officer of the house, the sheriff and jailor will be authorized to commit and detain the person. Fines shall be collected by virtue of a similar warrant, directed to any proper officer of any county in which the offender has property, and executed

Fines.

in the same manner as executions for fines issued by courts of record, and the proceeds shall be paid into the state treasury.

SEC. 11. (15.) Punishment for contempt, as in this chapter provided, No bar. is no bar to any other proceeding, civil or criminal, for the same act.

ARTICLE 2.

An Act amending Chapter 2, of the Code.

[Passed March 22, 1858, took effect July 4, 1858; *Laws of Seventh General Assembly, Chapter 126, page 248.*]

SECTION 12. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That sections four, five and six, of chapter two of the code are hereby repealed. Repeal.

SEC. 13. (2.) The regular sessions of the general assembly shall be biennial, and shall commence on the second Monday in January next ensuing the election of its members, and shall take place at the seat of government unless specially convened at some other place, and the governor may so convene them in times of pestilence or public danger. Sessions.

SEC. 14. (3.) At two o'clock in the afternoon of the day of the sitting of the general assembly, and at the place of the sitting of the houses respectively, the president of the senate shall call the senate to order; and some person claiming to be elected a member of the house of representatives shall call the house to order, and the persons present claiming to be elected to the senate, shall choose a secretary, and those of the house of representatives a clerk for the time being. In case of the absence of the president of the senate at the time of the convening of the general assembly, the senate may be called to order by any person claiming to be elected a member of that body, and a president *pro tempore*, shall be chosen from their own number, by the persons claiming to be elected senators. Organization pro tem.

SEC. 15. (4.) The secretary and clerk so elected, shall receive and file the certificates of election presented, each for his own house, and make a list of the names of the persons who appear by such certificates to be elected members of the respective houses. Certificates of election.

SEC. 16. (5.) The speaker of the house of representatives shall hold his office until the first day of the meeting of a regular session of the general assembly next after that at which he was elected. All other officers elected by the senate or house of representatives, shall hold their offices only during the session at which they were elected. Term of office.

SEC. 17. (6.) Section eleven of said chapter is hereby repealed.

ARTICLE 3.

An Act fixing the compensation of future General Assemblies.

[Passed March 12, 1858, took effect July 4, 1858; *Laws of Seventh General Assembly, Chapter 46, page 52.*]

SECTION 18. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That each member of the general assembly of the state of Iowa, shall be entitled to receive as compensation for his services, three dollars per day while in session, and also three dollars for every twenty miles traveled in going to and returning from the place where such session is held, by the nearest traveled route.

PRIOR LAWS. 1. "An Act to regulate the mode of petitioning the legislative council in certain cases," passed July 31, 1824; M. D., 1833, p. 164. *Repealed by*

2. "An act to regulate the mode of petitioning the legislature in certain cases," passed Jan. 19, took effect Feb. 19, 1839; I. T., 1st sess., p. 369. *Repealed Feb. 17, 1842; I. T., 4th sess., chap. 116, p. 97.*

3. "An act to authorize the legislative council to punish for contempt, and to

privilege the members of the council from arrest," passed July 17, 1824; M. D., 1833, p. 164. *Modified* by

4. "An act of the same title, passed Nov. 12, 1836; Wis., 1st sess., No. 1, p. 11.

5. "An act to exempt the clerks, officers and messengers of the legislative council from serving in juries, and from militia duty," passed June 16, 1828; M. D., 1833, p. 165.

6. "An act to fix the time for the annual meeting of the legislative assembly," passed July 8, 1836; Wis., 1st sess., No. 35, p. 71.

7. "An act supplementary to an act, entitled an act to regulate the mode of petitioning the legislative council in certain cases," passed Jan. 19, 1838; Wis., 2d sess., No. 96, p. 309. *Repealed* by number 2 above.

All the above *repealed* by

8. "An act to repeal the acts therein named," passed July 30, took effect Aug. 30, 1840; I. T., 2d sess. extra, chap. 29, p. 20.

9. "An act fixing the time for the annual meeting of the legislative assembly," passed Jan. 23, took effect Feb. 23, 1839; I. T., 1st sess., p. 325.

10. "An act to authorize the governor to call a special legislative assembly," passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 325.

11. "An act to authorize the legislative assembly to punish for contempt, and to privilege the members from arrest," passed Nov. 28, took effect Dec. 28, 1839; I. T., 2d sess., chap. 3, p. 4; also, reprint 1843, p. 70.

12. "An act to provide for an extra session of the legislative assembly," passed Jan. 15, took effect Feb. 15, 1840; I. T., 2d sess., chap. 53, p. 75.

13. "An act relative to the authentication of statutes without the approval of the governor, and for other purposes," passed Jan. 16, 1840; I. T., 2d sess., chap. 64, p. 87; also, reprint 1843, p. 575.

14. "An act to provide for the annual organization of the council and house of representatives of the territory of Iowa," passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 66, p. 88; also, reprint 1843, p. 71. *Amended* Feb. 15, 1844; I. T., 6th sess., chap. 37, p. 58.

15. "An act fixing the time for the annual meeting of the legislative assembly," passed Jan. 13, took effect Feb. 13, 1841; I. T., 3d sess., chap. 51, p. 41; also, reprint 1843, p. 73.

16. "An act relative to the officers of the legislative assembly," passed Feb. 17, took effect March 17, 1842; I. T., 4th sess., chap. 90, p. 80.

*Repealed* Jan. 21, 1843; reprint 1843, chap. 13, p. 74.

17. "An act fixing the compensation per diem of the members of the general assembly," passed Jan. 24, took effect Feb. 9, 1848, 1st sess. extra, chap. 45, p. 44.

## CHAPTER 3.

### THE STATUTES.

[Code—Chapter 3.]

**Approval** SECTION 19. (16.) When the governor approves a bill he shall set his name thereto with the date of his approval.

**Bill returned.** SEC. 20. (17.) When a bill, which passes both houses of the general assembly, is returned by the governor without his signature and with his objections thereto, and upon a reconsideration is passed in both houses by a constitutional majority, it shall be authenticated as having become a law by a certificate indorsed thereon or attached thereto in the following form: "This bill, having been returned by the governor with his objections thereto, and having upon reconsideration been passed in both houses of the general assembly by a constitutional majority, has become a law this — day of —;" which certificate shall be signed by the presiding officer of each of the houses.

**Bill retained.** SEC. 21. (18.) When a bill passes both houses of the general assembly and is not returned by the governor within three days after it is presented to him, and thereby becomes a law, it shall be authenticated

by the governor causing that fact to be certified thereon by the secretary of state in the following manner: "This bill, having remained with the governor three days (Sunday excepted,) the general assembly being in session, has become a law this — day of —."

J. C., Secretary of State."

SEC. 22. (19.) The original acts of the general assembly shall be deposited with, and kept by, the secretary of state, and be printed and distributed and copies deposited for sale as the general assembly directs

*When the statutes take effect.*

SEC. 23. (20.) All acts of a private nature, which do not expressly prescribe the time when they are to take effect, shall take effect on the thirtieth day next after the day on which they are approved by the governor, or otherwise become law in conformity with the constitution.

SEC. 24. (21.) All acts which are to take effect by publication in the newspapers shall be published in at least two papers, (one at least of them at the seat of government if there be one there,) and shall take effect on the twentieth day after the date of the last publication,\* and the secretary of state shall make and sign, on the original roll of each of such acts, a certificate stating in what papers it was published, and the date of the last publication in each of them, and such certificate shall be conclusive thereof, and the printing thereof at the foot of the act in the volume of printed laws shall be evidence of its own genuineness.

SEC. 25. (22.) The acts of a public nature and resolutions passed at the regular sessions of the general assembly are required to be printed, bound, and deposited in the office of the secretary of state, by the first day of May following the session, and the secretary shall distribute them to all the organized counties of the state by the first day of June following, and such acts as have not taken effect before by virtue of other provisions of law, shall take effect throughout the state on the fourth† day of July following. And every such act shall be presumed to have taken effect at that time unless the contrary appear as provided in the following two sections.

SEC. 26. (23.) In case the statutes are not in fact distributed to all the organized counties by the first day of July, the secretary of state shall make, sign, and file in his office, a certificate stating on what day they were deposited in the last county, and they shall take effect on the tenth day after the day on which they are so deposited.

SEC. 27. (24.) The said certificate, or a copy thereof under the hand of the secretary and the seal of the state, shall be considered evidence of the fact therein stated, and, immediately after filing it in his office, the secretary shall publish a copy thereof for four weeks successively in six different newspapers, two of them being papers published at the seat of government (if such there be,) which publication shall be prima facie evidence of the existence of such a certificate.

SEC. 28. (25.) The acts and resolutions of the special sessions shall be published at such time, and in such manner, as the general assembly direct in conformity with the constitution.

*Construction of Statutes.*

SEC. 29. (26.) In the construction of the statutes of this state the following rules shall be observed unless such construction would be in-

\* Cases where the act does not fix the paper nor the time of taking effect.

† See constitution, art. 3d, 26.

- consistent with the manifest intent of the general assembly or repugnant to the context of the statute.
- Repeal. 1. The repeal of a statute does not revive a statute previously repealed; nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed.
- Words and phrases. 2. Words and phrases shall be construed according to the context, and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such peculiar and appropriate meaning.
- Number. 3. Words importing the singular number only may be extended to several persons or things, and words importing the plural number only may be applied to one person or thing, and words importing the masculine gender only may be extended to females.
- Gender. 4. Words giving a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority.
- Joint authority. 5. The words "highway" and "road" include public bridges, and may be held equivalent to the words "county way," "county road," "common road," and "state road."
- "Road," &c. 6. The words "insane person" include idiots, non-compotes, lunatics, and distracted persons.
- "Insane persons." 7. The word "issue," as applied to the descent of estates, includes all the lawful lineal descendants of the ancestor.
- "Issue." 8. The word "land," and the phrases "real estate," and "real property," include lands, tenements and hereditaments, and all rights thereto, and interests therein, equitable as well as legal.
- "Real estate," &c. 9. The words "personal property" include money, goods, chattels, evidences of debt, and "things in actions."
- "Personal property." 10. The word "property" includes personal and real property.
- "Property." 11. The word "month" means a calendar month unless otherwise expressed, and the word "year" alone, and also the abbreviation "A. D.," is equivalent to the expression "year of our Lord."
- "Month," "Year," "A. D." 12. The word "oath" includes "affirmation" in all cases where an affirmation may be substituted for an oath; and in like cases the word "swear" includes the word "affirm."
- "Oath" and "affirmation." 13. The word "person" may be extended to bodies politic and corporate.
- "person" 14. Where the seal of a court or public office, or officer, may be required by law to be affixed to any paper, the word "seal" shall include an impression of such seal upon the paper alone as well as upon wax or a wafer affixed thereto.
- "Seal." 15. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories, and the words "United States" may include the said district and territories.
- "State." 16. The word "town" may include cities as well as incorporated villages.
- "Town." 17. The word "will" includes codicils.
- "Will." 18. The words "written" and "in writing" may include printing, engraving, lithography and any other mode of representing words and letters; excepting those cases where the written signature, or the mark of any person is required by law.
- "In writing." 19. The term "sheriff" may be extended to any person performing the duties of the sheriff, either generally, or in special cases.
- "Sheriff." 20. The word "deed" is applied to an instrument conveying lands,
- "Deed."



but does not imply a sealed instrument; and the words "bond" and "indenture" do not necessarily imply a seal, but in other respects mean the same kind of instruments as heretofore; and the word "undertaking" means a promise or security in any form, where required by law.

21. The term "executor" includes an administrator where the subject matter applies to an administrator.

22. The Roman numerals and Arabic figures are to be taken as part of the English language.

**PRIOR LAWS.**—1. "An act to amend and adapt the several laws of this territory for the several judiciary tribunals for the purpose of giving said laws full force and effect according to the provisions thereof," passed Dec. 8th, 1836; Wis. 1st sess., No. 39, p. 74.

2. "An act concerning the construction of statutes," passed Jan. 19, took effect Feb. 19, 1839; I. T. 1st. scss., p. 73; also reprint 1843, p. 572.

3. "An act in relation to evidence," passed Jan. 22, 1848; 1st sess., extra, chap. 5, p. 11.

4. "An act fixing the time when laws published in newspapers shall take effect," passed March 22d, 1858; took effect March 24th, 1858; laws of seventh general assembly, chap. 96, p. 188.

5. "An act to authorize the publication of certain laws in the Iowa Weekly Citizen and Iowa State Journal," passed March 23d, 1858; took effect March 31, 1858; laws of seventh general assembly, chap. 136, p. 260.

6. "An act to authorize the publication of certain laws in the Iowa State Register and the Iowa State Journal," passed April 3, 1860; laws of 8th sess., chap. 148, p. 115 of special laws.

**DECISIONS.**—Repeals by implication are not favored; the latter statute should expressly repeal; or should contradict the former; 5 Iowa, 1.

A petitioner for divorce for a cause sufficient, will not be defeated of his right to such divorce by a subsequent repeal of that cause; 5 Iowa, 220.

Code took effect July 1st, 1851; 1 Iowa, 435—4 G. 252.

Courts take notice when a law takes effect, 1 G. 89, and of its true reading, 5 Iowa, 503; case of right newspaper and wrong book publication, 8 Iowa, 396; value of the secretary's note of publication in newspaper, 1 G. 89.

## CHAPTER 4.

### REPEAL OF ACTS, REVISED AND CONSOLIDATED.

[Code—Chapter 4.]

#### ARTICLE 1.

**SECTION 30. (27.)** In the citation of the statutes of this state, this statute shall not be reckoned as one of the statutes of the present political year, but it may be designated as the "CODE," adding as may be necessary the title, chapter, or section. The code.

**SEC. 31. (28.)** All public and general acts passed prior to the present session of the general assembly, and all public and special acts the subjects whereof are revised in this code, or which are repugnant to the provisions thereof, are hereby repealed, subject to the limitations and with the exceptions herein expressed. Repeal.

**SEC. 32. (29.)** Local acts are not repealed, unless it be herein so expressed, or unless the provisions of this code are repugnant thereto. Local acts.

**SEC. 33. (30.)** The existing acts continue in force until the provisions of the code take effect upon them or their subjects respectively. Existing acts.

**SEC. 34. (31.)** This repeal of existing acts shall not affect any act done, any right accruing or which has accrued or been established, nor Existing rights and liabilities.

- any suit or proceeding had or commenced in any civil cause, before the time when such repeal takes effect; but the proceedings in such cases shall be conformed to the provisions of this code as far as consistent.
- Same. SEC. 35. (32.) No offense committed and no penalty or forfeiture incurred under any act hereby repealed and before the repeal takes effect, shall be affected by the repeal; except that when a punishment, penalty, or forfeiture is mitigated by the provisions herein contained, such provisions shall be applied to a judgment to be pronounced after the repeal.
- Suits pending. SEC. 36. (33.) No suit or prosecution, pending when this repeal takes effect, for an offense committed, or for the recovery of a penalty or forfeiture incurred, shall be affected by the repeal, but the proceedings may be conformed to the provisions of this code as far as consistent.
- Officers. SEC. 37. (34.) Persons holding office when this repeal takes effect, may continue to hold the same until the provisions of the code are carried into effect in relation to them respectively, except those offices which are herein abolished, and those as to which a different provision is made.
- SEC. 38. (35.) The terms "heretofore" and "hereafter," as used in this code, have relation to the time when this statute takes effect.
- Acts of present session. SEC. 39. (36.) Whenever any act of a general nature, passed at the present session of the general assembly, separate from this code, conflicts with or contravenes any of the provisions thereof, the provisions of the code shall prevail.

## ARTICLE 2.

An Act to re-enact all such Acts as may have been repealed or suspended in their operation by the new Constitution, but which are not in conflict therewith.

[Passed March 23, 1858, took effect April 7, 1858. *Laws of the Seventh General Assembly, Chapter 135, page 259.*]

SEC. 40. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all acts which were in force at the time of the taking effect of the new Constitution, and which have not been repealed thereby, or by the acts of the general assembly now in session, be and they are hereby re-enacted and revived.

PRIOR LAWS. 1. "An act to repeal all acts of the parliament of England, &c.," passed Sept. 16, 1810; M. D., 1833, p. 563

2. "An act to amend and adapt the several laws of this territory for the several judiciary tribunals for the purpose of giving said laws full force and effect according to the provisions thereof," passed Dec. 8, 1836; Wis., 1st sess., No. 39, p. 74.

3. "An act to repeal the acts therein mentioned," passed July 30, took effect Aug. 30, 1840; I. T., 2d sess. extra, chap. 29, p. 20; also Reprint 1843, p. 540 [This repealed all the acts of Michigan and Wisconsin which were of force on July 4, 1838, also all the statutes of *Great Britain.*]

4. "An act to amend the several acts therein named," passed Feb. 16, took effect March 16, 1843; Reprint of 1843, chap. 20, p. 89. [This act looks as if the Reprint of 1843 was intended to repeal all but its own general laws. See also resolution No. 4 of Reprint of 1843, p. 728.]

5. "An act relative to the time of taking effect of laws of the present session," (5th sess. being of 1843,) passed Feb. 13, 1843; Reprint of 1843, chap. 90, p. 377.

6. "An act to complete the change from a territorial to a state government," passed Feb. 23, 1847, took effect March 17, 1847; 1st sess., chap. 78, p. 94.

7. "Joint resolution concerning the taking effect of acts public and private," Feb. 24, 1847; 1st sess., p. 202.

8. "An act in relation to evidence," passed Jan. 22, 1848; 1st sess. extra, chap. 5, p. 11.

9. "An act to provide for the appointing of commissioners to draft, revise and arrange a code of laws," passed Jan. 25, 1848, took effect Feb. 9, 1848; 1st sess. extra, chap. 43, p. 42.

10. An act in relation to the taking effect of general laws, passed Jan. 24, took effect Jan. 31, 1855: 5th sess., chap. 106, p. 169. Declared unconstitutional.

DECISIONS. Construction, 2 Iowa, 165-280; 2 G., 15-270; M., 39; 7 Iowa, 262-275; 1 G., 325; 3 G., 104; 7 Iowa, 224; 5 ib., 1; 3 G., 42-86; 2 G., 135; 1 G., 398.

Right of trial by jury, 2 G., 15. Application of a new change in a rule of practice, M., 378-28-238-68-321.

Sec. 8 of chapter 29 of 2d session extra, Iowa territory, construed 4 Iowa 400-381. Repeals by implication not favored, 5 Iowa, 1; 3 G., 255; 2 G., 270. Custom can repeal a statute, M., 70

Vote of the people can not make or repeal a law. 5 Iowa, 491.

The intention of chapter 4 was to save all existing and accruing rights under former laws. 3 Iowa, 287.

This chapter was intended to save all rights, relations and duties, 4 Iowa, 367.

Statutes of England prior to 1707 are in force in Iowa, and are not repealed by the act of July 30, 1840. 4 Iowa, 401.

[They were enacted here Jan. 19, 1816, by territorial legislature of Missouri. See Terr. Laws of Missouri, p. 436.]

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## TITLE II.

### OF CERTAIN STATE OFFICERS.

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#### CHAPTER 5.

##### GOVERNOR.

[Code—Chap. 5.]

##### ARTICLE 1.

SECTION 41. (37.) The salary of the governor shall be *two thousand* *Salary.* *sand* dollars annually, to be audited like other claims on the state, and paid *quarterly*,\* out of any money in the treasury, not otherwise appropriated.

SEC. 42. (38.) The official term of the governor, for the purpose of *Term.* computing his salary, commences on the *first Monday of the December*† following his election, except in case of a special election to fill a vacancy in that office, when the term of service commences on the day of his qualification.

SEC. 43. (39.) When during a vacancy in the office of governor, *Vacancy.* the secretary of state, the president of the senate, or the speaker of the

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\* All salaries of state officers are made payable monthly; section 18 of chapter 135 of laws of 8th session. See special laws. The salary of the code was one thousand dollars; of the act of the sixth general assembly, chapter 234, fifteen hundred dollars, and of the act of the seventh general assembly, chapter 113, two thousand dollars, as above.

† See section 465, and 8th session, chapter 135, section 2, special laws.

house of representatives, performs the duties of that office, such officer may receive the compensation of governor for such period as he fills the vacancy.\*

Power in relation  
to actions.

SEC. 44. (40.) Whenever the governor receives information of the commencement of any action or proceeding by which the rights, interests, or property of the state are liable to be affected, he may employ counsel to act in conjunction with the counsel of the proper party, to protect the interests of the state, and when any civil action is, or is about to be commenced by any prosecuting attorney in behalf of the state, if, in the opinion of the governor, the case be such as to render it advisable, he may employ additional counsel to assist in the cause.

Expenses.

SEC. 45. (41.) Expenses incurred under the preceding section and in causing the laws to be executed (when not otherwise provided for) and also in recapturing fugitives from justice fleeing from this state, may be allowed by the governor and paid from the contingent fund, or by appropriation made by the general assembly.

#### ARTICLE 2.

An Act to authorize the Governor to appoint Commissioners to examine the accounts of the State Officers and to define the duties of the Governor in certain cases.

[Passed March 23, 1858, took effect April 8, 1858, *Laws of the Seventh General Assembly, Chapter 169, page 410.*]

Inquiry into  
state offices.

SECTION 46. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the governor of said state be and he is hereby authorized and empowered and it is hereby made his duty to appoint a commission of three competent and safe accountants, who shall examine the books, papers, vouchers, moneys, securities and other documents in the hands or possession or under the control of each and every executive officer of said state, to make out a full, complete and specific statement of the transactions of each of said officers with, for, or on behalf of the state, showing the true balance or balances in each and every case, and report the same to the governor with such suggestions as they may deem proper, on or before the first day of June, 1858.

Same.

SEC. 47. (2.) It shall further be the duty of the governor to appoint similar commission and cause the examination provided in the foregoing section to be made in the month of June of each and every year, and at such other times as in his judgment the public interest or safety may demand, who shall be required to report to him as in said foregoing section required.

Suspension of  
officer.

SEC. 48. (3.) Whenever any commission of investigation appointed as aforesaid shall report to the governor that any officer has been guilty of any defalcation, misapplication or misappropriation of public money, or that his accounts, papers and books are improperly or unsafely kept, and that the state is likely or liable to suffer loss thereby, it shall be the duty of the governor to forthwith suspend such officer from the exercise of all the functions of his office and to require him to deliver all the money, books, papers, documents, vouchers, furniture and other property of the state to the governor, to be disposed of as shall hereinafter be provided.

Consequences.

SEC. 49. (4.) From and after the date of the suspension of any officer under the provisions of this act, it shall be unlawful for such officer to exercise or attempt to exercise any of the functions of such office

\* See new constitution, article 4, section 15.

until such suspension shall be revoked, and any such exercise or attempt to exercise the rights, duties, or franchises of said office after such suspension, shall be deemed a misdemeanor and shall subject the offender for each and every such offense to the penalty of not more than one year imprisonment in the county jail, and not more than one thousand dollars fine, to be recovered and enforced as provided for by the laws of the state.

SEC. 50. (5.) It shall be unlawful for any officer or person whatever to recognize the authority of any such suspended officer, after the date of such suspension, or to transact any public business with him for and on behalf of the state until such suspension shall be removed, and every person guilty of a violation of the provisions of this section, shall be deemed guilty of a misdemeanor and subject to a fine of not less than five hundred dollars, nor more than five thousand dollars, to be recovered as provided by law.

Penalty for doing business with suspended state officer.

SEC. 51. (6.) In every case of suspension it shall be lawful, and it is hereby made the duty of the governor of the state to appoint some suitable person to fill the office *ad interim*, from which such person has been suspended, and shall before he enters upon the duties of the office, give bond as now required by law, to be approved by the governor, and who when thus appointed and qualified shall have full power and authority to do and perform all the duties and enjoy all the rights and franchises to the said office appertaining and belonging, until the removal of the suspension of his predecessor or the election of a successor.

Appointment *ad interim*.

SEC. 52. (7.) It shall be the duty of the governor of the state, whenever he shall suspend the functions of any such public officer, to direct the proper legal steps to be taken to indemnify the state from loss by instituting suit upon the official bond of said officer or otherwise as the governor may deem fit.

State indemnity.

SEC. 53. (8.) The commissioners provided for in this act, shall each receive the sum of three dollars per day for each and every day they may be actually employed in the performance of their duties.

Commissioners' compensation.

SEC. 54. (9.) Said commissioners shall have power when in session, to issue subpoenas to call any person or persons before them to testify in reference to any fact connected with their investigation; also to require such persons to produce any papers or books when by the laws of evidence the district court might require by rule to be produced.\*

Commissioners' power.

ARTICLE 3.

An Act entitled an Act to amend Chapter 160, of the Acts of the Seventh General Assembly of the State of Iowa.

[Passed April 2nd, 1860, took effect April 11, 1860; Laws of the Eighth General Assembly, Chapter 102.]

SECTION 55. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That nothing in chapter 160 of the acts of the seventh general assembly entitled an act to authorize the governor to appoint commissioners to examine the accounts of the state officers and to define the duties of the governor in certain cases, approved March 23, 1858, shall be so construed as to authorize or compel the governor to appoint the commissioners provided for in said act, unless in his judgment the public service requires it.

Such appointment discretionary.

\* See also a temporary act for the purpose of such inquisition, passed January 24, 1855, 5th session, chapter 164, p. 248.

Offices of printer  
and binder.

SEC. 56. (2.) The commissioners appointed by the governor under the act to which this is amendatory, shall examine the books, accounts and vouchers, work and prices of the state printer and state binder in the same manner as other state officers.

#### ARTICLE 4.

An Act authorizing the Governor to offer rewards for the arrest and delivery of persons charged with the commission of Capital Crimes.

[Passed April 3, 1860, took effect May 9, 1860; Laws of Eighth General Assembly, Chapter 151.]

Reward for crim-  
inals.

SECTION 57. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That whenever the governor of this state shall be satisfied, by authentic information, that a capital crime has been committed within the state, and that the person or persons charged with the commission of such crime have escaped from arrest, or remain unarrested, he may, in his discretion, offer a reward not exceeding five hundred dollars, for the arrest and delivery to the proper authorities of the person or persons so charged, and where the governor shall be satisfied that such reward has been earned in compliance with his proclamation offering such reward, he shall give to the person entitled to the same a certificate stating that fact, and the auditor, upon the presentation of such certificate, shall issue his warrant on the treasurer for the amount so certified, which shall be paid as other warrants.

PRIOR LAWS. "An act prescribing the duties of governor," passed February 8, took effect February 17, 1847; 1st session, chapter 32, p. 43.

## CHAPTER 6.

### SECRETARY.

[Code—Chapter 6.]

#### ARTICLE I.

Salary.

SECTION 58. (42.) The salary of the secretary of state shall be fifteen hundred dollars annually, to be audited like other claims on the state, and paid *quarterly*\* out of any money in the treasury not otherwise appropriated. And he may receive such sum for distributing the laws, and for indexing them when he performs this duty, as may be allowed by the general assembly, and fees allowed by law, but no others.†

Office and duties.

SEC. 59. (43.) He shall keep his office at the seat of government, and perform all duties which at any time may be required of him by law, and he shall have charge of and keep all the acts and resolutions of the territorial legislature, and those which have been or may be passed by the general assembly of the state, the enrolled copy of the constitution of the state, all official bonds of officers approved by the governor, except the bond of such secretary, and all books, records, maps, registers, and other papers, which now are or hereafter may be deposited to be kept in his office.

\*See note to section 41.

† This salary was by code, five hundred dollars, and was made fifteen hundred dollars as above, by laws of sixth general assembly, chapter 234, page 393.

SEC. 60. (44.) Commissions required by law to be issued by the governor shall be countersigned by the secretary, who shall register each commission in a book to be kept for that purpose, specifying the name of the officer, the office conferred, the date of the commission, and the tenure of the office. Commissions.

SEC. 61. (45.) The secretary shall procure, at the expense of the state, for each county when organized, a seal for the district court of the same description with that heretofore adopted; and also provide the necessary stationery and fuel for his office, and that for the general assembly during its session, the accounts for which shall be audited like other claims on the state. Court seals. Expenses of office.

SEC. 62. (46.) Immediately after the adjournment of the general assembly he shall furnish the printer authorized to print the statutes with copies of the acts and resolutions passed at the session, prepared with marginal abstracts, and cause them to be printed in a plain manner as a pamphlet. Printing the acts.

SEC. 63. (47.) He shall make his certificate that the acts and resolutions therein contained are truly copied from the original rolls, and cause the certificate to be printed at the end of each volume, which shall be prima facie evidence of their correctness. Certificate.

SEC. 64. (48.) The secretary is required to report to the general assembly at each regular session, (and at such other times as required,) an abstract for each year of the criminal returns received from the clerks of the district court, embracing all the facts contained in such returns. Criminal returns.

ARTICLE 2.

An Act providing for the publication of certain laws in the several Counties of the State.

[Passed March 23, 1858, took effect July 4, 1858. Laws of Seventh General Assembly, Chapter 151, page 303 ]\*

SECTION (1.) [Obsolete.]

SEC. 65. (2.) At each future session of the general assembly, the secretary of state shall procure from one of the newspapers printed at Des Moines City, in which the general assembly shall order any general law to be printed, so many of such newspapers or printed slips, containing such laws, as shall be sufficient to furnish two such newspapers or slips to each county judge in the state, and it shall also be his duty as soon as possible, within sixty days after the adjournment of each future session, to furnish to each county judge one copy of all general laws not ordered to be printed in the newspapers at Des Moines City. Slips to counties.

SEC. 66. (3.) It shall be the duty of the county judge of each county to cause such of said general laws as he may consider of interest to the people of his county, to be published in two weekly newspapers published in his county, if so many be therein published; and if but one weekly newspaper be published in his county, then in such newspaper: *provided*, that not more than thirty-five cents per thousand shall in any case be allowed for publishing such laws. Duty of county judge to publish.

SEC. 67. (4.) The accounts for such printing shall be audited and allowed the same as other accounts against the county: *provided*, that all accounts for such printing shall first be sworn to by some one acquainted with the correctness thereof. Accounts therefor how audited.

\* Does county judge in this chapter mean board of supervisors? See chapter 22, article 11.

Preservation of  
the papers.

SEC. 68. (5.) It shall be the duty of the county judge of such county to keep and preserve at least one number of each paper of his county in which any law may be published under the provisions of this act, and whenever he has fifty-two numbers of such paper, he shall cause the same to be bound in a substantial form, and place the same in his office, where it shall remain for future reference; and if such laws shall be published in two weekly newspapers in his county, then fifty-two numbers of each shall be bound in the same volume.

Polk, excepted.

SEC. 69. (6.) Nothing in this act contained shall be so construed as to require or authorize the publication in the county of Polk of any such general laws as have been published in two newspapers of that county by order of the general assembly.

PRIOR LAWS. 1. "An act prescribing the general duties of secretary of state," passed Jan. 27, took effect Feb. 4, 1847; 1st sess., chap. 33, p. 30.

2. "An act to authorize the secretary of state to collect and arrange certain papers in his office," passed Jan. 9th, 1849; 2d sess., chap. 35, p. 56.

## CHAPTER 7.

### AUDITOR.

[Code—Chapter 7.]

SECTION 70. (49.) The salary of the auditor of public accounts shall be *fifteen*\* hundred dollars annually, to be audited like other claims on the state, and paid *quarterly* † from any money in the treasury not otherwise appropriated. He shall keep his office at the seat of government, and may receive fees allowed by law, but no others.

Powers and du-  
ties.

SEC. 71. (50.) The auditor is the general accountant of the state, and it is his duty:

Keep accounts.

1. To keep and state all accounts between the state of Iowa and the United States or any other state, or any public officer of this state indebted thereto, or intrusted with the collection, disbursement, or other management of any funds belonging to the same, when they are derivable from, or payable into, the state treasury;

2. To settle the accounts of all county treasurers and other collectors and receivers of state revenues, taxes, tolls, and incomes, payable into the state treasury, for each of their official terms separately;

Revenues.

3. To keep fair, clear, and separate accounts of all the revenues, funds, and incomes of the state payable into the state treasury, and also of all disbursements and investments thereof, showing the particulars of the same;

Settle accounts.

4. To settle the accounts of all public debtors for debts due the state treasury, and require such persons, or their legal representatives, who have not accounted at the proper time, to settle their accounts;

Claims.

5. To settle all claims against the treasury, and when the law recognizes a claim but no appropriation has been made therefor, to settle the

\* See note to section 41.

† The salary of the code was six hundred dollars, made thus by the laws of the sixth general assembly, chapter 234, page 393.



claim and give the claimant a certificate thereof and report the same to the general assembly ;

6. To direct and superintend the collection of all money payable into the treasury, and to cause to be instituted and prosecuted the proper actions for the recovery of debts and other moneys so payable ;

Collection of money.

7. To superintend the fiscal concerns of the state and secure their management in the manner required by law, and to furnish proper instructions and forms to the assessors and treasurers of the counties, as may be found expedient ;

Fiscal concerns.

8. To draw warrants on the treasurer for money directed by law to be paid out of the treasury as the same may become payable ; and each warrant shall bear on its face its number, date, amount, the name of the payee, and a reference to the law under which it is drawn, be entered in a book kept for that purpose in the order of issuance, and as soon as practicable after issuing such warrant he shall certify the above particulars in relation to it, to the treasurer, who is required to enter the same in the same order ;

Warrants.

9. To have the custody of, and keep, all books, papers, records, documents, vouchers, and all conveyances, leases, mortgages, bonds, and other securities, appertaining to the fiscal affairs and the property of the state, which are not required by law to be kept in some other office ; and to have charge of all property of the state where no other provision is made by law for its custody ;

Books, &c.

10. To furnish to the governor on his requisition, information in writing upon any subject connected with this office ; and to suggest to the governor, or the general assembly, plans for the improvement and management of the public revenue and property ;

Information to governor.

11. To report to the general assembly, at its regular sessions, and at such other times as it may require, a complete statement of the revenue, funds, income, taxable property, and other resources, of the state, and of the property of the state, known to his office, and of the public revenues and expenditures of the state since his last report, up to the first Monday of the November preceding each regular session, with a detailed estimate of the expenditures to be defrayed from the treasury for the ensuing two years, specifying each object of expenditure, and distinguishing between such as are provided for by appropriations, and such as require to be provided for, and showing the probable deficiency of any former appropriations ;

Report to general assembly.

12. To perform all other duties which may from time to time be required of him by law.

Other duties.

SEC. 72. (51.) When the amount due from the state to any person exceeds twenty dollars, the auditor is directed, if requested, to divide the sum into parcels of not less than ten dollars, and to issue warrants for the several sums.

Warrant divided.

SEC. 73. (52.) The auditor may at any time require any person receiving money, securities, or property, or having the management, disbursement, or other disposition, of any property, money, or securities, of the state, of which an account is kept in his office, to render statements thereof or information touching the same in his possession. And any such person refusing or neglecting to render such statement or information shall forfeit the sum of twenty-five dollars, to be recovered by civil action in the name of the state.

Call for information.

SEC. 74. (53.) Every claim against the state shall be presented to the auditor for settlement within two years after the claim accrues, and not thereafter ; and when a claim is so presented, the auditor is author-

Claims vs. state, when presented.

ized to swear and examine the claimant, and any other persons as witnesses, touching the claim, or cause them to answer by affidavit or deposition.

Officers' accounts.

SEC. 75. (54.) If any officer who is accountable to the treasury in respect to any money or property, neglects to render his account to the auditor within the time prescribed by law, or, if no time be so prescribed, then within twenty days after being required so to do by the auditor, the auditor shall state an account against him from the books of the auditor's office, charging ten per cent. damages on the whole sum appearing due, and interest at the rate of six per cent. per annum on the aggregate from the time when the account should have been rendered; all which may be recovered by an action brought on such account stated, or on the official bond of the officer.

Officers failing to pay money.

SEC. 76. (55.) If any such officer fails to pay into the treasury the amount received by him, within the time prescribed by law, or having settled an account with the auditor fails to pay the amount due from himself, the auditor shall charge him with twenty per cent. damages on the amount due, with interest on the aggregate from the time the first sum was payable, at the rate of six per cent. per annum, and the whole may be recovered by an action brought on either such account stated or on the official bond of the officer, and he shall forfeit his commissions.

Defense.

SEC. 77. (56.) The penal provisions in the preceding two sections are subject to any legal defense which the officer may have against the account as stated by the auditor, but judgment for costs shall be rendered against the officer in the action, whatever be its result, unless he rendered an account within the time named in the above two sections.

Oath of officer settling.

SEC. 78. (57.) When a county treasurer, or other collector or receiver of public money, seeks to obtain credit on the books of the auditor's office for payment made to the treasurer, before giving such credit the auditor shall require him to take and subscribe an oath that he has not used or appropriated any of the public money for his private benefit, (further than that which the law allows him,) nor for the benefit of any other person.

Notice to account.

SEC. 79. (58.) In those cases where the auditor is authorized to call upon persons or officers for information or statements, or to render accounts, he may issue his requisition therefor, in writing, to the person or officer called upon, allowing reasonable time, which, being served as a notice in a civil action, by the sheriff or any constable of the county in which the person or officer called upon resides or exercises his office, and returned to the auditor with the service endorsed thereon, shall be evidence of the making the requisition therein expressed.

Office open.

SEC. 80. (59.) All things pertaining to the auditor's office are at all times open to the inspection of the governor, the general assembly, or either house thereof, and to any committee thereof appointed to examine into them.

Expenses.

SEC. 81. (60.) All books, maps, stationery, furniture, fuel, and other necessities for the use of the auditor's office, are to be furnished at the expense of the state.\*

PRIOR LAWS. 1. "An act relative to the office and duties of the auditor of the territory of Michigan," passed Nov. 5, 1829; M. D., 1853, p. 177.

2. "An act providing for the appointment and duties of auditor of public accounts and regulating the duties of territorial treasurer," passed Jan. 7, 1840; I. T., 2d sess., chap. 95, p. 142; also reprint of 1843, p. 84.

\* For the auditing of printing, see section 161, and chapter 12, article 3.

- 3. "An act regulating the salary of the auditor of public accounts and treasurer," passed Feb. 16, 1843; reprint of 1843, chap. 18, p. 88.
- 4. "An act requiring certain officers therein named to make their annual reports to the executive of the territory of Iowa," passed Jan. 9, took effect Feb. 9, 1846; I. T., 8th sess., chap. 46, p. 45.
- 5. "An act prescribing the general duties of the auditor of state," passed Feb. 18, took effect Feb. 24, 1847; 1st sess., chap. 57, p. 71.
- 6. "An act to authorize the auditor of state to audit and allow expenses of the supreme court of this state," passed Jan. 9, took effect Jan 17, 1849; 2d sess., chap. 36, p. 56.

CHAPTER 8.

TREASURER.

SECTION 82. (61.) The salary of the treasurer of the state shall be fifteen\* hundred dollars annually, to be audited like other claims on the state, and paid *quarterly*† out of any money in the treasury not otherwise appropriated. And he may receive fees allowed by law, but no others. Salary.

SEC. 83. (62.) He shall keep his office at the seat of government, and it is his duty to keep an accurate account of the receipts and disbursements at the treasury in books to be kept for that purpose, in which he shall specify the names of the persons from whom money is received, and on what account, and the time thereof. Duties

SEC. 84. (63.) He shall enter the memorandum of warrants issued as certified to him by the auditor, and he shall receive in payment of public dues the warrants issued by the auditor in conformity with law, and redeem such when presented if there be money in the treasury not otherwise appropriated; and on receiving any such warrant, cause the person presenting it to indorse it, and the treasurer shall write on its face the word "redeemed," and enter in his book containing the auditor's memoranda in the appropriate columns, the name of the person to whom in fact paid, the date of the payment, and the amount of the interest if any. Warrants.

SEC. 85. (64.) When any amount is paid into the treasury the treasurer is required to give the person paying, receipts in duplicate, stating the fund to which the money belongs, one of which may be kept by him, and the other must be delivered to the auditor in order to obtain the proper credit, and the amount shall be charged to the treasurer. Receipts

SEC. 86. (65.) He shall pay no money from the treasury but upon the warrant of the auditor, and shall pay such warrants in the order of their issuance, or if there be no money in the treasury from which such warrant can be paid he shall, upon request of the holder, indorse upon the warrant the date of its presentation, and sign it, from which time the warrant shall bear an interest of eight per cent. per annum until the time limited in the next section. Paying out money.

SEC. 87. (66.) He shall keep a record of the number and amount of the several warrants so presented and indorsed for non-payment, and Record of warrants.

\* See note to section 41.

† The salary of the Code was \$400; it was made \$1500, as above, by the laws of sixth general assembly, chapter 234, page 393.

when there are funds in the treasury for their payment to an amount sufficient to render it advisable, he shall give notice thereof, and to what number of warrants the funds will extend, or the numbers of the outstanding warrants which the funds will pay, by three insertions in a newspaper printed at the seat of government; and at the expiration of thirty days from the day of the first insertion the interest on the warrants so notified of being payable shall cease.

Certify warrants canceled.

SEC. 88. (67.) Once in each week he shall certify to the auditor the number, date, amount, and payee, of each auditor's warrant taken up by him, with the date when taken up, and the amount of interest allowed, if any: and on the first Monday of March, June, September and November annually he is directed to account with the auditor and deposit in his office all such warrants received at the treasury, and take the auditor's receipt therefor.

Report to governor.

SEC. 89. (68.) As soon as practicable after the first Monday\* of November preceeding the regular session of the general assembly, he shall report to the governor the state of the treasury up to that date, exhibiting the amount received and paid out by the treasurer since his last report, and the balance remaining in the treasury.

Books, &c., subject to inspection.

SEC. 90. (69.) It is his duty to submit his books, accounts, vouchers, and funds, to the inspection of the governor, the general assembly, either house thereof, or any committee of either house appointed for that purpose, when required thereby.

Expenses.

SEC. 91. (70.) The expenses of the treasury are to be audited like other claims on the state, and paid by the state.

PRIOR LAWS. 1. "An act defining the duties of treasurer of the territory of Michigan," passed Nov. 4, 1829; M. D., 1833, p. 174. Repealed Aug. 30, 1840.

2. "An act to provide for the appointment of a territorial treasurer, and defining his duties," passed Jan. 24, took effect Feb. 24, 1839; I. T., 1st sess., p. 452; also Reprint of 1843, p. 610.

Repealed as to section 2, 3, and 4, by

3. "An act providing for the appointment and duties of auditor of public accounts, and regulating the duties of territorial treasurer," passed Jan. 7, took effect Feb. 7, 1840; I. T., 2d sess., chap. 95, p. 142.

4. "An act to abolish the office of territorial agent," passed May 29, took effect June 29, 1845; I. T., 7th sess., chap. 7, p. 24.

5. "An act prescribing the general duties of treasurer of state," passed Jan. 21, took effect Feb. 3, 1847; 1st sess., chap. 10, p. 27.

## CHAPTER 9.

### ARTICLE I.

An act to establish a State Land Office, with a register thereof, and to define his duties.

[Passed Jan 25, 1855, took effect Feb. 9, 1855; Laws of Fifth General Assembly, Chapter 153, page 222.]

Established.

SECTION 92. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That for the purpose of preserving a proper record of all lands belonging to the state, and of their final disposition, and of transacting business in relation thereto, there shall be a state land office established at the seat of government, with a register thereof, who shall be elected by the people on the *first Monday in April next*,† and shall

Election of register.

\* See chapter 91, article 4.

† See chapter 31.

hold his office for two years, and until his successor is elected and qualified.

SEC. 93. (2.) The state land office shall be furnished by the secretary of state with a suitable room, and with the necessary furniture and stationery, and a sufficient number of tract books, and other necessary books for records; said tract books to be ruled in a manner similar to those used in the United States land offices, so as to record each tract by its smallest legal subdivision, its section, township, range, and to whom sold, and when price per acre, to whom patented, and when.

Furniture and books.

SEC. 94. (3.) Separate tract books shall be kept for the university lands, the saline lands, the half million acre grant, the sixteenth sections, the swamp lands, and such other lands as the state now owns, or may hereafter own, so that each description of state lands shall be kept separate from all others, and each set of tract books shall be a complete record of all the lands to which they relate.

Separate tract books.

SEC. 95. (4.) The governor of the state, together with the register and receiver of the United States land office in Iowa City, are hereby appointed commissioners to assist in arranging with said register the plan on which the books and records of the state land office shall be kept, so that they may present and preserve an accurate chain of title from the general government to the ultimate purchasers of each smallest legal subdivision of land, and to preserve a permanent record in books, suitably indexed, of all correspondence with the general government, or any of its departments, in relation to state lands, and to preserve, by proper records thereof, copies of the original lists furnished by the state selecting agents, and of all other papers in relation to state lands, which are of permanent interest.

Commissioners to arrange plan.

SEC. 96. (5.) The register of the state land office, immediately after being qualified, as hereinafter provided, shall proceed to take possession of all books, papers, plans, or maps, now in the possession of the superintendent of public instruction, which relate to the selection, or compose a part of the records of any description of state lands, and of the records of patents issued by the state, in the office of the secretary of state; and if any dispute should arise between said register of the state land office and any officer of whom books or other documents are demanded, under the provisions of this section, the governor of this state, and the register and receiver of the land office in Iowa City, as commissioners as aforesaid, shall determine the same, and their decision shall be final.

Duty of register.

Arbitrators.

SEC. 97. (6.) All patents for state lands shall issue from the state land office, and shall be signed by the governor, and recorded by the register, and each patent shall contain therein a marginal certificate of the book and page on which it is recorded, which certificate shall be signed by the register, and all patents shall be delivered to the patentees free of charge.\*

Patents

SEC. 98. (7.) No patents for any portion of the state lands now set apart for educational purposes shall issue, except upon the written requisition of the superintendent of public instruction,† which requisition the register of the state land office shall file and record.

Requisition of S. P. I.

SEC. 99. (8.) In like manner no patents or conveyances of Des Moines river improvement lands shall issue, except on the written requisitions of the commissioner thereof;‡ and no patent shall issue for

Commissioner of D. R. I. & c.

\* That in italics which was repealed by chapter 148 of 7th session, was made law again by chapter 4 of 8th session.

† See section 108, and 1972 and 1973.

‡ See the Des Moines river acts, and especially chapter 99 of 7th session.

- any other lands belonging to the state, except upon the written requisition of the person or persons specially charged with the custody of the same, or in pursuance of law: *provided*, that all patents issued for any of the Des Moines river improvement lands, shall contain the following
- Saving clause.** clause: "Nothing in this patent shall be construed into a warranty by the state against any claim or claims to said lands arising out of any pre-existing contract in relation to said lands, made or entered into by the state or any of its agents, nor as intended to interfere with any of the rights of any person or company, to any of said lands accruing by virtue of any law of this state, or any contract under the provisions of any of said laws."
- Salary.** SEC. 100. (9.) The salary of the register of the state land office shall be \$1500 per annum, and he is hereby authorized to employ a
- Clerk.** clerk in said office, by the advice and consent of the governor of the State.\*
- Business hours.** SEC. 101. (10.) The state land office shall be kept open for business during business hours of every day, and shall have the personal attendance of the register; the documents therein shall be subject to inspection, in the presence of the register, by parties having an interest therein, and certified copies thereof, signed by the register, shall be deemed *prima facie* evidence of the fact to which they relate, in all courts in the State, and they shall be furnished by the register for a reasonable compensation, an account of which shall be kept, and the amount thereof paid quarterly into the treasury.
- Inspection.**
- Copies.**
- Rules and regulations.** SEC. 102. (11.) The governor and the register and receiver of the land office at Iowa City, acting as commissioners as aforesaid, shall have power to make all needful rules and regulations, not inconsistent with this act, for giving to the state land office a proper efficiency and correctness, and for rendering it a public convenience; and for this purpose they shall enter and sign their orders in this respect in a minute book, to be kept in said land office, and the orders so signed by a majority of them, shall be binding on the register.

## ARTICLE 2.

An Act to authorize the Register of the State land office and Governor to issue patents to the purchasers of Des Moines river improvement lands.

[Passed March 23, 1858, took effect April 7, 1859; *Laws of Seventh General Assembly, Chapter 148, page 289.*]

- Register authorized to issue.** SECTION 103. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That it is hereby made the duty of the register of the State land office to issue patents to the purchasers of Des Moines river improvement lands purchased prior to the ninth day of June, A. D. 1854.
- Governor sign.** SEC. 104. (2.) It is made the duty of the register to present said patents to the governor, whose duty it shall be to sign them.
- Patents recorded.** SEC. 105. (3.) The register shall record each patent and shall indorse on the same a marginal certificate of the book and page in which the same is recorded.
- Fee for patent.** SEC. 106. (4.) The register shall deliver to each person entitled to a patent the same. [The rest of this section is repealed by laws of 8th general assembly, chap. 4, passed Jan. 24, 1860, took effect July 4, 1860. See special laws page 137.]
- Conflicting act repealed.** SEC. 107. (5.) So much of chapter one hundred and fifty-three of

\* The 1,000 of this section was made 1,500 by laws of 7th general assembly, chap. 113, p. 214.

the acts of the fifth general assembly of the state of Iowa as conflicts with this act be and the same is hereby repealed.

### ARTICLE 3.

An Act to authorize the Register of the State Land Office to convey the title and issue patents for certain University lands.

[Passed April 2, 1860, took effect May 2, 1860; Laws of Eighth General Assembly, Chapter 121.]

SECTION 108. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That it shall be the duty of the register of the state land office to issue a patent to any bona-fide purchaser of any university lands, who may have purchased the same in good faith, before the passage of the joint resolution by the sixth general assembly, approved January 28th, 1857, by which certain sales of university lands were declared null and void, either of the board of trustees or of any person or persons purchasing through them, whenever the register, as aforesaid, shall be satisfied that any such bona-fide purchaser has paid for such land, according to the terms of purchase. Patents for University lands.

## CHAPTER 10.

An Act providing for the election of, and defining the duties of Supreme Court Reporter.

[Passed April 2, 1860, took effect May 9, 1860. Laws of Eighth General Assembly, Chapter 109.]

SECTION 109. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the supreme court shall appoint a person of known integrity, experience and learning in the law, reporter of the decisions thereof, and said reporter shall hold his office for the term of four years unless sooner removed by the court. Qualifications.

SEC. 110. (2.) Said reporter shall give bond to the state, with at least two sufficient sureties, to be approved by the governor, in the sum of ten thousand dollars, upon condition for the faithful performance of his official duties, and shall further take and subscribe an oath or affirmation, to be filed in the office of secretary of state, that he will perform the duties of his said office with correctness, impartiality and fidelity, and that the volumes of reports printed under his charge shall in every respect comply with this law, and no reporter shall be deemed qualified to act as such until he shall have complied with the provisions of this section. Bond.

SEC. 111. (3.) The judges of the supreme court shall reduce their opinions in every case to writing at the time such case may be decided, but they are instructed to make such opinions as brief as practicable, in the decision of questions already determined by the court in opinions, which they do not modify or overrule. Opinions written.

SEC. 112. (4.) It shall be lawful for the reporter to receive, at the close of each term of the supreme court, the records of all causes decided at such term, with the opinions thereon, and retain the same for such reasonable time as he may require to prepare the report thereof, when they shall be returned and remain in the office of the clerk. Reporter's right to opinions.

SEC. 113. (5.) The reporter shall, as fast as practicable, after the His duty,

- cases are decided, prepare an exact syllabus of each opinion, a short abstract of the facts, involving in the decisions followed by the legal propositions made by counsel in the argument, with the authorities relied on for their support, but not the argument at length. He shall also prepare and arrange suitable indexes and captions, and a table of cases.
- What he shall report.** SEC. 114. (6.) It shall be the further duty of the supreme court reporter to attend the several terms of the supreme court, and to report briefly any such cases of practice, and other matters disposed of at the hearing, as the court shall deem of sufficient importance to be reported.
- Volume.** SEC. 115. (7.) As often as the reports shall be sufficient to constitute a volume of six hundred pages, exclusive of index and table of cases, it shall be the duty of the reporter to cause the same to be printed and published in a manner and style as neat and substantial as the fourth volume of Iowa Reports, provided that not more than two volumes annually shall be published.
- Price.** SEC. 116. (8.) Said reports shall not be sold by the reporter or any other person at a rate higher than four dollars per volume, and if any person shall sell any volume of said reports in violation of the provisions of this act, he shall, on conviction thereof in any district court of this state, pay a fine of two hundred dollars.
- State purchase.** SEC. 117. (9.) For the purpose of securing the prompt publication of said reports, the governor is hereby authorized and required to subscribe for and take four hundred and fifty-one copies of each volume, and the state shall pay therefor four dollars per volume.
- Conditions thereof.** SEC. 118. (10.) It shall not be lawful for the governor to subscribe for any copies of any volume of said reports until he receives the certificate of the judges of the supreme court that the volume offered is in compliance with the requirements of this law, and the certificate of the secretary of state that four hundred and fifty-one copies of such volume have been delivered to him. Upon receiving such certificate he shall draw his order upon the auditor of state, who shall audit and allow the same upon presentation, and draw his warrant on the treasurer of state for the amount of the same. It shall not be lawful for any person to sell or dispose of any copies of any volume of said reports until the same have been approved by the judges of the supreme court as hereinbefore provided.
- Exchange thereof.** SEC. 119. (11.) The secretary of state is hereby authorized to exchange one hundred copies of each volume of said reports for such other books on law and equity as the supreme court may select, and the books obtained by such exchange shall be deposited in the state library, and remain the property of the state.
- Reporters' rights.** SEC. 120. (12.) The reporter shall be entitled to receive the copyright of his reports, but the supreme court shall have the power to order the publication of an addition of any volume when, in the opinion of the court, such publication is necessary and practicable, and if the reporter refuses to publish in accordance with such order, the court shall have power to declare the copy-right forfeited to the state.
- His expenses.** SEC. 121. (13.) The actual and necessary expenses incurred by the reporter in attending the sessions of the supreme court at Davenport shall be paid out of the state treasury, vouchers to be under oath.
- Unpublished decisions.** SEC. 122. (14.) It is hereby made the duty of the present reporter, Thomas F. Withrow, to prepare and publish reports of all cases decided by the supreme court that may remain unpublished after the eighth volume of Iowa Reports shall be issued by W. Penn Clarke.
- SEC. (15.) All acts and parts of acts in conflict with this law are hereby repealed.



PRIOR LAWS. 1. "An act to provide for the appointment of a reporter of the decisions of the supreme court and for other purposes," passed Jan. 25, took effect Jan. 31, 1855; 5th sess. chapter 161, p. 244.

2. Same amended Jan. 24, took effect Feb. 9, 1857; 6th sess., chapter 108, p. 123.

CHAPTER 11.

ATTORNEY GENERAL.

An Act to provide for the election of Attorney General and defining his duties.

[Passed March 22, 1858, took effect April 10, 1858; Laws of Seventh General Assembly, Chapter 104, page 205.]

SECTION 123. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That at the October election, A. D. 1858, and every two years thereafter, there shall be elected an attorney general, who shall hold his office for two years and until his successor is elected and qualified. Elected in 1858 for two years.

SEC. 124. (2.) The attorney general shall appear for the state and prosecute and defend all suits and proceedings, civil and criminal, in which the state shall be a party or interested when requested to do so by the governor, secretary of state, auditor, treasurer or general assembly, and shall prosecute and defend for the state all causes in the supreme court in which the state may be a party, or interested. Attorney general appears for state.

SEC. 125. (3.) The attorney general when requested, shall give his opinion in writing upon all questions of law submitted to him by the general assembly or either branch thereof, governor, lieutenant governor, auditor, secretary of state, treasurer, superintendent of public instruction, register of state land office, and district attorneys; and when required he shall prepare proper drafts for contracts, forms and other writings which may be required for the use of the state, and shall report to the general assembly when requested, upon any business pertaining to his office. He gives opinions in writing.  
Prepares drafts for contracts.

SEC. 126. (4.) All moneys received by the attorney general belonging to the people of the state, shall be paid by him into the state treasury. Moneys paid over.

SEC. 127. (5.) The attorney shall keep in proper books, a register of all actions and demands prosecuted and defended by him in behalf of the state, and of all proceedings had in relation thereto, and shall deliver the same to his successor in office. He keeps a register.

SEC. 128. (6.) Before entering upon the discharge of his duties, he shall take and subscribe an oath faithfully and impartially to discharge the duties of the same, and shall execute to the state of Iowa a bond with good and sufficient sureties in the sum of ten thousand dollars, to be approved by the governor, conditioned for the faithful discharge of his duties, and paying over all moneys as provided in this act, and which shall be filed with the secretary of state, and whenever required by the governor or general assembly he shall give additional and further security. Takes an oath and gives bond.  
Bond filed.

SEC. 129. (7.) His compensation shall be one thousand dollars per annum, to be paid quarterly, and he shall further receive for his attendance on the supreme or inferior courts three dollars per day during his necessary attendance on business pertaining to his office, and fifteen cents per mile for his actual travel in going to or returning from such Salary.  
Fees and mileage.

court by the nearest and most practicable route : *provided*, his compensation shall not exceed fourteen hundred dollars per annum.

Office at the  
capitol

SEC. 130. (8.) The secretary of state shall furnish a suitable office at the capitol, and such books of record and stationery as may be required for his office ; and the attorney general shall attend in person at the capitol of the state during the session of the general assembly, and the supreme court.

Record of official  
opinions.

SEC. 131. (9.) The attorney general shall keep in his office a book in which he shall record all the official opinions given by him during his term of office, which book shall be by him delivered to his successor in office.

PRIOR LAWS. 1. "An act to provide for the election of attorney general and define his duties," passed Jan. 24, 1853, took effect Feb. 9, 1853; laws of 4th general assembly, chap. 107, p. 186. Superseded by the act of the 7th general assembly, chap. 104. Perhaps we should refer to sec. 4 of it, for the promptness needed to be used by the attorney in payments to the treasury, and to sec. 6, as to the number of sureties.

2. "An act to fix the compensation of the attorney general," passed Jan. 28, 1857, took effect Feb. 20, 1857; laws of 6th general assembly, chap. 196, p. 312. Superseded by chap. 11.

## CHAPTER 12.

### STATE PRINTER.

#### ARTICLE 1.

An Act to create the office of State Printer, to provide for his election, to define his duties, and to establish the price of printing.

[Passed Dec. 29, 1848, took effect Jan. 10, 1849; Laws of Second General Assembly, Chapter 17, page 38.]

Office of state  
printer estab-  
lished.

SECTION 132. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That there is hereby established an office to be called the office of state printer.

When elected.

SEC. 133. (2.) That a state printer shall be elected at the present session of the general assembly, by a joint vote of the two houses thereof, who shall hold his office for the term of two years, and until his successor shall be elected and qualified.

Term of office.

Certificate of  
election.

SEC. 134. (3.) That the president of the senate and the speaker of the house of representatives shall, without delay, furnish to the person elected to the office of state printer, a certificate of his election, and within ten days after receiving the same, he shall give bond and security, and he shall take the oath of office, and enter upon the discharge of his duties at such time as is hereinafter provided for, and if he fail to do so, his office shall become vacant.

Give bond.

Bond to be given  
to the state.

SEC. 135. (4.) That the bond of the state printer shall be given to the state of Iowa, shall be signed by at least three good securities, shall be in the penalty of five thousand dollars, shall be conditioned for the faithful and punctual performance of all the duties of his office, and shall be approved by the governor and secretary of state, and shall be filed in the office of secretary of state, to be by him recorded.

Penalty.

Conditions.

Approved and  
filed.

Enter upon  
duties.

SEC. 136. (5.) That the state printer to be elected at the present

session of the general assembly, shall enter upon the duties of his office on the first day of May next; and state printers thereafter elected shall hold office for the term of two years, and until their successors shall be elected and qualified.

SEC. 137. (6.) That if the office of state printer shall become vacant from death, resignation, or otherwise, the governor shall appoint a public printer, who shall give bond and qualify, and shall hold his office for the same time that the person in whose stead he shall be appointed, would have held. Vacancy governor to appoint.

SEC. 138. (7.) That the state printer shall *hold his office at the seat of government, and*\* shall print the laws, the journals of the two houses of the general assembly, the incidental printing thereof, and all forms and blanks that may be required to supply the offices of governor, secretary of state, auditor and treasurer, and superintendent of public instruction. Office held at the seat of government. Duties.

SEC. 139. (8.) That the laws, journals, and all other printing in book form, shall be executed in small pica type, on pages to contain not less than fifteen hundred ems, and shall be printed on strong and fair paper of good quality, and the head notes and indexes, printed by the state printer, shall be in brevier type.† Materials to be used in printing.

SEC. 140. (9.) That all the state printing shall be done in a neat, substantial, and workmanlike manner, and shall be promptly performed and delivered, so that the public business shall not be delayed, nor the public interest permitted to suffer from any failure to have the work done in a reasonable and proper time. State printing to be executed neatly, &c.

SEC. (10.) [Repealed by act of 6th general assembly, chap. 184.]

SEC. 141. (11.) That it shall be the duty of the secretary of state, upon the completion of the printing of the laws and journals as aforesaid, to examine whether they have been properly executed according to the provisions of this act, and should they be thus executed, he shall give his receipt therefor, stating the same, together with the amount to which the printer is entitled for said work, and if not so executed, he may nevertheless receive the same and give his receipt therefor, noting said deficiency in said receipt. Secretary to examine work and give receipt therefor.

SEC. 142. (12.) That the auditor of state, on the production of the aforesaid receipt of the secretary of state, shall issue his warrant on the state treasurer for the amount therein stated, and should there be a deficiency noted on said receipt, he is hereby required to order suit to be commenced immediately against the printer and his securities, on the bond hereinbefore provided for, and report the proceedings therein in his next report to the general assembly. Auditor of state to issue warrant. Duty when deficiency noted.

SEC. 143. (13.) That the accounts of the state printer, for bills and all other job work done for each house of the general assembly, shall be carefully and strictly examined by a committee, and so much as is justly due to him shall be certified to the auditor of state by the presiding officer of the house for which the work shall have been done, and thereupon the auditor shall draw his warrant upon the state treasurer, in favor of the public printer, for the amount thus certified. Accounts of state printer to be examined. Auditor to draw warrant upon treasurer.

SEC. 144. (14.) That the secretary of state shall furnish to the state printer, within ten days after the adjournment of the general assembly, Secretary to furnish copies of all laws, &c.

\* That part italicised was repealed by an act of Feb. 4, 1851, laws of 3d general assembly, chap. 49, p. 100, which was itself repealed; its first section by an act of 4th general assembly, chap. 102, and its second section by an act of 5th general assembly, chap. 90.

† See section 156.

State printer to print the laws within fifty days.	at each session, a copy of all acts, memorials, and joint resolutions, passed at each; and the state printer shall, within fifty days after such copy shall have been furnished to him as aforesaid, print all copies that may be by law required, and the secretary of state shall, within five days after the same are printed, make out and deliver to the public printer an index
Secretary to furnish index.	to the same, who shall, within thirty days, print the same and deliver to the secretary of state such copies of the laws, bound in such manner as
Proviso.	is hereinbefore provided for: <i>provided</i> , that the time herein provided for printing laws shall not apply to the printing of any revised code of laws hereafter adopted by the general assembly.
Accounts to be audited.	SEC. 145. (15.) That all other accounts for work done for the state by the state printer in pursuance of law, the payment for which is not hereinbefore provided for, shall be presented and allowed in the same manner as is provided for in the eleventh and twelfth sections of this act.
Secretary may issue certificate before the work is completed.	SEC. 146. (16.) That at any time during the progress of the printing of the laws or journals of the general assembly, the secretary of state may issue his certificate for one-half the value of the work done and performed according to the requisitions of this act, to be ascertained by said secretary, and the amount so certified shall be audited and allowed as is provided in the twelfth section of this act.
Repealing sec.	SEC. (17.) [Obsolete.] SEC. (18.) That all acts and parts of acts contravening the provisions of this act, be and the same are hereby repealed.

An Act to amend the several acts in relation to a State Printer.

[Passed Jan. 24, 1853; Laws of Fourth General Assembly, Chapter 102, page 159.]

[1st section repealed, and rest found as chapter 91, article 2.]

#### ARTICLE 2.

An Act requiring the State Printer to keep his Office at the Capital of the State.

[Passed Jan. 24, 1855, took effect March 6, 1855; Laws of Fifth General Assembly, Chapter 90, page 141.]

Office of state printer to be kept at the capital.

SECTION 147. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That from and after the term of office of the present state printer, the state printer shall, at all times during the term of his office, keep an office at the capital of the state, with sufficient material, type, presses and workmen, to do and perform all the incidental printing of the state, and all printing for the state officers; and a failure to keep such office at all times at the capital during his said term of office, ready to do all work that may be required of him, promptly and in a workmanlike manner, shall be deemed a resignation of the office, and the governor shall, in such case, have power to appoint his successor.

Penalty.

An Act in relation to State Printing.

[Passed Jan. 28, 1857, took effect June 16, 1857; Laws of Sixth General Assembly, Chapter 184, page 280.]

[Sections 1 to 7, inclusive, superseded by next act. Sec. 8 of it repeals chapter 64 of the 5th session.]

#### ARTICLE 3.

An Act relating to State Printing.

[Passed April 2, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 126.]

Price of composition.

SECTION 148. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That the compensation for state printing shall be, for

composition on the laws, journals, reports, circulars, and all other printed matter, except blanks, sixty cents per thousand ems, and ninety cents per thousand ems for figure work, where the figures are arranged in columns, and one dollar and twenty cents per thousand ems for rule and figure work.

SEC. 149. (2.) For press work the compensation shall be fifty cents Of press work per token for each eight page form, octavo size, or for each four page form, quarto size; provided that two hundred and forty-two impressions shall constitute a token, except when the work ordered shall not amount to that many impressions; when any less quantity shall be counted as a token; and for pressing books and pamphlets in the sheet, said printer shall receive eight cents per hundred sheets.

SEC. 150. (3.) For printing blanks where the blanks require one For blanks. side of a sheet of folio-post or any larger sized paper, there shall be allowed for the first quire, one dollar and seventy-five cents, for the balance of the first ream, sixty cents per quire, and twenty-five cents per quire for any number exceeding one ream.

SEC. 151. (4.) For printing blanks on letter, cap or any larger Same. paper (less than folio post) there shall be allowed for the first quire, one dollar and twenty cents; if the blank occupy one side of a sheet, for the balance of the first ream, thirty cents per quire, and for any number exceeding one ream, twenty cents per quire; provided that twenty-four blanks shall constitute a quire, except when two blanks are printed on one side of a sheet, when twenty four sheets of paper shall constitute a quire.

SEC. 152. (5.) For printing blanks upon any paper mentioned in Same. the preceding section of this act or any smaller paper, and when two or more blanks are printed upon a half sheet, seventy-five cents shall be allowed for the first quire, fifteen cents per quire for any number exceeding one ream; provided that for this kind of blanks, twelve sheets of paper shall constitute a quire.

SEC. 153. (6.) For printing heading to assessments or census Headings to blanks. blanks, one dollar and thirty cents shall be allowed for the first quire, and forty cents per quire for the balance of the first ream, and twenty-five cents per quire for any number exceeding one ream: *provided*, that when a sheet is printed on both sides, twelve sheets shall constitute a quire, and when on one side, twenty-four sheets shall constitute a quire.

SEC. 154. (7.) All accounts rendered by the state printer for com- Actual work only. position or press work, shall be, for type actually set and imposed, or for paper actually printed; and no constructive charges of any kind shall be allowed.

SEC. 155. (8.) The state printer shall file with the secretary of Duty of state printer as check. state a copy of each job, on which each item of charges is made at the time of rendering his account. The actual number of ems and tokens of press work in each job, shall be specified, with a statement that the law has been strictly complied with, and that no constructive charges are embraced in his account as rendered, which statement shall be sworn to by the state printer, before the auditor of state shall audit such account.

SEC. 156. (9.) The journals and the acts, resolutions and memorials shall be printed in small pica type, and the matter shall be solid. Mode of doing work. Whenever a subject is commenced, whether it be the name of a member or otherwise, the subject matter shall follow in the same line, unless such line is filled by such word. The report of each motion or resolution shall be embraced in one paragraph, and where the yeas and nays

are given, each division list shall be in one paragraph with the names run in alphabetically, and the result given in the last line.

Paper receipt  
book.

SEC. 157. (10.) It shall be the duty of the secretary of state to provide a "state paper receipt book," and whenever he shall deliver to the state printer paper for any kind of printing, a receipt therefor shall be entered in said book, which receipt shall describe the kind and quality of paper so delivered.

SEC. 158. (11.) Whenever any work is performed by the state printer he shall certify the amount of paper used in said work to the secretary of state, who when satisfied that the same is correct shall give a receipt to the state printer, which shall be a voucher therefor.

Auditor's duty.

SEC. 159. (12.) All accounts audited under this act shall have endorsed by the auditor upon their backs, the amount allowed, and the number and date of the warrant issued in payment of the same, which account shall be filed in the office of the auditor of state, and carefully preserved by him.

SEC. 160. (13.) For all work done by the present state printer after taking effect of this act, the compensation shall be as herein provided.

SEC. (14.) All acts and parts of acts inconsistent with this act are hereby repealed.

#### ARTICLE 4.

An Act providing for auditing accounts for publishing Laws in newspapers.

[Passed April 2, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 119.]

Auditing by au-  
ditor.

SECTION 161. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the auditor of state be, and hereby is, authorized to audit and allow any accounts for publication of laws ordered by the general assembly, at the expense of the state, where the compensation for such publication is not fixed by law: *provided,* that he shall not allow more than thirty cents per square of ten lines.

## CHAPTER 13.

### STATE BINDER.

#### ARTICLE 1.

An Act to create the office of State Binder, to provide for his election, to define his duties and to establish the prices of public binding.

[Passed January 24, 1855, took effect February 21, 1855; Laws of Fifth General Assembly, Chapter 75, page 109.]

Office created.

SECTION 162. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That there is hereby established an office, to be called the "office of state binder."

Election.

SEC. 163. (2.) That a state binder shall be elected at the present session of the general assembly, by a joint vote of the two houses thereof, who shall hold his office for the term of two years, and until his successor shall be elected and qualified.

Term.

Certificate.

SEC. 164. (3.) That the president of the senate, and the speaker of the house of representatives, shall, without delay, furnish to the person elected to the office of state binder, a certificate of his election, and

within ten days after receiving the same, he shall give bond and security, and take the oath of office, and enter upon the discharge of his duties, at such times as is hereinafter provided for, and if he fails so to do, his office shall become vacant. Bond and oath.  
Failure.

SEC. 165. (4.) That the bond of the state binder shall be given to the state of Iowa, signed by at least three good securities, in the penalty of two thousand dollars, conditioned for the faithful and punctual performance of all the duties of his office, approved by the governor and filed in the office of the secretary of state, to be by him recorded. Penalty and condition of bond.  
Approval.

SEC. 166. (5.) That the state binder, to be elected at the present session of the general assembly, shall enter upon the duties of his office on the first day of May next, and thereafter elected, shall hold office for the term of two years, and until their successors shall be elected and qualified. Commence.  
Term.

SEC. 167. (6.) That if the office of state binder shall become vacant from death, resignation, or otherwise, the governor shall appoint a public binder, who shall give a bond, and qualify, and hold the office for the same time that the person in whose stead he shall be appointed, would have held. Vacancy.

SEC. 168. (7.) That the state binder shall hold his office at the seat of government, and bind the laws, the journals, and incidental binding of the two houses of the general assembly, and the incidental binding that may be required for the offices of governor, secretary of state, auditor and treasurer, superintendent of public instruction, and other officers of the state. Office to be held at the capital.  
Duties.

SEC. 169. (8.) That all the state binding shall be done in a neat, substantial, and workmanlike manner, and promptly performed, and delivered, so that the public business shall not be delayed, nor the public interest permitted to suffer from any failure to have the work done in a reasonable and proper time. Performance.

SEC. 170. (9.) That the state binder shall receive for his services the following prices, to wit:—for stitching, folding, and binding the laws and journals of the general assembly, in strong paper covers, seven cents per copy; for folding and trimming messages and documents, not exceeding one sheet, *thirty*\* cents a hundred copies; for folding and stitching, and trimming messages and documents, not exceeding one sheet, \$1.25 per hundred copies, and for every additional sheet twenty-five cents per hundred; for binding books, the size of the Code, full bound sheep, in a substantial manner, sixty-five cents; and for any other binding, the usual prices, for such work. Prices.  
Laws and journals.  
Messages, &c.  
Books.  
Miscellaneous.

SEC. 171. (10.) That it shall be the duty of the secretary of state, upon the binding and completion of the laws and journals, as aforesaid, to examine whether they have been executed according to the provisions of this act; and should they be thus executed, he shall give his receipt therefor, stating the name, together with the amount to which the binder is entitled for said work, and if not so executed, he may, nevertheless, receive the same, and give his receipt therefor, noting said deficiency in said receipt. Duty of secretary.

SEC. 172. (11.) That the auditor of state on the production of the aforesaid receipt of the secretary of state, shall issue his warrant on the state treasury for the amount therein stated, and should there be a deficiency noted in said receipt, he is hereby required to order suit commenced immediately against the binder, and his securities, on the bond Auditor.  
Suit.

\* See article 2 of this chapter.

- hereinafter provided for, and report the proceedings therein in his next report to the general assembly.
- State printer. SEC. 173. (12.) That the state printer shall furnish to the state binder the sheets of all work that requires binding, as soon as the same are printed, and ready for folding, and the state binder shall bind all work that comes into his hands, within a reasonable time, and when the same is bound, deliver the said work to the secretary of state.
- Other accounts. SEC. 174. (13.) That all other accounts for work done for the state, by the state binder, in pursuance of this law, the payment of which is not hereinbefore provided for, shall be presented and allowed in the same manner as is provided for in the tenth and eleventh sections of this act.
- Advance on work. SEC. 175. (14.) That at any time during the progress of the binding of the laws or journals of the general assembly, the secretary of state may issue his certificate for one-half of the value of the work done, and performed according to the requisitions of this act, to be ascertained by said secretary and the amount so certified shall be audited and allowed, as is provided in the eleventh section of this act.
- Repeal. SEC. 176. (15.) That all acts and parts of acts contravening the provisions of this act, be, and the same are hereby repealed.

## ARTICLE 2.

## An Act in relation to State Binding.

[Passed April 3, 1860, took effect May 2, 1869; Laws of Eighth General Assembly, Chapter 136.]

- Compensation. SECTION 177. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That hereafter the state binder shall receive for folding and trimming messages and documents, not exceeding one sheet, twenty cents a hundred copies, and for binding any volume the size of the code, in a good, substantial manner, in cloth or muslin, thirty-five cents per copy, and in proportion for any larger size.
- How bound. SEC. 178. (2.) The session laws of the general assembly shall hereafter be bound in boards, with cloth backs, for which the state binder shall receive the sum of fifteen cents per copy.
- SEC. 179. (3.) All acts and parts of acts inconsistent with this act are hereby repealed.

## CHAPTER 14.

## ARTICLE 1.

## An act providing for the Geological Survey of the State.

[Passed January 23, 1855, took effect January 31, 1855. Laws of Fifth General Assembly, Chapter 83, page 121.]

- Governor to appoint state geologist. SECTION 180. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the governor may appoint, by and with the advice and consent of the senate, a state geologist, who shall be a person of competent scientific and practical knowledge of the science of geology and mineralogy, who shall hold his office for the term of two years, unless sooner removed by the governor.
- Term. SEC. 181. (2.) The said state geologist shall, by and with the consent of the governor, appoint one suitable person to assist him in the
- Assistant.



discharge of his duties, who shall be a skillful analytical and experimental chemist.

SEC. 182. (3.) It shall be the duty of said geologist and his assistant, State survey. as soon as may be practicable after the appointment, to commence and carry on, with as much expedition as possible, a thorough geological and mineralogical survey of the state, as also of the character and quality of the soil for agricultural purposes. Soil.

SEC. 183. (4.) It shall be the duty of the assistant to make full and Assays. complete examinations and assays of all rocks, ores, soils or other substances which may be submitted to him by the state geologist for that purpose, and to furnish him with a detailed and complete account of results so obtained.

SEC. 184. (5.) It shall be the duty of the state geologist, on or before Report. the first Monday of December in each year during the time necessarily occupied by said survey, to make report of said survey and the progress thereof, accompanied with such maps, drawings and specifications as may be necessary and proper to exemplify the same to the governor, who shall lay a copy of the reports before the general assembly. Maps and drawings.

SEC. 185. (6.) It shall also be the duty of such geologist to forward to Specimens. the governor, from time to time, during the progress of said survey, such specimens of the rocks, ores, coals, soils, fossils, and other mineral substances discovered and examined, properly labeled, as may be proper and necessary to form a complete cabinet of collections of specimens of Cabinet. geology and mineralogy of the state. And the governor shall cause the same to be preserved for the benefit of the state for public inspection. Public inspection. Said geologist shall cause to be represented on the map of the state, by Geological map. colors and other appropriate means, the various areas occupied by the different geological formations in the state, and mark thereon the localities of the respective beds of deposits of the various mineral substances discovered, and the character of the soil; and on the completion of the survey, to compile a memoir of the geology and mineralogy of the state, Memoir. comprising complete accounts of the leading subjects and discoveries which have been embraced in the survey.

SEC. 186. (7.) [The omitted part obsolete.] The salaries of the Salaries. geologist and assistant shall be fixed by the census board of the state. The salaries of the geologist and assistant, however, shall not commence until they have respectively entered upon the discharge of their duties. And upon the completion of said survey and the duties connected therewith, the same shall cease and determine. Cense.

#### ARTICLE 2.

An act making provisions for the continuance of the Geological Survey of the State.

[Passed January 24, 1857, took effect February 2, 1857. Laws of Sixth General Assembly, Chapter 103, page 120.]

SEC. (1.) [Obsolete.]

SEC. 187. (2.) All geological specimens and fossils collected during Specimens. said survey are hereby granted to the state university, and shall be deposited and carefully kept in a cabinet to be by that institution devoted to this purpose.

## CHAPTER 15.

## COMMISSIONERS IN OTHER STATES.

[Code—Chapter 9.]

Commissioners' oaths.	SEC. 188. (71.) The governor may appoint in each of the United States one or more commissioners to continue in office during the pleasure of the governor; and such commissioners are empowered to administer oaths, and to take depositions and affidavits, to be used in this state, and also to take the acknowledgment or proof of deeds or other instruments to be recorded in this state.
Acknowledgments.	
Same.	SEC. 189. (72.) Oaths administered by any such commissioner, affidavits and depositions taken by him, and acknowledgments as aforesaid, certified by him under his hand and appropriate seal, are made as effectual in law for all intents and purposes as if done and certified by a justice of the peace in this state.
Qualification.	SEC. 190. (73.) Before such commissioner can perform any of the duties of his office, he is required to take and subscribe an oath that he will faithfully perform the duties of such his office, which oath shall be taken and subscribed before some judge or clerk of a court of record in the state in which the commissioner is to exercise his appointment, and certified under the hand of the person taking it and the seal of his court; and he is also required to file the oath and certificate, together with his signature on paper, and a clear impression of his seal on wax or wafer in the office of the secretary of this state.
Oath. Seal.	
Signature and seal; effect of.	SEC. 191. (74.) A signature and seal purporting to be his will be entitled to the same force, as evidence, with a signature and seal purporting to be those of a notary public.
Fees.	SEC. 192. (75.) Such commissioner is authorized to demand for his services the same fees as may be allowed for similar services by the laws of the state in which he is to exercise his office.
Those heretofore appointed.	SEC. 193. (76.) Those persons who have heretofore been appointed commissioners in other states in accordance with any previous law of the territory or state of Iowa, may continue to hold said offices according to the tenor of their several commissions.
Those appointed by other states in this state.	SEC. 194. (77.) Commissioners of the like nature appointed in this state under the authority of any other of the United States are hereby invested with all the authority of a justice of the peace to issue subpoenas requiring the attendance of witnesses before them to give their testimony by deposition or affidavit in any matter in which his deposition or affidavit may be taken by the law of such other state; and they are also authorized to administer oaths in any matter in relation to which they are required or permitted by the law of the other state; and false swearing in such cases is hereby made subject to the penal laws of this state relating to perjury.

**PRIMER LAW.**—1. "An act to authorize the governor to appoint commissioners to take acknowledgments of deeds or other contracts and depositions in other territories or states," passed Jan. 9th, took effect Feb. 9th, 1846; I. T. 8th sess., chap 9, p. 7.

CHAPTER 16.

NOTARIES PUBLIC.

[Code—Chapter 10.]

ARTICLE 1.

SECTION 195. (78.) The governor may appoint and commission one or more notaries public in each organized county of the state, who may respectively hold their offices three years unless sooner removed by the governor. Appointment

SEC. 196. (79.) Each notary is invested with the powers and shall perform the duties which pertain to that office by the custom and law of merchants. Powers and duties.

SEC. 197. (80.) The notary before entering upon the duties of his office is required to give bond to the state of Iowa in the penal sum of five hundred dollars, conditioned for the true and faithful execution of the powers and duties of his office, with two or more sureties to be approved of by the clerk of the district court in the county where such notary resides, which bond shall be filed in the office of the said clerk, and may be sued for the use of the state or of any person injured by the acts or omissions of the notary. Qualification.

SEC. 198. (81.) Every notary public is required to keep a true record of all notices given or sent by him, with the time and manner in which the same were given or sent, and the names of all the parties to whom the same were given or sent, with a copy of the instrument in relation to which the notice is served, and of the notice itself. Record.

SEC. 199. (82.) Such records, and copies of them authenticated by the hand and seal of the notary, his protests, and all his official acts as notary, and his seal, shall receive such credit and faith as they are entitled to by the law and custom of merchants. Records, & Evidence.

SEC. 200. (83.) Each notary public is required to have a seal on which are to be engraved the words "notarial seal," and "Iowa," with his surname at length and at least the initials of his christian name. Seal.

SEC. 201. (84.) Notaries public are empowered to administer oaths, and to take the acknowledgment and proof of deeds required or permitted by the law of this state to be recorded or acknowledged. Take oaths, &c.

SEC. 202. (85.) On the death, resignation, or removal from office, of any notary, his records with all his official papers shall within three months therefrom be deposited in the office of the clerk of the district court in the county for which such notary shall have been appointed. And if any notary on his resignation or removal neglect for three months so to deposit them, he shall be held guilty of a misdemeanor and be punished accordingly and be liable in an action to any person injured by such neglect; and if an executor or administrator of a deceased notary wilfully neglect for three months after his acceptance of that appointment to deposit the records and papers of the deceased notary which came into his hands in said clerk's office, he shall be held guilty of a misdemeanor and punished accordingly. Vacancy of office, Records.

SEC. 203. (86.) If a notary removes his residence from the county for which he was appointed, such removal shall be taken as a resignation. Removal.

SEC. 204. (87.) It is the duty of each clerk aforesaid to receive, and safely keep, all such records and papers of the notary in the cases Records with Clerk.

above named, and to give attested copies of them under the seal of his court, for which he may demand such fees as by law may be allowed to the notaries, and such copies shall have the same effect as if certified by the notary.

## ARTICLE 2.

An Act to amend Chapter 10 of the Code in relation to Notaries Public.

[Passed Jan. 25, 1855, took effect Jan. 31, 1855; Laws of Fifth General Assembly, Chapter 158, page 285.]

- Record of Commission.**      **SECTION 205. (1.)** *Be it enacted by the General Assembly of the State of Iowa,* That on or before the 1st day of May next, every notary public then in commission in the state, shall have his commission recorded in the office of the recorder of deeds of his county.
- Failure.**      **SEC. 206. (2.)** Any notary public failing to comply with the provisions of the foregoing section shall be deemed removed from office from and after the said first day of May next.
- After 1st May.**      **SEC. 207. (3.)** Every notary public whose commission bears date after the said first day of May next, shall comply with the following conditions:
- Bond.**      1. Before entering upon the discharge of his official duties, he shall give bond to the state of Iowa, in the penal sum of five hundred dollars, conditioned for the true and faithful execution of the powers and duties of his office, with two or more sureties, to be approved on said bond by the clerk of the district court of the proper county.
- Approval.**      2. On the approval of said bond by said clerk, said notary shall have his commission recorded by the recorder of deeds of his county, and shall pay to the clerk of the district court the sum of one dollar.
- Record.**      **SEC. 208. (4.)** Said notary public shall then be deemed commissioned, and not before.
- Fees.**      **SEC. 209. (5.)** The clerk of the district court shall thereupon transmit to the secretary of state, a certificate that said notary public is duly qualified, and specifying the date of his qualification, which certificate shall bear the signature of said notary public, and said secretary is hereby required to file said certificate in his office, and to keep a book in which he shall enter the names of notaries hereafter qualified, in the order in which the same are transmitted to him, with the name of the county and the date of qualification of each.
- Commissioned.**      **SEC. 210. (6.)** Any notary public exercising the duties of his office after the expiration of his commission, or when otherwise disqualified, or appending his official signature to documents, when the parties have not appeared before him, shall be guilty of a misdemeanor, and be subject to a fine of fifty dollars for each offense, to be recovered before any justice of the peace of the county, and shall also be removed from office by the governor.
- Clerk's certificate.**      **SEC. 211. (7.)** The governor of the state is hereby authorized to appoint one or more notaries public in any unorganized county, who shall qualify as herein before provided, in the county to which said unorganized county is attached for judicial purposes.
- Signature.**      **SEC. 212. (8.)** Such provisions of chapter 10 of the code, as conflict with the provisions of this act are hereby repealed.
- Filed.**
- Penalty.**
- Appointment in unorganized counties.**
- Repeal.**

ARTICLE 3.

An Act regulating the mode of Service of Notices of Protest by Notaries Public.  
 [Passed Feb 25, 1858, took effect March 2, 1858; *Laws of the Seventh General Assembly, Chapter 25, page 29*]

SECTION 213. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That in case of a demand of payment of any promissory note, bill of exchange or other commercial paper, by a notary public, and a refusal by the maker, drawer or acceptor, as the case may be, the notary making said demand may inform the indorser or any party to be charged, if in the same town or township, by notice deposited in the nearest post-office to the party to be charged, on the day of demand, and no other notice shall be necessary to charge said party. Notice to indorser deposited in post-office.

PRIOR LAWS. 1. "An act concerning notaries public," passed April 12, 1827; M. D., 1833, p. 244.  
 2. "An act to provide for the appointment of notaries public, and to prescribe their duties," passed Dec. 24, took effect Jan. 24, 1840; I. T., 2d sess., chap. 11, p. 14.

CHAPTER 17.

STATE BUILDINGS AND STATE INSTITUTIONS.

An Act requiring complete Reports from Officers in charge of State Buildings and State Institutions.  
 [Passed March 27, 1860, took effect July 4, 1860; *Eighth Session, Chapter 60.*]

SECTION 214. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That it shall be the duty of all commissioners, or architects or superintendents, having in charge the erection of public buildings belonging to the state, and of all trustees principals, directors, inspectors and wardens of any charitable school, university, asylum, or penitentiary, or proper officer of other state institutions on or before the twentieth day of December preceding each regular session of the general assembly, to transmit to the governor of the state (to be by him laid before the assembly) a detailed report showing the expenditure of all public moneys placed or coming into their hands, and such report shall show the expenditure down to the fifteenth day of December preceding the day aforesaid. The governor shall cause one thousand copies of each of said reports to be printed and laid on the desks of the members at the commencement of the session of the general assembly. Report of officers.  
One thousand copies to be printed.

SEC. 215. (2.) It shall be the further duty of all such officers above named, to transmit with their reports to the governor each and every separate voucher, or duplicate voucher for all expenditures they have made. Further duties.

SEC. 216. (3.) The failure or refusal of any officer as above named to make such report as is herein required shall work a forfeiture of office and be deemed a misdemeanor and be punishable as such. Penalty of failure

SEC. 217. (4.) This act shall take effect and be in force as provided by law.

## TITLE III.

OF THE CIVIL AND POLITICAL DIVISIONS OF THE STATE, AND  
THE OFFICERS THEREOF.

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### CHAPTER 18.

CONGRESSIONAL DISTRICTS.

[Code—Chapter 11.]

**SECTION 218. (88.)** The congressional districts of the state remain as they now are until changed by the general assembly.

[The acts on this subject are those of the first general assembly, chapter 70, of the first session extra, chapter 35, and of the sixth general assembly, chapter 199.]

**PRIOR LAWS.** 1. "An act to divide the state into two congressional districts," passed Feb. 22, 1847; 1st sess., chap. 70, p. 84.

2. "An act to amend an act entitled an act to divide the state into congressional districts," passed Jan. 24, 1848; 1st sess. extra, chap. 35, p. 34.

3. "An act to change the boundaries of the first and second congressional districts of the state of Iowa," passed Jan. 28, 1857, and took effect July 1, 1857; 6th sess., chap. 199, p. 323.

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### CHAPTER 19.

JUDICIAL DISTRICTS.

[Code—Chapter 12.]

[THE law on this subject is undergoing constant change, and is therefore not inserted here.]

**PRIOR LAWS.** "An act to lay off and organize counties west of the Mississippi river," passed Sept. 6, took effect Oct. 1, 1834; 2d sess. of the 6th legislative council of Michigan, p. 10.

[This act gave judicial organization to "Demoine" and Dubuque counties. The other acts are too many and too unimportant to deserve insertion here.]

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### CHAPTER 20.

LEGISLATIVE DISTRICTS.

[For the present law see chapters eighty and ninety-five of the eighth session, pages fifty-six and seventy-two of the special laws of eighth session.]

## CHAPTER 21.

## COUNTIES.

[Code—Chapter 14.]

## ARTICLE 1.

SEC. 219. (91.) The boundaries of the several counties remain as Boundaries.  
now established.

SEC. 220. (92.) The rights and liabilities of the several counties Rights.  
now existing remain as they are.

SEC. 221. (93.) Each county now or hereafter organized is a body Body corporate  
corporate for civil and political purposes only, and as such may sue and powers.  
be sued; shall keep a seal such as provided by law; may acquire and  
hold property and make all contracts necessary or expedient for the  
management, control, and improvement, of the same, and for the better  
exercise of its civil and political powers; may make any order for the  
disposition of its property; and may do such other acts and exercise  
such other powers as may be allowed by law.

SEC. 222. (94.) The county judge of each county having a seal is Seal.  
required to obtain, as soon as practicable, for his county, a new seal of  
the same size with the present one, and with the same device, but the  
inscription on which shall be, "seal of the county of —, Iowa," (nam-  
ing the county,) in capital letters, and each new seal hereafter obtained  
shall be of the same description. The county seal is the seal of the  
county court, its capacities both of county and probate court. But the  
seals of the board of commissioners and of the probate court remain  
until the new seal is obtained.

SEC. 223. (95.) Counties bounded by a stream or other water, Jurisdiction.  
have concurrent jurisdiction over the whole of the waters lying between  
them.

SEC. 224. (96.) Each organized county shall elect a judge of the Officers.  
county court, a *prosecuting attorney*,\* a clerk of the district court, a  
recorder, a sheriff, a surveyor, a coroner, and a *supervisor of roads*,†  
each of whom may hold his office for the term of two years, except the  
county judge, who may hold for the term of *four*‡ years.

SEC. 225. (97.) An action may be brought in the name of a county  
on any instrument heretofore given to the board of commissioners of  
the county, or to any officer thereof for the benefit of the county; and  
in the name of the State when the instrument was in part for the benefit  
of the State.

*Unorganized Counties, and other Country.*

SEC. 226. (98.) Unorganized counties and other districts now or Annexation.  
hereafter annexed to any organized county for judicial, electoral, or  
revenue purposes, shall for those purposes respectively, be deemed to  
be within the limits of the county to which they are or may be so  
annexed, and to form a part thereof, unless otherwise provided by law.

SEC. 227. (99.) The first election holden in unorganized counties First election.

\* Superseded by chapter 25.

† Superseded by chapter 46, article 3.

‡ Now two years, see section 473.

for the purpose of organization shall be holden at the first *August* or general election which takes place after the act authorizing the organization takes effect, and shall be conducted as far as practicable as directed concerning the general election. *And if such first election is the general election, those officers then elected who are by law to be elected at the August election, shall hold for the term of one year, and another choice shall be made at the next ensuing August election of such officers, to hold for the term of two years.\**

Townships.

SEC. 228. (100.) The *county judge*† of a county to which an unorganized county is attached for election purposes, is required to divide the attached county into townships, and to determine the place of holding elections in each, and to appoint the judges of election, who shall appoint the clerks. But if such appointment of judges is not made, or if the judges or any of them do not attend, the electors may choose others in their stead.

Justices and constables.

SEC. 229. (101.) Each township in an unorganized county may elect two justices of the peace, and two constables, whose qualification for office shall be as directed hereafter.

Voting.

SEC. 230. (102.) The electors in unorganized counties are not entitled to vote for county and township officers for the counties to which they may respectively be attached.

## ARTICLE 2.

## An act in relation to County Seats.

[Passed Jan. 22, 1855, took effect 31st Jan., 1855; Laws of Fifth General Assembly, Chapter 46, page 71.4]

Re-location.

SECTION 231. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That whenever the citizens of any organized county desire the re-location of their county seat, they may petition *their county court* respecting the same.

Petition.

SEC. 232. (2.) Such petition shall designate the place at which the petitioners desire to have the county seat re-located, and shall be signed by none but legal voters of said county.

Presented.

SEC. 233. (3.) Such petition shall be presented at any regular term of *the county court*, an affidavit shall be made before the judge of said court by at least one credible witness that the signers are, as the affiant verily believes, legal voters of said county.

Vote.

SEC. 234. (4.) Upon petitions being presented at any term of *the county court*, signed by at least one-half of all the voters in the county, as shown by the last preceding census, asking for a re-location of a county seat at any one place therein named, *said court* shall order that at the next *April*§ election holden thereafter, a vote shall be taken between said designated place and the existing county seat, and shall require a constable of each township in the county, to post notices of such order in three public places in such township, at least ten days before such election, and shall also publish a notice of such election in some newspaper, if there be one published in the county, at least three weeks before such election.

Notice.

Presentation.

SEC. 235. (5.) Twenty days' notice of the presentation of any petition provided by this act, shall be made by one insertion in a weekly

\* Probably all in italics is superseded by section 459.

† Board of Supervisors, see section 312-7.

‡ Should the words in italics read, "the county board of supervisors," throughout this chapter?

§ Should not "April" read "general?" chapter 31.



newspaper, if there be one printed in the county, if no paper be therein printed, by posting the same at four public places in the county, one of which shall be on the court house door in said county.

SEC. 236. (6.) The ballot shall designate that it was cast for the Ballots. county seat, and name the place voted for.

SEC. 237. (7.) Such election shall be conducted as elections for Conducting. county officers.

SEC. 238. (8.) If the point designated in the petition obtain a ma- Removal. jority of all the votes cast, *the county judge* shall make a record thereof and declare the same to be the county seat of the county, and shall remove the records and documents thereto as early as practicable thereafter.

SEC. 239. (9.) Nothing in this act shall be so construed as to pre- Remonstrance. vent the people of a county who are opposed to a re-location of a county seat remonstrating against it.

## CHAPTER 22.

### COUNTY JUDGE.

[Code—Chapter 15.]

#### ARTICLE 1.

[Section 103 is superseded by section 15, of the 159th chapter of the laws of the seventh general assembly, which makes county judge electable at the general election of 1859, and every two years thereafter; see section 473.]

SEC. 240. (104.) The county judge is required to keep his office at Office. the county seat, and it is to be kept open for business at all usual times, and he is the keeper of the county seal.

SEC. 241. (105.) The county judge is hereby invested with the Powers. usual powers and jurisdiction of *county commissioners\** and of a judge of probate, and with such other powers and jurisdiction as are conferred by this statute; and his official style may be either "county judge" or "judge of" (such a county, naming it).

SEC. 242. [106. Thus modified by sec. 312.]

FIFTH—To keep a book to be known as the "minute book," in which Books. shall be recorded all orders and decisions made by him, except those relating to probate affairs.

SIXTH—To keep also separate books for the probate business.

[See additional Section, 283.]

SEC. 243. (107.) As the *judge*† issues warrants from time to time, he Warrants. is required to deliver to the treasurer a memorandum of the number, date, amount, and drawee's name, of each.

SEC. 244. (108.) Deeds for the conveyance of lands, and other Deeds, &c. contracts made by the county which are to be formally executed, shall be in the name of the county, executed *by the county judge in his official capacity, and acknowledged by him, and have the county seal affixed.*‡

SEC. 245. (109.) The county judge can not act as attorney or Not act as attorney.

\* This jurisdiction is taken away by art. 11 hereof.

† Clerk of the board of supervisors, see sec. 312-18 and 330.

‡ Probably superseded by art. 11 and 13 hereof.

- counsellor in any business which has or may come before him in his capacity as a county judge.
- Acknowledgments and oaths. SEC. 246. (110.) He has authority to administer oaths and take the acknowledgment of instruments, whenever the same is required or permitted by law, and in the performance of such acts the county seal shall be his seal of office.
- Vacancy or interest. SEC. 247. (111.) In case of a vacancy in the office of county judge, and in case of the absence, inability, or interest, of that officer, the *prosecuting*\* attorney of the county shall supply his place; and when a party in direct interest makes his affidavit to the fact of the interest of the judge, it will be his duty to vacate his seat for the time being, and to cause the *prosecuting* attorney to be notified to attend, and the judge's refusal so to do will be good cause for an appeal, which may be taken either before the matter is heard, or after. When for the same causes the *prosecuting* attorney can not act, the county clerk shall fill the place of the judge, and the affidavit must apply to both judge and attorney. When, for any of the above causes, the judge, or the attorney in his proper order, does not act, the record of the proceeding must shew the fact and the cause.
- Field notes. SEC. 248. (112.) The *judge*† is required to procure for his county (where it has not been done) a copy of the original field notes of the original survey of his county by the United States, and cause a map of the county to be constructed in accordance therewith on a scale of not less than one inch to a mile, and laid off into congressional townships and sections, to be kept open in the office of the judge, and the field notes to be deposited in the same.
- Plat- of town- ship. SEC. 249. (113.) The *said judge*‡ is further required to cause a plat of each congressional township in his county to be constructed on a scale of not less than two and a half inches to a mile, and divided into sections and quarter sections and subdivisions as subsequent occasion may require, and cause the letter S, or some other suitable letter to be marked on each division and subdivision which appears to be sold according to the returns transmitted by the auditor of state as obtained from the land offices.
- Submit ques- tions to people. SEC. 250. (114.) The *county judge*§ may submit to the people of his county at any regular election or at a special one called for that purpose. the question whether money may be borrowed to aid in the erection of public buildings; whether the county will construct, or aid to construct, any road or bridge which may call for an extraordinary expenditure; whether *stock*¶ shall be permitted to run at large, or at what time it shall be prohibited; and the question of any other local or police regulation not inconsistent with the laws of the state. [No contract made by any county *judge* for the use of or for the erection of county buildings, where the expenditure exceeds two thousand dollars, shall be legal unless it is first submitted to a vote of the people of his county as provided in sections one hundred and thirteen (113) and one hundred and fourteen 114. ¶] And when the warrants of a county are at a depreciated value, *he* may in like manner submit the question whether a tax

\* Since the repeal of chapter 18 of code of 1851 this duty would perhaps devolve upon the clerk of district court.

† Should judge read board of supervisors, Sec. 312-11.

‡ See last note.

§ For the italics read "Board of supervisors," 312-23.

¶ See an amendment making stock include sheep and swine, sec. 287.

¶¶ Should not this read 114 and 115 of the code of Iowa? The matter included in brackets was passed March 22, 1860, laws of 8th session, chapter 49.

of a higher rate than that provided by law shall be levied, and in all cases when an additional tax is laid in pursuance of a vote of the people of any county for the special purpose of repaying borrowed money, or of constructing or aiding to construct any road or bridge, such special tax shall be paid in money and in no other manner.

SEC. 251. (115.) The mode of submitting such questions to the people shall be the following: the whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty for its violation if there be one, is to be published at least four weeks in some newspaper printed in the county. If there be no such newspaper the publication is to be made by being posted up in at least one of the most public places in each township in the county, and in all such cases in at least five among the most public places in the county including the above, and one of them in all cases at the door of the court house, during at least thirty days prior to the time of taking the vote. All such notices shall name the time when such question will be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of the election. Manner.

SEC. 252. (116.) When a question so submitted involves the borrowing or the expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes, as directed in the following section, and no vote adopting the question proposed will be of effect unless it adopt the tax also. Borrowing and expending money.

SEC. 253. (117.) The rate of the tax shall in no case be more than one per cent. on the county valuation in one year. When the object is to borrow money for the erection of public buildings as above provided, the rate shall be such as to pay the debt in a period not exceeding ten years. When the object is to construct, or to aid in constructing, any road or bridge, the annual rate shall be not less than one mill on a dollar of the valuation, and any of the above taxes becoming delinquent shall draw the same interest with the ordinary taxes. Rate of tax, &c.

SEC. 254. (118.) When it is supposed that the levy of one year will not pay the entire amount, the proposition and the vote must be to continue the proposed rate from year to year, until the amount is paid. Tax.

SEC. 255. (119.) The county judge,\* on being satisfied that the above requirements have been substantially complied with and that a majority of the votes cast are in favor of the proposition submitted, shall cause the proposition and the result of the vote to be entered at large in the minute book and a notice of its adoption to be published for the same time and in the same manner as above provided for publishing the preliminary notice; and from the time of entering the result of the vote in relation to borrowing or expending money, and from the completion of the notice of its adoption in the case of a local or police regulation, the vote and the entry thereof on the county records shall have the force and effect of an act of the general assembly. Question adopted.

SEC. 256. (120.) Propositions thus adopted, and local regulations thus established, may be rescinded in like manner and upon like notice by a subsequent vote taken thereon, but neither contracts made under them, nor the taxes appointed for carrying them into effect, can be rescinded. Rescission of vote.

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\* Board of supervisors, sec. 312.

- When put.** SEC. 257. (121.) The *judge*\* shall submit the question of the adoption or rescision of such a measure when petitioned therefor by one fourth of the voters of the county.
- Record evidence.** SEC. 258. (122.) The record of the adoption or rescision of any such measure shall be presumptive evidence that all the proceedings necessary to give the vote validity have been regularly conducted.
- Excess of tax.** SEC. 259. (123.) In case the amount produced by the rate of tax proposed and levied exceeds the amount sought for the specific object, it shall not therefore be held invalid, but the excess shall go into the ordinary county funds.
- Money appropriated.** SEC. 260. (124.) Money so raised for such purposes is specially appropriated and constitutes a fund distinct from all others in the hands of the treasurer, until the obligation assumed is discharged.

*As a County Court.*

- Always open.** SEC. 261. (125.) The county court shall be considered in law as always open, but for the transaction of business requiring notice, the judge shall hold regular sessions on the first Monday of each month except April and August, and on the Tuesday following the first Monday of those months.
- Sessions.** SEC. 262. (126.) When the district court is to sit in a county on any of the days appointed in the preceding section for the session of the county court, the latter shall be held on the Monday preceding, and when the county judge is required by law to perform any duty which takes him from his county on one of the appointed days, the session of the county court shall be holden on the following Thursday, or such day as the judge may appoint.
- What heard in session.** SEC. 263. (127.) Matters requiring a notice shall be heard in session only, but the judge may continue any business from a session to an intermediate day; and any matter may be heard out of session (the judge assenting) if all parties consent in writing, or if the record shew that they are present and assenting. Other matters than those requiring notice, and orders of an intermediate nature not affecting the merits of matters requiring notice, may be heard and acted upon at any time.
- Books.** SEC. 264. (128.) The "minute book," and records of probate business, constitute the records of the county court.
- Powers of court.** SEC. 265. (129.) The county *court*\* has authority to provide for the erection and reparation of court houses, jails, and other necessary buildings within and for the use of the county, and such authority in relation to roads, ferries, the poor *and cases of bastardy*,† as is given in the chapters relating to those subjects, and has such other powers as are or may be given it by law. It shall determine the amount of tax to be levied for county purposes, according to the provisions of law in force at the time, and cause the same to be collected.
- Trials** SEC. 266. (130.) All questions in the county court shall be tried by the court, except when it is otherwise provided.
- Appeals.** SEC. 267. (131.) An appeal is allowed (except when otherwise expressed) from all decrees and decisions of the county court on the merits of any matter affecting the rights or interests of individuals as distinguished from the public, including an intermediate order involving the merits, and necessarily affecting the decree or decision. The appeal

\* Board of supervisors, sec. 312.

† Bastardy cases are within the jurisdiction of the county court.

shall be taken within thirty days from the day on which the decision was made, and shall be taken by claiming the appeal and filing in the county office a bond with one or more sureties and a penal sum to be approved by the county judge or clerk, which approval shall be indorsed thereon, and with a condition in substance as follows; that the appellant will prosecute the appeal with effect; that if the appeal be dismissed or the judgment below affirmed, he will comply with the judgment and the orders made by the court below, and that he will pay all costs and sums of money which may be adjudged against him in the court appealed to, and will comply with the orders of that court. But the appeal shall be taken to the next term of the district court in the county if there be ten days between the day when the judgment was rendered by the county court and the day of the sitting of the district court, and the matter shall stand for hearing at that time if required by the appellee, subject to the ordinary rules of practice.

SEC. 268. (132.) Within twenty days from the day of the appeal, and within five days in the case mentioned in the last paragraph of the preceding section, the county clerk is required to file a transcript of the proceedings in the matter in which the appeal is taken, authenticated by the county seal, with the clerk of the district court, who shall enter the same among the causes pending in that court. Transcript.

SEC. 269. (133.) If more than one person be concerned in the matter of the decision from which the appeal is taken, any number of them may take the appeal as above provided; but, if the nature of the case admit of it, the decision may be carried into effect as it regards those who do not join in the appeal bond. Who may appeal.

SEC. 270. (134.) If the party entitled to an appeal fails, without fault on his part, to claim or perfect or prosecute his appeal, he may apply to the district court, which, upon being satisfied of the above matter and that the case requires revision, may authorize an appeal to be taken upon such terms as it deems reasonable and may take such order as may be requisite to give it effect. But no appeal shall be thus allowed without due notice to those adversely interested nor after one year from the act complained of. Failure to appeal, without fault.

SEC. 271. (135.) In all cases in which the county court is empowered to render judgment for a sum of money, or for costs, that court may issue execution against the personal property of the party; but when it is desired to issue execution against real property, or to make the judgment a lien upon it, a transcript of all the proceedings and of the judgment, shall be filed in the office of the district court, and an abstract of the judgment entered on the judgment docket, and from the time it is so filed and entered the judgment shall become as a judgment of the district court, and be a lien on the real property of the party in all respects as a judgment of the district court, and execution may issue from that court as on its own judgments. Executions, filing transcript.

SEC. 272. (136.) Transcripts of the records of, and copies of the papers pertaining to, the county court, may be certified and signed by either the clerk or the judge. Copies.

SEC. 273. (137.) A trial by jury in the county court is not given unless the party desiring it demand a jury, and it can be demanded in those cases only in which such trial is expressly given. When there is a jury it shall consist of six persons and the number of challenges shall be the same as in the court of a justice of the peace; and in the cases of insane persons and apprentices, provided for in the chapters relating to them, if they have no property by which to pay costs when adjudged against them the jurors shall be paid by the county. Jury.

- As judge of probate. SEC. 274. (138.) As the judge of probate, the county judge has jurisdiction of the probate of wills, the administration of the estates of deceased persons, and of the guardianship of minors and insane persons.
- Probate records. SEC. 275. (139.) The probate records shall be kept in books separate from those of the other business of the county court.
- SEC. 276. (140.) It is hereby directed that the business pending in either the probate court or the court of the board of commissioners in any county when this statute takes effect be, in its further progress, conformed to the provisions of this statute as far as practicable; but no proceeding or matter shall become void for want of such conformity if it be conducted legally according to the pre-existing statutes.

## ARTICLE 2.

## An Act to require County Judges to give Bond.

[Passed January 19, 1853, took effect July 1, 1853; Laws of Fourth General Assembly, Chapter 40, page 71.]

- County judge to give bond. SECTION 277. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That every county judge hereafter elected, shall, previous to entering upon the duties of his office, enter into bond, with two or more good and sufficient sureties, in a sum ten times greater in amount than his *salary*,\* conditioned for the faithful discharge of his duties as such judge, and for the payment of all public moneys which may come into his hands, said bond to be approved by the *prosecuting* attorney and treasurer, and to be kept by the county treasurer.
- Condition. Approval. Filed. County judges now in office to give bond or office forfeited. SEC. 278. (2.) County judges already in office shall, within sixty days after the taking effect of this act, enter into bond as prescribed in the first section hereof, and in default of their compliance with this requirement, their offices are hereby declared forfeited.
- Term. SEC. 279. (3.) County judges hereafter elected shall hold their offices for the term of two years, and until their successors are elected and qualified.†
- Repeal. SEC. 280. (4.) All sections or parts of sections of the code, conflicting with the provisions of this act, are hereby repealed.

## ARTICLE 3.

## An Act to amend an act entitled, 'An act to require County Judges to give Bond.'

[Passed December 22, 1856, took effect September 5, 1856; Laws of Sixth General Assembly, Chapter 21, page 17.]

- Expiration co. judges' office. SECTION 281. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the county judges' office shall become vacant at the expiration of twenty days after their successors shall have been elected as prescribed by law.
- SEC. (2.) [Repealed by sections 312-19.]
- Repeal. SEC. 282. (3.) All sections or parts of sections heretofore enacted, conflicting with this act, are hereby repealed.

\* The subject of bonds is within the jurisdiction of board of supervisors, 312-10.

† See section 473.

## ARTICLE 4.

An Act to amend Section 106, Chapter 15, of the Code of Iowa.

[Passed January 24, 1853, took effect July 1, 1853; *Laws of Fourth General Assembly, Chapter 90, page 151.*]

SECTION 283. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That chapter fifteen of the code of Iowa, section one hundred and six, be and the same is hereby amended so as to authorize the county judge to have transcribed and indexed the records of his county, in manner and form as he may prescribe, not inconsistent with law. County judge.  
Transcribe and index.

## ARTICLE 5.

An Act requiring County Judges to pay into the County Treasury all money received by them from the sale of County Property.

[Passed January 22, 1853, took effect July 1, 1853; *Laws of Fourth General Assembly, Chapter 72, page 128.*]

SECTION 284. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That county judges\* shall pay into the county treasury all moneys and county warrants received by them from the sale of town lots. or other county property, which they are empowered by law to sell in their counties, within twenty days from the receipt of the same; and upon failure thereof, they shall pay twenty per cent. upon all money so received from the date of its reception. County judges to pay.

## ARTICLE 6.

An Act defining what shall constitute a copy of the Field Notes of the Original Survey, as contemplated in Section 112 of the Code.

[Passed January 22, 1857, took effect July 1, 1857; *Laws of Sixth General Assembly, Chapter 78, page 84.*]

SECTION 285. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That a copy of the field notes of the original survey, as required in section one hundred and twelve of the code, is hereby construed and understood to mean a copy of the field books of the original survey as returned to the surveyor general's office, and not merely a copy of the descriptive lists returned to the district land offices. Copy.

SEC. 286. (2.) Said copy shall give the dates of the surveys in the order in which they appear in the original field books, and the name of each deputy surveyor as signed to the work he performed, and embrace everything in relation to the lines contained in said field books, only excepting the descriptions of the land which follow the notes of each mile of survey and the general description of the township at the end of each book. Copy to contain.

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\* Board of supervisors, sec. 312-3-11. and sec. 330.

## ARTICLE 7.

An Act amending Section 114, of Chapter 15 of the Code, and also to regulate the same.

[Passed January 28, 1857, took effect July 1, 1857; Laws of Sixth General Assembly, Chapter 193, page 309.]

Amend code.

SECTION 287. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That so much of section one hundred and fourteen of chapter fifteen of the code, as authorizes *county judges\** to submit the question whether stock shall be permitted to run at large, the word "stock" shall be construed to mean swine and sheep.

Power to restrain.

SEC. 288. (2.) That in any county that has heretofore decided, or shall hereafter decide by a majority vote, in favor of restraining swine and sheep from running at large, every owner of such stock shall, from and after eight months from the canvass of the vote in said county, retain their swine and sheep from running at large in said county; and in the event of a failure so to do, shall be liable for any damages done by said swine or sheep, to be recovered by action of trespass by the party injured.

Take up.

SEC. 289. (3.) That any person may take possession of any swine or sheep found running at large in said county, after the time specified in section two of this act, and give notice thereof to any constable in said county, who shall have power, and it is hereby made his duty, to sell such swine or sheep at public auction at the highest bidder for cash, upon giving ten days' notice of the time and place of sale, by posting the same in writing in three public places in the township where such swine or sheep were found running at large, the proceeds of which sale, after payment of costs and charges of keeping, shall be paid into the county treasury, to be applied to the use of the county until legal proof be made to the county judge of said county, by the person or persons claiming such property to be his or theirs, whereupon the said judge shall order said amount to be paid out of any money in the hands of the treasurer not otherwise appropriated: *provided,* that if the owner, or any person for him, shall, on or before the day of such sale, pay the costs and charges thus far made, the constable is hereby required to release said sheep or swine to the person making such application, upon satisfactory proof being made of ownership.

Fees.

SEC. 290. (4.) The fees of the constable under this act shall be the same as upon sale of like property on execution.

## ARTICLE 8.

An Act further defining the duties of County Judges.

[Passed January 29, 1857, took effect February 26, 1857; Laws of Sixth General Assembly, Chapter 228, page 389.]

Transmit the names of county officers.

SECTION 291. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the county judges of the several counties of this state are hereby required to furnish the secretary of state the names by the first day of April, A. D. 1857, of each county judge, clerk of the district court, treasurer and recorder, *prosecuting*† attorney, sheriff and *school fund commissioner*,‡ in their counties respectively, designating the

\* Board of supervisors secs. 330 and 312-11.

† Obsolete, see chapter 25.

‡ Obsolete, by section 27 of chapter 158, of 7th session.



office to which each is elected, and the date of the expiration of their said office, and also to report in like manner, and from all county officers hereafter elected or appointed, within ten days after their election and qualification, to said secretary of state.

SEC. 292. (2.) It is hereby made the duty of the secretary of state <sup>Record.</sup> to procure a suitable book, at the expense of the state, in which he shall record the name, the office and term of each officer so reported, as contemplated in the first section of this act.

ARTICLE 9.

An Act in relation to County Funds, and the manner of drawing the same from the County Treasury.

[Passed January 26, 1857, took effect February 18, 1857; Laws of Sixth General Assembly, Chapter 120, page 131.]

SECTION 293. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That where any money has been or shall hereafter be appropriated by the county court,\* for any work of internal improvement in any county, for the erection of any bridge, or the construction of any highway, no part of said appropriation shall be drawn from the county treasury, for the purpose aforesaid, until the work shall have been actually commenced in good faith, and then only in such sums as may be necessary to pay for the work as it progresses, on regularly certified estimates made by the engineer, superintendent or agent having charge of the work. <sup>Appropriations.</sup>

SEC. 294. (2.) No county judge shall make any appropriation of the county funds, nor draw any warrant on the county treasury in favor of any partnership, firm, company, association or incorporation of which the said county judge is an officer, agent or attorney, and any appropriation made, or warrant drawn as aforesaid, and in contravention of the provisions of this act, shall be utterly null and void, and shall not be paid from the county treasury. <sup>Not made if county judge is interested.</sup>

SEC. 295. (3.) All moneys belonging to any county, arising from the sale of any property owned by the county, shall be paid into the county treasury by the person holding the same, and no payment of the same to any other person than the county treasurer shall be of any binding force or effect. <sup>Pay into county treasury.</sup>

SEC. 296. (4.) It shall be the duty of the county judges in making settlements of any moneys received by them, for the sale of any property of the county, to state distinctly the time when any moneys shall have been received by them, and if the same has not been paid into the county treasury by them, in twenty days from the time of receiving the same, in accordance with the first section of the act approved July 15, 1856,† the said county judges shall be charged interest on such moneys, while in their hands, at the rate of twenty per centum per annum. <sup>Judge pay over.</sup>

SEC. 297. (5.) It shall be the duty of the prosecuting ‡ attorneys of each county, to see that this act is strictly enforced, and to prosecute all violation of the same. <sup>Prosecuting attorney must enforce.</sup>

SEC. 298. (7.) *Provided,* nothing in this act shall be so construed as repealing any part of the act in relation to swamp lands, approved July <sup>Repeal.</sup>

\* Perhaps the words italicised in the 1st, 2d, and 4th sections should read "board of supervisors." See sections 312-11, and 330.

† Probably chapter 36 of 5th session extra is meant, being chapter 47, article 6, hereof.

‡ District chapter 25, hereof.

15, 1856, or with any appropriations of said swamp land funds as contemplated by the swamp land act, approved 1853.

ARTICLE 10.

An Act to regulate Public Shows.

[Passed March 22, 1858, took effect April 7, 1858; Laws of Seventh General Assembly, Chapter 129, page 261.]

Shows prohibited without license.

SECTION 299. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That before any exhibitor or exhibitors of any traveling public show, not already prohibited by law, shall be allowed to exhibit or show any natural or artificial curiosity or exhibition of horsemanship in a circus or otherwise, for any price, gain, or reward, he or they shall apply to the county judge of the county in which he or they intend to show or exhibit, for a permit, and the county judge shall give him or them a permit specifying the time, place or places he or they may be allowed to show or exhibit in the county, on the person or persons thus applying paying into the county treasury the amount said county judge may assess on him or them for the privilege of exhibiting or showing such show, which assessment shall in no case exceed one hundred dollars, nor less than ten, for each and every place at which such show shall be exhibited: *provided,* it shall not be necessary for any exhibitor or exhibitors as aforesaid to obtain a permit from the county judge to show or exhibit in any incorporated town or city where by the laws or ordinances of such town or city such exhibitor or exhibitors may be required to obtain a permit or license from the municipal authority of such town or city.

Cost of license.

Cities may grant license.

Exhibitions without license, punished.

SEC. 300. (2.) That if any person or persons shall exhibit any public show without first having obtained the permit according to the provisions of this act, he or they shall, for every such offense, pay the sum of one hundred dollars to be recovered in an action of debt at the suit of the county judge or treasurer, or any citizen of the county, before any justice of the peace of the county in which the offense may be committed, and paid into the treasury of said county.

Fees for licenses go to school fund.

SEC. 301. (3.) That all moneys paid into the treasury of any county under the provisions of this act shall be appropriated to the support of common schools in said county, and it shall be the duty of the treasurer of such county annually to apportion the same to the respective school districts in his county, according to the number of youths therein, and to pay the same to the several districts of his county at the time the general school fund is paid and distributed.

ARTICLE 11.

An Act creating a County Board of Supervisors, defining their duties, and the duties of certain County Officers.

[Passed March 22, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 46.]

County body politic.

SECTION 302. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That each organized county shall be a body politic and corporate with such powers and immunities as shall be established by law.

Board of supervisors.

SEC. 303. (2.) In each organized county there shall be a board of supervisors, consisting of one from each civil township, to be elected by the legal voters of each civil township; but if the population of any such township exceeds four thousand inhabitants and is less than eight thou-

sand, there shall be elected one additional supervisor from such township or townships and one additional supervisor for each four thousand inhabitants over and above eight thousand; the number of inhabitants to be determined by the last preceding state or federal census; each of which supervisors shall hold his office for two years except as hereinafter provided.

SEC. 304. (3.) The board of supervisors at their first regular meeting shall be classed and divided by lot, one part holding for one year and the other for two years as hereinafter provided. Classed.

SEC. 305. (4.) The clerk shall prepare the requisite number of ballots marked "1" year and "2" years alternately which when drawn shall entitle the holder to the term corresponding with his ballot and in the absence of any member the clerk shall draw for him but if the number of supervisors be odd, then there shall be a bare majority of ballots marked "1" year. In the event of the organization of new townships, the supervisors therefrom shall hold for one or two years, as may be determined by the number of the next new additional ballot or ballots to be marked as aforesaid: *providing further*, that in case any township has more than one supervisor there shall be a separate drawing of the ballots by the supervisors from such township but made in accordance with the above provisions. Terms of holding.

SEC. 306. (5.) Duplicate certificates of such drawing, and the result shall be filed, in the office of the county and township clerks, and shall be recorded in the book in which the canvass of votes is recorded. Record of vote.

SEC. 307. (6.) The supervisors of the several townships in the state shall meet on the first Monday of January, June, and the first Monday after the general election in each year at the court-house of their respective counties if there be one, and if none, at the office of the clerk of district court. Time of meeting.

SEC. 308. (7.) A majority of the supervisors of any county shall constitute a quorum for the transaction of business, and all questions which shall arise at meetings shall be determined by the votes of a majority of the supervisors present, except in such cases as is otherwise provided; they shall sit with open doors, and all persons may attend their meetings. The board of supervisors at their first meeting in every year shall organize by choosing one of their number as chairman, who shall preside at all the meetings of the board during the year. Power of majority.

In case of his absence the members present shall choose one of their number as temporary chairman. Every chairman of the board of supervisors shall have power to administer an oath to any person concerning any matter submitted to the board or connected with their powers.

SEC. 309. (8.) Special meetings of the board of supervisors shall be held only when requested by at least a majority of the board, which request shall be in writing, addressed to the clerk of the district court; on the reception of such request the clerk shall immediately give notice in writing to each of the supervisors by causing the same to be delivered to such supervisor or by leaving a copy at his residence at least six days before such meeting, and also immediately cause a notice thereof to be once inserted in the newspapers published in the county not exceeding two (if there be such) at least one week before such meeting, but if there be no paper published in the county a notice of such meeting shall be posted at the front door of the court-house or usual place of meeting; and cause one to be posted in some public place for at least one week; which said notice shall in all cases state the object for which such special meeting is called; at such special meetings no

- other business shall be transacted than that designated in the notice aforesaid.
- Oath.** SEC. 310. (9.) The members of said board of supervisors shall take and subscribe the following oath or affirmation to wit: I do solemnly swear (or affirm as the case may be) that I will support the constitution of the United States and the constitution of the state of Iowa, and that I will faithfully and impartially discharge the duties of the office of supervisor according to the best of my ability.
- Failure of duty.** SEC. 311. (10.) If any supervisor shall neglect or refuse to perform any of the duties which are or shall be required of him by law as a member of the board of supervisors, without just cause therefor, he shall for each offense forfeit one hundred dollars.
- Powers.** SEC. 312. (11.) The board of supervisors at any lawful meeting shall have the following powers, to wit:
- Chairman.** 1. To appoint one of their number chairman, and also a clerk in the absence of the regular officers.
- Adjourn.** 2. To adjourn from time to time, as occasion may require.
- Control county property.** 3. To make such orders concerning the corporate property of the county as they may deem expedient.
- Settle accounts.** 4. To examine and settle all accounts of the receipts and expenditures of the county and to examine, settle and allow all just claims against the county unless otherwise provided by law.
- Buildings.** 5. To build and keep in repair the necessary buildings for the use of the county and for the district court.
- Insurance, &c.** 6. To cause the county buildings to be insured in the name of the county or otherwise, for the benefit of the county as they shall deem expedient, and in case there is no county building, to provide suitable rooms for county purposes.
- County boundaries.** 7. To set off, organize and change the boundaries of townships in their respective counties, designate and give names thereto and define the place of holding the first election.
- Licenses.** 8. To grant licenses for keeping ferries in their respective counties as provided by law.
- County seat and buildings.** 9. To purchase for the use of the county any real estate necessary for the erection of buildings for county purposes, to remove or designate a new site for any county buildings required to be at the county seat when such removal shall not exceed the limits of the village or city at which the county seat is located.
- Control of county officers.** 10. To require any county officer to make a report under oath to them on any subject connected with the duties of his office, and to require any such officer to give such bonds or additional bonds as shall be reasonable or necessary for the faithful performance of their several duties; and any such officer who shall neglect or refuse to make such report or give such bonds within twenty days after being so required, may be removed from office by the board by a vote of a majority of the members elected.
- County agents.** 11. To represent their respective counties, and to have the care and management of the property and business of the county in all cases where no other provision shall be made.
- School fund.** 12. To manage and control the school fund of their respective counties as shall be provided by law.
- Lay out road.** 13. To appoint commissioners to act with similar commissioners duly appointed in any other county or counties, and to authorize them to lay out, alter or discontinue any road extending through their own and one or more other counties, subject to the ratification of the board.

14. To fix the compensation of all services of county and township officers not otherwise provided for by law, and to provide for the payment of the same. Fix compensation.

15. To authorize the taking of a vote of the people for the re-location of the county seat as provided by law. Submit to vote.

16. To alter, vacate or discontinue any state or territorial road within their respective counties. Regulate state roads.

17. To lay out, establish, alter or discontinue any county road heretofore or now laid out or hereafter to be laid through or within their respective counties, as may be provided by law. County roads.

18. To provide for the erection of all bridges which may be necessary and which the public convenience may require within their respective counties and to keep the same in repair. Bridges.

19. To fill by appointments all vacancies that may occur in any of the county offices by death, resignation or removal and such appointee shall hold his office until the next succeeding general election and until his successor shall be elected and qualified. Fill vacancies.

20. To purchase for the use of the county any real estate necessary for the erection of buildings for the support of the poor of such county and for a farm to be used in connection therewith. Support of poor.

21. To have and exercise all the powers in relation to the poor now possessed by the county judge or county court, and to make such rules and regulations (not inconsistent with law) as they may deem necessary for the government of their body, the transaction of business and the preservation of order. Power as to poor.

22. The board of supervisors shall constitute the board of county canvassers. County canvassers.

23. That it shall not be competent for said board of supervisors to order the erection of a court house, jail, poor house or other building or bridge, nor the purchase of real estate for county purposes where the probable cost will exceed two thousand dollars, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all voting for and against such proposition, at a general election; notice of the same being given for thirty days previously in a newspaper, if one is published in the county, and if none, be published therein then by written notice, posted in a public place in each township in the county. Conditions of same.

SEC. 313. (12.) They shall cause to be made out and published immediately after each regular or special meeting of the board, in at least one newspaper, if there be one in the county, if not by posting on the court house door, a schedule of the receipts and expenditures of the county, which shall state the names of all claimants, the amount claimed, the amount allowed, for what purpose allowed, and a full statement of the amounts of the treasurer's accounts at the last settlement as on his balance sheet, or account-current in making the settlement; no tax shall be levied, no contract for the erection of any public buildings entered into, no settlement with the county officers made, no real estate purchased or sold, no new site designated for any county buildings, no change made in the boundaries of townships, and no money appropriated to aid in the construction of roads and bridges without a majority of the whole board of supervisors voting therefor and consenting thereto. Statement of condition of county.

SEC. 314. (13.) The authority heretofore exercised by the county judge in ordering the publication of advertisements in each county, shall be hereafter exercised by the clerk of the district court, sheriff, and treasurer and recorder respectively, each one acting for his own department. Advertisements.

- ment, and the board of supervisors shall designate the journals in which all other county notices shall be published.
- Equalize assessments.** SEC. 315. (14.) It shall be the duty of the board at their June meeting, to equalize the assessment rolls, and levy all uniform taxes to be levied on the taxable property in the county.
- Jury fees.** SEC. 316. (15.) All jury fees may be audited and paid as now provided by law, the clerk keeping a true record of the same which shall be laid before the board of supervisors and be made up in their account.
- Compensation.** SEC. 317. (16.) Each member of the board of supervisors shall be allowed a compensation of two dollars per day for his services in attending the meetings of the board, and six cents per mile in going to and returning from the place of meeting, to be audited by the board and paid by the county, provided no supervisor shall receive pay for more than fifteen days in one year.
- Books to be kept.** SEC. 318. (17.) The board is authorized and required to keep the following books:
- Minute book.** 1. A book to be known as the "minute book," in which shall be recorded all orders and decisions made by them, except those relating to roads, and in which, orders for the allowance of money from the county treasury, shall state on what account and to whom the allowance is made, dating the same and numbering them consecutively through each year.
- Road record.** 2. A book to be known as the "road record" in which shall be recorded all proceedings and adjudications relating to the establishment, change, or discontinuance of roads.
- Warrant book.** 3. A book to be known as the "warrant book," in which shall be entered in the order of their insurance, the number, date, amount, names of the drawee of each warrant drawn on the treasury and the number of the warrants as directed in relation to the minute book.
- Clerk of board and his duties.** SEC. 319. (18.) The clerk of the district court or in his absence his deputy, shall be the clerk of the board of supervisors, and it shall be his duty,
1. To record all the proceedings of the board in proper books provided for that purpose.
  2. To make full entries of all their resolutions and decisions on all questions concerning the raising of money and for the allowance of money from the county treasury.
  3. To record the vote of each supervisor on any question submitted to the board if required by any member present.
  4. To sign all orders issued by the board for the payment of money and to record in a book provided for the purpose, the reports of the county treasurer, of the receipts and disbursements of the county.
  5. To preserve and file all accounts acted upon by the board with their action thereon, and he shall perform such special duties as are or may be required of him by law.
- What each account must show.** SEC. 320. (19.) It shall be the duty of the clerk to designate upon every account on which any sum shall be audited and allowed by the board, the amount so audited and allowed and the charges for which the same was allowed, and he shall also deliver to any person who may demand it, a certified copy of any record in his office, or any account therein, on receiving from such person a fee of five cents for every folio of one hundred words contained in such certified copy.
- Issuance of county orders.** SEC. 321. (20.) The clerk shall not sign or issue any county order except upon the recorded vote or resolution of the board of supervisors

authorizing the same, except for jury fees, and every such order shall be numbered, and date, amount, and number of the same and the name of the person to whom issued shall be entered in a book to be kept by him in his office for the purpose.

SEC. 322. (21.) Whenever the clerk of the board of supervisors of any county shall receive from the state authorities notice of the apportionment of school moneys to be distributed in the county, he shall file the same in his office and transmit a certified copy thereof to the county treasurer and he shall also lay a certificate copy thereof before the board at their next regular meeting. Duty as to school money.

SEC. 323. (22.) The first election under this act shall be held at the general election of 1860. 1st election.

SEC. 324. (23.) After the taking effect of this act neither the county judge nor county court shall have or exercise any of the powers hereby conferred upon the board of supervisors, but this act shall not effect said judge or court in any county, until the first meeting of said board of supervisors in January, 1861. Power taken from county judge.

SEC. 325. (24.) In all cases where the powers hereby conferred upon said board of supervisors have heretofore been by law exercised by the county judge, county court, or other county officers, the said supervisors shall conduct their proceedings under said powers in the same way and manner as nearly as may be as is now provided by law in such cases for the proceedings of said county judge, county court and county officers, provided they are not inconsistent with the provisions of this act. Follow the method of the county judge.

SEC. 326. (25.) All acts and parts of acts heretofore enacted, and which are inconsistent with this act, are hereby repealed.

ARTICLE 12.

An Act in relation to Roads and Highways.

[Passed April 2, 1860, took effect Jan. 1, 1861; Laws of Eighth General Assembly, Chapter 127.]

SECTION 327. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the board of supervisors shall have the same power, and perform the same duties in relation to roads and highways in their respective counties, as have been exercised under previous laws by county judges and county courts, subject to such modifications as shall be or have been made at the present session of the legislature. Roads.

SEC. 328. (2.) When duties are to be performed, or acts done, which can not be performed by the board of supervisors without too much delay or inconvenience, such board may confer the power to perform such duties upon the clerk of the district court, and it shall be the duty of such clerk to exercise authority so conferred, and discharge the duties so required. Power conferable on clerk.

SEC. 329. (3.) This act shall take effect and be in force from and after the 1st January 1861.

ARTICLE 13.

An Act conforming existing laws to the change made in the system of County Government and Organization.

[Passed April 2, 1860, took effect Jan. 1, 1861; Laws of Eighth General Assembly, Chapter 100.]

SECTION 330. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all laws which may be in force at the time of the taking effect of this act, devolving any jurisdiction or powers on county judges, Transfer of power to supervisors.

which said jurisdiction or powers are conferred on the county board of supervisors by an act of the present general assembly, entitled "an act creating a board of county supervisors, defining their duties, and the duties of certain county officers," shall be held to apply to, and devolve said jurisdiction and powers upon the said county board of supervisors in the same manner and to the same extent as though the words, "county board of supervisors" occurred in said laws instead of the word, "county judge."

SEC. 331. (2.) This act shall take effect and be in force from and after the first day of January, A. D. 1861.

#### ARTICLE 14.

An Act to provide for the Election of the Members of the Board of Supervisors.  
[Passed April 3, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 156.]

Election of  
board.

SECTION 332. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That the members of the board of supervisors shall be elected at the same time and in the same manner as township officers: *provided, however*, that nothing herein contained shall be so construed as to conflict with the provisions of an act of the eighth general assembly, entitled "an act creating a county board of supervisors, defining their duties and the duties of certain county officers."

#### ARTICLE 15.

An act to adapt the Law for canvassing Votes to the Supervisor system.  
[Passed April 2, 1860, took effect January 1, 1861 Laws of Eighth General Assembly, Chapter 122.]

Delivery of poll  
book.

SECTION 333. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That it shall be the duty of the judges of election by one of their number, within one day after the election, to deliver to the member of the county board of supervisors of their townships, the poll book and return of the election now required to be delivered to the county judge.

Disposition of it.

SEC. 334. (2.) It shall be the duty of such member of the board of county supervisors (or in case of his inability to attend, the judge of election who delivered the poll book and return to him) on or before twelve o'clock M., of the first Monday after the election to deliver said poll book with its return to the board of county canvassers at their regular place of meeting.

Canvass of the  
returns.

SEC. 335. (3.) It shall be the duty of the board of county canvassers, at twelve o'clock M., on the first Monday after the election, to proceed publicly to open and canvass the several returns, and to make and certify under their hands respectively the abstracts and returns now required by law to be done by the county canvassers; and when the canvass is concluded, the several township returns shall be delivered to the county judge to be kept and recorded as now required by law.

More than one  
county embraced  
appointee.

SEC. 336. (4.) When more than one county is embraced in one senatorial or representative district, it shall be the duty of the board of county canvassers to make out and certify an abstract and return of the votes of their county cast for such office, and seal the same carefully, designating the contents thereof on the cover, addressed to the district board of canvassers for the office so voted for, and deliver the same to one of their own number to be designated by them for that purpose.

Duty of ap-  
pointee.

SEC. 337. (5.) It shall be the duty of the member of the county



board designated as in section four of this act prescribed, to attend at the place of the district canvass, at twelve o'clock M., on the second Monday after the election, and the member so designated from the several counties in such district shall constitute the board of district canvassers, and shall then and there proceed to open and canvass the votes returned from the several counties, composing such district, and having so canvassed, shall make out abstracts and returns, duly signed by the members of the board, and in all respects proceed as the canvassing officers are now required by law to do in like cases.

SEC. 338. (6.) In any case where the district canvass for more than one office is to take place at the same place, the board of county supervisors may designate the same member to bear the returns and attend the board of canvassers for each of such offices, and constitute a member of such board. More than one office.

SEC. 339. (7.) The provisions of this act shall go into operation on the first day of January, 1861, and not before.

#### ARTICLE 16.

An act requiring the Clerk of the Board of Supervisors to give an official bond. Bond of clerk  
 [Passed April 3, 1860, took effect July 4, 1860. *Laws of Eighth General Assembly, Chapter 155.*]

SECTION 340. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the clerk of the board of supervisors in each organized county of this state, be and he is hereby required to give a good and sufficient bond in such amount as said board may deem sufficient, such bond to be conditioned for the correct and faithful performance of his various duties as such clerk, said bond to be subject to the approval of said board, and when thus approved by them to be filed and presented by the chairman of the board after said bond has been duly approved and filed as above provided, and not until then the said clerk may proceed to perform the duties of his office as clerk of the board of supervisors.

SEC. 341. (2.) This act to take effect and be in force from and after its publication according to law.

PRIOR LAWS.—1. "An act to provide for defraying the public and necessary expenses in the respective counties of this territory and for other purposes," passed March 6, 1833; M. D., 1833, p. 98.

Amended Dec. 6, 1836; Wis. 1st sess., No. 16, p. 43.

2. "An act to authorize the board of supervisors to ascertain township lines in certain cases," passed June 26, 1832; M. D., 1833, p. 116.

3. "An act organizing a board of county commissioners in each county in this territory," passed Dec. 20, 1837; Wis. 2d sess., No. 7, p. 16.

4. "An act for the relief of the poor," passed Jan. 3, 1838; Wis. 2d sess., No. 22, p. 48.

5. "An act to authorize the several counties in this territory to hold and convey real estate, to sue and be sued, and for other purposes," passed Jan. 8, 1838; Wis. 2d sess., No. 26, p. 59.

6. "An act to authorize the boards of county commissioners of the several counties in this territory to borrow money for the purpose of erecting court houses and jails," passed Jan. 15, 1838; W. 2d sess., No. 46, p. 86; all the above repealed Aug. 30, 1840.

7. "An act organizing a board of county commissioners in each county in the territory of Iowa," passed Dec. 14, 1838, took effect Jan. 14, 1839; I. T., 1st sess., p. 101. Repealed by

8. "An act organizing a board of county commissioners in each county," passed Feb. 15, 1843; reprint of 1843, chap. 31, p. 121.

9. "An act to district the several counties in this territory for the election of county commissioners," passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 106.

10. "An act to legalize the acts of county commissioners," passed Jan. 25, took effect Feb. 25th, 1839; I. T., 1st sess., p. 107; also reprint of 1843, p. 120.
11. "An act for establishing courts of probate," passed Jan. 17, took effect Feb. 17, 1839; I. T., 1st sess., p. 126; also reprint of 1843, p. 135
12. "An act (among other things) to provide for the election of judges of probate," passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 56, p. 78.
13. "An act to amend an act organizing a board of county commissioners in each county," passed Feb. 8, 1842, took effect 1st Monday of April, 1842; I. T., 4th sess., chap. 38, p. 29. Repealed by No. 8 above.
14. "An act to amend an act establishing the court of probate," passed Feb. 16, took effect March 16, 1842; I. T., 4th sess., chap. 73, p. 64; also reprint of 1843, p. 137.
15. "An act making clerk of board of county commissioners elective by the people," passed Feb. 16, took effect March 16, 1842; I. T., 4th sess., chap. 76, p. 66; also reprint of 1843, p. 120.
16. "An act amendatory of an act to regulate ferries, approved Dec. 20, 1838," passed Feb. 16, took effect March 16, 1842; I. T., 4th sess., chap. 80, p. 68.
17. "An act to authorize boards of commissioners to appoint agents to dispose of real estate," passed Feb. 17, took effect March 17, 1842; I. T., 4th sess., chap. 100, p. 89; also reprint of 1843, p. 65
18. "An act authorizing the several boards of county commissioners to grant permits for constructing dams across navigable rivers," passed Feb. 16, 1843; reprint of 1843, chap. 32, p. 128.
19. *Amended* June 10, 1845; I. T., 7th sess., chap. 19, p. 37.
20. "An act authorizing county commissioners to lay off their counties into county commissioners' districts," passed Feb. 22, took effect March 18, 1847; 1st sess., chap. 72, p. 87.
21. "An act making county orders bear interest," passed Jan. 25, 1848; 1st sess., extra, chap. 65, p. 74.

DECISIONS. On an appeal from the rejection by the county court of a claim against the county, (defendant,) may answer in writing; 4 Iowa, 567.

The order of a county court establishing or altering a county road, is not appealable; 5 Iowa, 553.

The remonstrants against an order of the county court making or changing a road, have not such an interest as to have a right of appeal; 5 Iowa, 553.

Where a question of probate is found in the district court on appeal in favor of the probate, the district court should remand the cause to the county court, with an order that the same be admitted to probate, &c.; 4 Iowa, 522.

An order of the county court establishing a road is not a case appealable from by an individual; he may in a proper case have *certiorari* to try validity of the proceeding; 4 Iowa, 502.

The county judge is not an agent in every sense; his record may be taken against him and the county as true; 5 Iowa, 56.

Only unliquidated claims need to be presented for hearing to the county judge; 5 Iowa, 15.

A claim, though unliquidated against a county, may be sued at once without presentation to the county judge; 5 Iowa, 381.

Counties may subscribe stock to railroad companies whose roads run within them; 5 Iowa, 15.

Recitals in a bond given by a county are not conclusive on it; 5 Iowa, 48.

The county is not bound by bonds issued without legal authority; 5 Iowa, 53.

Thirty days publication not necessary; 5 Iowa, 48.

Powers, &c., of county, 4 G., 367; liabilities of new county for portion of indebtedness of original county, 3 G., 604. Construction of chapters 46 and 140 of the 5th session as to county seats, 5 Iowa, 1. Counties have right to subscribe to stocks in railway companies, 4 G., 1, 328; 5 Iowa, 15; 6 ib., 265, 304, 391; 3 ib., 311; qualified by *Stokes et al. v. Scott Co.*, Dec., 1859.

Mandamus to compel delivery of bonds; "*The State of Iowa v. Co. Judge of Wappello Co.*," Dec., 1859.

Form of vote in case of submission to voters of county; question of subscription to railroad stock, 4 G., 328.

Power of county court over minors' estates, 4 G., 207. Minors suing to enforce a trust; 8 Iowa, 463—must allow an appeal, 4 G., 343—for purposes of an appeal, "county judge" means "county court."

Powers and discretion of county judge as to building, &c.; *Rice v. Smith Co. Judge*, Dec., 1859; 7 Iowa, 425.

Whether his act be judicial or ministerial, see 3 Iowa, 472; 4 G., 273, 367, 300, 348.

When elected to fill a vacancy, he serves the unexpired term only of his predecessor; 2 Iowa, 96.

"Two years," in sec. 3 of chap. 40, of the 4th session, defined; 2 Iowa, 96—failure of county judge to pay over moneys; 7 Iowa, 177—his duty and liability under the 88th chap. of the 4th sess.; 4 G., 377; 8 Iowa, 322.

After an appeal from the judge an answer and set-off may be filed; 4 Iowa, 566.

What district court should do as to board of commissioners in suit vs. them; 1 G., 413.

Action against commissioners of a county on orders; 2 G., 469; 1 G., 486.

Interest on county orders runs from presentment, if due; 1 G., 486—as to special fund drawn on, see 1 G., 486 and 3 Iowa, 467; 5 Iowa, 15-44.

County court has limited jurisdiction; 4 G., 376—and consent can not extend its subject matter, 1 Iowa, 492—can not give damages after establishing a road, *ibid*—not adjudicate land titles; 4 G., 376—not wind up a partnership nor decree specific performance; 3 Iowa, 171.

Sec. 119 does not require thirty days' notice of the adoption of a proposition of subscription; 5 Iowa, 15.

A proposition should be distinct and unconnected with any other, except one pro- vided tax to pay subscription; 3 Iowa, 311.

What record of county should show as to such vote, and what purchaser of bond need to look to; 5 Iowa 15—legislature may legalize such bonds; 6 Iowa, 304, 391.

County may sue and be sued and claims against it need not be presented before suit to the county court; 5 Iowa, 380; 5 Iowa, 15-44; 4 Iowa, 566; 3 *id.*, 467.

From a disallowance of a claim against the county an appeal lies and *mandamus* will not; 4 G., 348; 5 Iowa, 380.

What is a waiver of notice on appeal; 6 Iowa, 274.

What will excuse its taking after the lapse of thirty days; 6 Iowa, 459.

Order establishing county road not appealable—remedy by *certiorari*; 5 Iowa, 552; 4 *id.*, 500; 4 G., 204.

*Certiorari* brings up question of *expediency*—appeal that of *damages*; 7 Iowa, 248; *Spray & Burns vs. Thompson et al.*, June term, 1859.

Effect of appeal, 6 Iowa, 274; 7 *id.*, 315—filing set off after, 4 Iowa, 566.

To whom deed should be made under act of January 22, 1853; 6 Iowa, 433; 2 Iowa, 75.

Right to remove county seats; 5 Iowa, 1; 4 G., 60;—effect on land donated for county seat, *ibid.*—a resident of a county seat may enjoin its illegal removal; 8 Iowa, 129.

Appeal from board of commissioners; M. 31.

Auditing claim vs. county is a judicial act and appealable—drawing warrant on treasury ministerial; 3 Iowa, 467; see also 1 G., 486; 4 Iowa, 566; 5 Iowa, 15, 44, 380, 383.

Power of probate court; 2 G., 165.

## CHAPTER 23.

### CLERK OF THE DISTRICT COURT.

[Code—Chapter 16.]

#### ARTICLE I.

SECTION 342. (141.) The clerk of the district court is *ex officio* the Office and duties. clerk of the county court and the register of probate.

SEC. 343. (142.) He shall keep his office at the county seat; shall attend the sessions of the district and county courts himself or by deputy; keep the records, papers and seal of the district court; and keep a record of the proceedings of each of those courts in separate sets of books, as may belong to his office, and as required by law, under the direction of the judges of those courts severally.\*

\* The clerk is made clerk of board of supervisors by 312-18.

Expenses.	SEC. 344. (143.) The books and stationery of his office shall be procured at the expense of the county.
Records.	SEC. 345. (144.) The records of the district court consist of the original papers constituting the causes adjudicated or pending in that court, and the books prescribed in the next section.
Books to be kept.	SEC. 346. (145.) The clerk is required to keep the following books for the business of the district court :
Record book.	1. A book containing the entries of the proceedings of the court, which may be known as the "record book," and which is to have an index referring to each proceeding in each cause under the name of the parties both plaintiff and defendant, and under the name of each person named in either party ;
	2. A book containing an abstract of the judgments, having in separate and appropriate columns the names of the parties, the date of the judgment, the damages recovered, costs, the date of the issuance and return of executions, with the entry of satisfaction, and other memoranda ; which book may be known as the "judgment docket," and is to have an index like that required for the record book ;
Fee book.	3. A book in which to enter in detail the costs and fees in each action or proceeding under the title of the same, with an index like that required above, and which may be known as the "fee book ;"
Sale book.	4. A book in which to enter the following matters in relation to any judgment under which real property is sold, entering them after the execution is returned—the title of the action, the date of the judgment, the amount of damages recovered, the total amount of costs, and the officers' return in full—which book may be known as the "sale book," and is to have an index like those required above ;
Complete record.	5. A book in which to make a complete record when required by law.*
Duty as county clerk.	SEC. 347. (146.) It is the duty of the clerk to keep a full and true record of the proceedings in the county court in session, entering distinctly each step in the progress of any proceeding. But such record shall be equally valid if made by the judge.
Confined to office.	SEC. 348. (147.) The clerk shall not be appointed by the county court to the discharge of any other duty than such as pertains to his office.
Criminal returns.	SEC. 349. (148.) The clerk of the district court is required to report to the secretary of state on or before the first Monday in November of each year, the number of convictions for all crimes and misdemeanors in that court in his county for the year preceding ; and such report shall show the character of the offense and the sentence of punishment, the occupation of the convict, whether he can read and write, and his general habits, and also the expenses of the county for criminal prosecutions during the year, including, but distinguishing, the compensation of the <i>prosecuting</i> † attorney.
Failure.	SEC. 350. (149.) For a failure to make such report the clerk shall forfeit the sum of ten dollars to be recovered in the name of the state by a civil action. And the certificate of the secretary, under the seal of the state, and sworn to by him before a competent officer, that no such report has been received at his office, shall be evidence.

\* Incumbrance book ; See section 3243.

† District ; See chapter 25.

ARTICLE 2.

An act requiring Witnesses' Fees to be paid into the County Treasury.

[Passed March 22, 1858, took effect April 14, 1858; Laws of Seventh General Assembly, Chapter 128, Page 250.]

[SECTIONS 1 and 2 repealed by section 357.]

SEC. 351. (3.) Any witness fees which may be received by justices of the peace for witnesses appearing before them, which shall not have been called for within one year after the date of collection, shall be paid into the county treasury for the use of the county, accompanied with a statement of the amount due each witness, but the witness entitled to such fees shall receive the same from the county treasury, upon a certificate from the justice of the peace before whom he may have appeared as such witness, or his successor in office, that he is entitled to such fees, and the amount of the same, and any person or officer paying any sum of money into the county treasury under the provisions of this act, shall take duplicate receipts from the treasurer therefor, one of which he shall file with the *county judge*,\* who shall charge the amount thereof to the treasurer as so much county revenue.

Justices pay fees into county treasury.

Receipts taken.

SEC. 352. (4.) Any failure to pay over to the county treasurer witness fees, as contemplated by this act, shall subject the offender to all the pains and penalties of an act entitled an act defining the crime and punishing the offense of making false entries of fines and fees of docket of courts or otherwise, and of failing or neglecting to pay over such fines or fees according to law.

Penalty for not paying over fees.

ARTICLE 3.

An act to amend an act requiring Witness Fees to be paid into the county treasury.

[Passed April 3, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 137.]

SECTION 353. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That it shall be, and is hereby made the duty of the respective clerks of the district courts, to pay into the county treasury of his county all money by him received for witness fees, and remaining unclaimed in his office for six months after the receipt of the same.

Clerk's duty.

SEC. 354. (2.) The clerk shall at the time of making such payment deliver to the treasurer a statement of the case, and the names of the witnesses, and the amount each one is entitled to receive.

Make statement.

SEC. 355. (3.) The money paid into the county treasury by virtue of this act, shall be paid by the treasurer to the person entitled to receive the same upon the certificate of the clerk of the district court.

Treasurer's duty.

SEC. 356. (4.) The treasurer of said county shall keep the money thus received by him separate from the general fund of the county, and shall deliver the same to the person or persons to whom the same may belong.

Same.

SEC. 357. (5.) That sections one and two of an act entitled an act, requiring witness fees to be paid into the county treasury, passed by the seventh general assembly and approved March 22, 1858, be and the same are hereby repealed.

Report.

PRIOR LAWS. 1. "An act to authorize the judges of the supreme court to appoint clerk to the several courts in their respective districts in the first instance," passed Nov. 17, 1836; Wis. 1st sess., No. 6, p. 17.

\* This should probably read clerk of the board of supervisors; sec. 312-11 and 798.

2. "An act to regulate and define the duties of the county officers in this territory," passed Jan. 17, 1838; Wis. 2d sess., No. 63, p. 201.

1 and 2 repealed Aug. 30, 1840.

3. "An act requiring clerks of the district court to give bonds," passed Jan. 15, took effect Feb. 15, 1841; I. T., 3d sess., chap. 78, p. 87.

4. "An act in relation to clerks and prosecuting attorneys," passed Jan. 21, took effect Jan. 27, 1847; 1st sess., chap. 9, p. 24.

5. "An act to provide for criminal returns," passed Feb. 24, 1847; 1st sess., chap. 91, p. 122.

## CHAPTER 24.

### RECORDER AND TREASURER.

[Code—Chapter 17.]

#### ARTICLE 1.

- Office and duties.** SECTION 358. (150.) The recorder shall keep his office at the county seat, and it is his duty to record at length, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law.
- As treasurer.** SEC. 359. (151.) The person who is elected recorder shall be treasurer of the county, and hold his office for the same term as that of recorder, and, as treasurer, shall be the collector of taxes, and if he omit to qualify either as recorder or as treasurer, it is a refusal of both offices.
- Duties.** SEC. 360. (152.) It is the duty of the treasurer to receive all money payable to the county, and to disburse the same on warrants drawn and signed by the *county judge*,\* and sealed with the county seal, and not otherwise; and to keep a true account of all receipts and disbursements, and hold the same at all times ready for the inspection of the county *judge*.†
- Warrants.** SEC. 361. (153.) When the warrant drawn by the *judge*‡ on the treasurer is presented for payment, and not paid for want of money, the treasurer shall indorse thereon a note of that fact and the date of presentation, and sign it, and thenceforth it shall draw interest at the rate of six per cent; and when a warrant which draws interest is taken up, the treasurer is required to indorse upon it the date and the amount of interest allowed, and such warrant is to be considered as canceled and shall not be re-issued.
- Same.** SEC. 362. (154.) When a person, wishing to make a payment into the treasury, presents a warrant of an amount greater than such payment, the treasurer shall cancel the same and give the holder a certificate of the overplus, upon the presentation of which to the *county judge*§ he shall file it, and issue a new warrant of that amount, and charge the treasurer therewith, and such certificate is transferable by delivery, and will entitle the holder to the new warrant, which, however, must be issued in the first drawee's name.

\* Clerk of the board of supervisors, 319.

† Board of supervisors, section 312.

‡ Clerk of board of supervisors, 319.

§ Sections 318 and 755.

SEC. 363. (155.) The treasurer is directed to keep a book, ruled so as to contain a column for each of the following items in relation to the warrants drawn on him by the judge—the number, date, drawee's name, when paid, to whom, original amount, interest—and on receiving the memoranda of the warrants issued by the *judge*\* to enter the particulars contained in the memoranda, and on payment of the warrants to enter the remaining particulars. Warrant book.

SEC. 364. (156.) The treasurer shall keep a separate account of the several taxes for state, county, school, and road purposes, opening an account between himself and each of those funds, charging himself with the amount of the tax, and crediting himself with the amounts paid over severally and with the amount of delinquent taxes when legally authorized so to do. Accounts to be kept.

SEC. (157.) and (158.) [Superseded by 798.]

SEC. 365. (159.) The warrants returned by the treasurer shall be compared with the warrant book, and the word "canceled" be written over the minute of the proper numbers in the warrant book, and the original warrant be preserved at least two years. Canceling warrants.

SEC. 366. (160.) The treasurer is required to make weekly returns to the *county judge*† of the number, date, drawee's name, when paid, to whom paid, original amount, and interest, as kept in the book before directed. Weekly returns.

SEC. 367. (161.) A person re-elected to, or holding over, the office of treasurer, shall keep separate accounts for each term of his office. New accounts each term.

SEC. 368. (162.) No person holding the office of judge or clerk of the supreme or district court, county judge, *prosecuting*‡ attorney, or sheriff, shall hold the office of county recorder, and if any person is elected to both offices his qualification for the one shall be a refusal of the other. Incapacity.

ARTICLE 2.

An act requiring suit to be instituted and prosecuted against delinquent County Treasurers.

[Passed March 22, 1858, took effect April 7, 1858. Laws of Seventh General Assembly, Chapter 107, page 208.]

WHEREAS, It is shown by the report of the auditor of state, made to the general assembly at its present session, that a large amount of revenue is due the state on taxes which should have been paid heretofore; now that the state may not suffer loss by reason of the delinquency or neglect of county treasurers in collecting or paying over the state revenue,— Delinquent taxes.

SECTION 369. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the governor of the state is hereby authorized and required to take such measures, either by suit at law or otherwise, as to him may seem effectual and expedient for the collection of all such moneys as may appear by the books of the auditor and treasurer of state, to be due the state from the county treasurers. Gov. commence suit for collection.

SEC. 370. (2.) *And be it further enacted,* That when such delinquency appears to have occurred during the official term of any former county treasurer, the same authority is hereby given and required to be exercised in the collection from them or their sureties of all sums of Suit commenced against sureties.

\* Clerk of board of supervisors, 318.

† Probably clerk of board of supervisors, 312.

‡ Prosecuting attorney obsolete, chapter 25.

money which may appear to be due the state from such former treasurers.

District attorney's assistant.

SEC. 371. (3.) *And be it further enacted*, That for the purpose of carrying the intention of this act into effect, the governor may require the services of the attorney general and prosecuting or district attorneys to aid and assist in commencing and prosecuting to judgment such suit or suits as may be required to be instituted and prosecuted in carrying into effect this act, and that the governor have authority to employ such other aid as in his judgment may be required for the same purpose: *provided*, that the compensation paid for the services of such other aid or assistance shall not exceed the *per diem* compensation allowed by law to the attorney general when employed in the service of the state.

Pay of counsel.

PRIOR LAWS. 1. "An act to provide for the election of county treasurers and coroners, and to define their powers and duties;" passed April 15, 1833; M. D., 1833, p. 117. Repealed Wis. 1st sess., No. 5, p. 14, as to *coroners*.

2. "An act to enforce the payment of certain moneys into the several county treasuries," passed Dec. 13, 1837; Wis. 2d sess., No. 4.

3. "An act to provide for the election of county treasurers and to define their duties," passed Dec. 20, 1837; Wis. 2d sess., No. 5, p. 9.

4. "An act to regulate and define the duties of county officers in this territory," passed Jan. 17, 1838; Wis. 2d sess., No. 63, p. 201; all repealed Aug. 30, 1840.

5. "An act relating to the office of recorder of deeds, &c." passed Jan. 19, took effect March 1, 1839; I. T., 1st sess., p. 396; (this repeals all laws within its purview.) Repealed by

6 "An act relating to the office of recorder of deeds," passed Jan. 20, 1843; reprint of 1843, chap. 131, p. 541.

7. "An act to provide for the election of county treasurers, and to define their duties," passed Dec. 24, took effect Dec. 30, 1839; I. T., 2d sess., chap. 12, p. 16; also reprint of 1843, p. 611.

8. "An act (among other things) for election of recorder," passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 56, p. 78.

9. "An act relating to the office of recorder of deeds," passed Jan. 23, took effect July 4, 1843, chap. 131, p. 541.

DECISIONS. Under code tax list and warrant is sufficient authority for collection of tax; 8 Iowa, 193.

Duties and responsibilities of a county treasurer fixed by his bond; 5 Iowa, 149.

The care required of him in the discharge of his duty. *Ibid.*

Authority to sell lands for taxes unpaid of any year prior to 1851, how derived; 6 Iowa, 5.

Duties under the revenue law of 1844, 3 G., 133, 1 G., 325; 5 Iowa, 284.

No compensation for making out list of school taxes, &c.; 1 G., 430.

Deputy and his compensation, 4 G., 300.

## CHAPTER 25.

### DISTRICT ATTORNEY.

[Code—Chap. 18.]

[Prosecuting attorney substituted by district attorney; see next act.]

An Act providing for the Election of District Attorneys, prescribing their duties and fixing their compensation.

[Passed March 22, 1858, took effect July 4, 1858: *Laws of Seventh General Assembly, Chapter 102, page 201.*]

Elected in 1858.

SECTION 372. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That there shall be elected by the qualified electors of



each judicial district, on the second Tuesday in October, eighteen hundred and fifty-eight, and every four years thereafter, one district attorney, who shall hold his office for four years, and until his successor is elected and qualified, and shall be qualified by the governor.

Term of office.

SEC. 373. (2.) The manner of conducting said election, the return and canvass thereof, as also the manner of proceeding in case of contest, shall be the same as may be provided by law in relation to other state officers: *provided*, that the governor and lieutenant governor shall not for the purposes of this act be deemed state officers.

Conducting election and canvass.

SEC. 374. (3.) It shall be the duty of the district attorney to appear for the state and several counties comprising his district in all matters in which the state or any such county may be a party or interested, in the district court of his district, before any judge, on a writ of *habeas corpus* sued out by a person charged or convicted of a public offense, the prosecution being in his district. He shall in any of the above proceedings taken from his district to the supreme court, furnish to the attorney general a brief containing the substance of such proceeding, and the questions therein involved, on or before the day in the term of the supreme court at which such proceeding is set for hearing in that court. He shall also appear for the state or any county in any proceedings brought to his district from any other on change of venue, and he is authorized when he deems it advisable, to appear before the justices of the peace in the initiatory proceedings in criminal cases: *provided*, that nothing herein contained shall prevent the county judge\* whenever he may deem it necessary from employing an attorney to appear to prosecute or defend in any case properly belonging to the duties of the district attorney.†

Duty to appear for state.

Furnish abstract of proceedings to attorney general.

Further appears for state.

Other counsel may be employed.

SEC. 375. (4.) The district attorney shall, when requested, give his opinion in writing, without fee, upon all questions of law submitted to him by any county officer within his district, and which has reference to the official duty of such officer, and whenever requested by any such officer he shall prepare proper drafts for contracts, forms and other writings which may be wanted for the use of any county in his district, and he shall file in his office and preserve a copy of his opinions thus furnished.

Opinion in writing.

Drafts for contracts.

SEC. 376. (5.) All moneys received by the district attorney belonging to the people of the state or any county, shall immediately upon the receipt thereof be paid by him to the officer who by law is entitled to the custody thereof.

Moneys paid over.

SEC. 377. (6.) Before entering upon the duties of his office, he shall take and subscribe an oath that he will support the constitution of the United States and of this state, that he will faithfully and impartially discharge the duties of his office, and shall execute to the state of Iowa a bond with good and sufficient sureties in the penal sum of ten thousand dollars, to be approved by the judge of the district court of his district, conditioned for the faithful discharge of his duties and the paying over of all moneys as provided in this act, which bond shall be filed in the office of the secretary of state, and said bond shall be renewed in a larger penal sum and with additional sureties whenever required by the district judge of the proper judicial district; such bond shall inure to and be for the benefit of the people of the state or any county or fund injured by a breach in the condition thereof.

Qualifies by taking oath.

Bond executed.

SEC. 378. (7.) The district attorneys elected under the provisions

Enters upon duty.

\*Is this power taken away and given to the supervisors? See section 312.

† See chapter 169, article 3 and 4.

of this act, shall enter upon the discharge of their duties on the first day of January next succeeding their election. Should there be a failure in this respect, from any cause whatever, the office shall be deemed vacant.

Vacancy.

Filled by governor.

SEC. 379. (8.) Should a vacancy occur in the office of district attorney at any time from any cause whatever, the vacancy thus occurring shall be filled by the governor by appointment, and the person so appointed shall hold said office until the next general election, when a successor shall be elected to fill the remainder of said unexpired term and until his successor is elected and qualified. \* \* \* \* [The omitted part obsolete.]

Salary.

SEC. 380. (9.) The several district attorneys shall receive for their services each the sum of eight hundred dollars per annum out of the state treasury, to be audited and paid as the salaries of other state officers.

Fees for conviction.

SEC. 381. (10.) In addition to the above salary, he shall receive for every conviction procured by him during his term of service, for a misdemeanor five dollars, for a felony ten dollars, such fees to be allowed and paid by the county judge\* in each county in which the cause originated.

Fees collected from defendant.

SEC. 382. (11.) In case of conviction contemplated in the preceding section, the following fees shall be taxed against the defendant, to wit: in case of a misdemeanor five dollars; in case of felony ten dollars, which shall be collected by the district clerk and paid into the county treasury.

PRIOR LAWS. 1. "An act providing for district prosecutors and defining their duties," passed Jan. 15, took effect Feb. 15, 1839; I. T., 1st sess., p. 178; also reprint of 1843, p. 230.

2. An act relative to district prosecutors, passed Jan. 17, 1846; I. T., 8th sess., chap. 18, p. 16.

3. An act to amend act of Jan. 15, 1839, passed Dec. 17, 1845; I. T., 8th sess., chap. 19, p. 17.

4. An act in relation to clerks and prosecuting attorneys, passed Jan. 21, took effect Jan. 27, 1847, 1st sess., chap. 9, p. 24.

5. An act to define the duties of prosecuting attorneys, and compensation, passed Feb. 4, took effect Aug. 1, Monday, 1847? 1st sess., chap. 30, p. 41.

6. An act to amend same, passed Jan. 4, 1848? 1st sess., extra, chap. 29, p. 30.

## CHAPTER 26.

### SHERIFF.

[Code—Chapter 19.]

Duties.

SECTION 383. (170.) It is the office of the sheriff and his deputies to serve or otherwise execute according to law, and return all writs and other legal process issued by lawful authority and to him or them directed or committed, and to perform such other duties as may be required of him by law.

Disobedience.

SEC. 384. (171.) His disobedience of the command of any such process is a contempt of the court from which it issued and may be

\*Board of supervisors, 312 and 330.

punished by the same accordingly, and he is, farther, liable to the action of any person injured thereby.

SEC. 385. (172.) He has the charge and custody of the jail or Jail. other prison of his county, and of the prisoners in the same, and is required to receive those lawfully committed, and to keep them himself or by his deputy or jailor until discharged by law.

SEC. 386. (173.) The sheriff and his deputies are conservators of Conservator. the peace, and to keep the same, or to prevent crime, or to arrest any person liable thereto, or to execute process of law, may call any person to their aid, and when necessary the sheriff may summon the power of the county.

SEC. 387. (174.) The sheriff shall attend upon the district court Attend district court. at its sessions in his county, and he is allowed the assistance of three constables, and of such further number as the court may direct, whose appointment constitutes them special constables; and he shall also attend the courts held by the county judge when required by him.

SEC. 388. (175.) No sheriff, deputy sheriff, coroner, or constable Not act as attorney. shall appear in any court as attorney or counsel for any party, nor make any writing or process to commence, or to be in any manner used in the same, and such writing or process made by any of them shall be rejected.

SEC. 389. (176.) No sheriff, deputy sheriff, coroner, or constable, Purchase at sales. shall become the purchaser, either directly or indirectly, of any property by him exposed to sale, under any process of law, and every such purchase is absolutely void.

SEC. 390. (177.) Sheriffs and their deputies may execute any Out of office, service of process. process which may be in their hands at the expiration of their office, and in case of a vacancy occurring in the office of sheriff from any cause, his deputies shall be under the same obligation to execute legal process then in his or their hands and return the same as if the sheriff had continued in office, and he and they will remain liable under the provisions of law as in other cases.

SEC. 391. (178.) Where a sheriff goes out of office, he shall deliver Same, books, &c. to his successor all books and papers pertaining to the office, and property attached or levied upon, except as provided in the preceding section, and all prisoners in the jail, and take his receipt specifying the same, and such receipt shall be sufficient indemnity to the person taking it.

SEC. 392. (179.) On the election or appointment of a new sheriff New sheriff, new process. all new process shall issue to such new sheriff.

SECTIONS (180,) (181,) and (182,) [repealed by session 4, chapter 69, now included in chapter 45 hereof.]

PRIOR LAWS. 1. An act concerning sheriffs and their powers, passed April 23, 1833; M. D., 1833, p. 229.

2. An act amending the same as to its second section, passed Nov. 17, 1836; Wis., 1st sess., No. 4, p. 14.

3. An act as to sheriff, passed Jan. 17, 1838; Wis., 2d sess., No. 63, p. 201. (Place of office). All the above repealed August 30, 1840.

4. An act for the appointment and duties of sheriffs, passed Jan. 21, took effect Feb. 21, 1839; I. T., 1st sess., p. 441; also, reprint of 1843, p. 576.

5. An act on election, &c., of sheriff, and repealing law, in part of 1839, passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 56, p. 78; also, reprint 1843, p. 582.

6. An act to authorize sheriffs to make and execute deeds for land sold on execution under the redemption law, passed Feb. 15, 1844; I. T., 6th sess., chap. 32, p. 55.

7. An act amendatory of the acts on the election and duties of sheriff, passed Feb. 15, 1844; I. T., 6th sess., chap. 33, p. 56.

8. An act supplemental to an act of Jan. 21, 1839, passed Jan. 12, 1849; 2d sess., chap. 39, p. 59.

DECISION. Construction of sec. 175, 2 Iowa, 165; judicial notice of officers, 7 Iowa, 56; sheriff should execute process; M., 311; 4 G., 273.

## CHAPTER 27.

### CORONER.

[Code—Chapter 20.]

- Duties.** SECTION 393. (183.) It is the duty of the coroner to perform all the duties of the sheriff, *except those of assessor*,\* when there is no sheriff, and in cases where exception is taken to the sheriff as provided in the next section.
- Service of process.** SEC. 394. (184.) In all proceedings in the courts of record, where it appears from the papers that the sheriff is a party, and where in any action commenced or about to be commenced an affidavit is filed with the clerk of the court stating a partiality, prejudice, consanguinity, or interest, on the part of the sheriff, the clerk or court shall direct process to the coroner, whose duty it is to execute it in the same manner as if he were sheriff.
- Clerk appoint.** SEC. 395. (185.) When there is no sheriff, deputy sheriff, or coroner, qualified to serve legal process, the clerk of the district court may, by writing under his hand and the seal of the court certifying the above fact, appoint any suitable person specially in each case to execute such process, who shall be sworn but he need not give bond, and his return shall be entitled to the same credit as the sheriff's, when the appointment is attached thereto.
- Inquests.** SEC. 396. (186.) The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means. When he has notice of the dead body of a person supposed to have died by unlawful means, found or being in his county, he is required to issue his warrant to a constable of his county requiring him to summon forthwith three lawful men of the county to appear before the coroner at a time and place named in the warrant.
- Warrant.** SEC. 397. (187.) The warrant may be in substance as follows:
- STATE OF IOWA, }  
County, }
- To any constable of the said county,*
- In the name of the state of Iowa you are hereby required to summon forthwith, three lawful men of your county, to appear before me at (name the place), at (name the day and hour or say forthwith), then and there to hold an inquest upon the dead body of \_\_\_\_\_, there lying, by what means he died.
- Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 18 \_\_\_\_ .  
(Signed,) A. B., coroner of \_\_\_\_\_ county.
- Service.** SEC. 398. (188.) The constable shall execute the warrant, and make return thereof at the time and place named.

\* Sheriff no longer is assessor. See chapter 35.

SEC. 399. (189.) If any juror fails to appear the coroner shall <sup>Jurors.</sup> cause the proper number to be summoned or returned from the bystanders immediately, and proceed to empanel them and administer the following oath in substance:—

“You do solemnly swear (or affirm) that you will diligently inquire, and true presentment make, when, how, and by what means the person whose body lies here dead came to his death, according to your knowledge and the evidence given you: So help you God.”

SEC. 400. (190.) The coroner may issue subpoenas within his county <sup>Subpoenas, con-</sup> for witnesses, returnable forthwith, or at such time and place as he shall <sup>tempt.</sup> therein direct, and witnesses shall be allowed the same fees as in cases before a justice of the peace, and the coroner has the same authority to enforce the attendance of witnesses, and to punish them and jurors for contempt in disobeying his process as a justice of the peace has when his process issues in behalf of the state.

SEC. 401. (191.) An oath shall be administered to the witnesses in <sup>Witnesses' oaths.</sup> substance as follows:

“You do solemnly swear that the testimony which you shall give to this inquest, concerning the death of the person here lying dead, shall be the truth, the whole truth, and nothing but the truth: So help you God.”

SEC. 402. (192.) The testimony shall be reduced to writing under <sup>Testimony.</sup> the coroner's order, and subscribed by the witnesses.

SEC. 403. (193.) The jurors having inspected the body, heard the <sup>Verdict.</sup> testimony, and made all needful inquiries, shall return to the coroner their inquisition in writing, under their hands in substance as follows, and stating the matters in the following form suggested, as far as found:

STATE OF IOWA, }  
County, }

An inquisition holden at \_\_\_\_\_, in \_\_\_\_\_ county, on the \_\_\_\_\_ day of \_\_\_\_\_ A. D. 18\_\_\_\_ before \_\_\_\_\_ coroner of the said county, upon the body of \_\_\_\_\_ (or a person unknown) there lying dead, by the jurors whose names are hereto subscribed. The said jurors upon their oaths do say (here state when, how, by what person, means, weapon, or accident, he came to his death, and whether feloniously.)

In testimony whereof the said jurors have hereunto set their hands, the day and year aforesaid;

[which shall be attested by the coroner.]

SEC. 404. (194.) If the inquisition find that a crime has been com- <sup>Same, secret.</sup> mitted on the deceased, and name the person whom the jury believe has committed it, the inquest shall not be made public until after the arrest directed in the next section.

SEC. 405. (195.) If the person charged be present, the coroner may <sup>Arrest.</sup> order his arrest by an officer or any other person present, and shall then make a warrant requiring the officer or other person to take him before a justice of the peace.

SEC. 406. (196.) If the person charged be not present, and the <sup>Warrant.</sup> coroner believes he can be taken, the coroner may issue a warrant to the sheriff and constables of the county, requiring them to arrest the person and take him before a justice of the peace.

SEC. 407. (197.) The warrant of a coroner in the above cases shall <sup>Same.</sup> be of equal authority with that of a justice of the peace, and when the person charged is brought before the justice he shall be dealt with as a person held under a complaint in the usual form.

Same, stand as complaint.	<b>SEC. 408. (198.)</b> The warrant of the coroner shall recite substantially the transactions before him and the verdict of the jury of inquest leading to the arrest, and such warrant shall be a sufficient foundation for the proceeding of the justice instead of a complaint.
Return.	<b>SEC. 409. (199.)</b> The coroner shall then return to the district court the inquisition, the written evidence, and a list of the witnesses who testify material matter.
Burial expense.	<b>SEC. 410. (200.)</b> The coroner shall cause the body of a deceased person which he is called to view, to be delivered to his friends if any there be, but if not he shall cause him to be decently buried, and the expense to be paid from any property found with the body, or, if there be none, from the county treasury by certifying an account of the expenses, which being presented to the <i>county judge</i> ,* shall be allowed by him if deemed reasonable and paid as other claims on the county.
Justice to act as coroner.	<b>SEC. 411. (201.)</b> When there is no coroner, and in case of his absence or inability to act, any justice of the peace of the same county is authorized to perform the duties of coroner in relation to dead bodies, and in such case he may cause the person charged to be brought before himself, by his warrant, and may proceed with him as a justice of the peace.
Surgeon. &c.	<b>SEC. 412. (202.)</b> In the above inquisition by a coroner, when he or the jury deem it requisite, he may summon one or more physicians or surgeons to make a scientific examination, and may allow in such case a reasonable compensation instead of witness fees.

**PRIOR LAWS.** 1. An act to provide for the election of coroners, and to define their powers and duties, passed April 13, 1833; M. D., 1833, p. 117; repealed Nov. 29, 1836, Wis., 1st sess., No. 5, p. 14.

2. An act concerning coroners, passed April 12, 1827; M. D., 1833, p. 240; repealed Nov. 29, 1836, Wis., 1st sess., No. 5, p. 14.

3. An act prescribing the duties of coroners, passed Nov. 29, 1836; Wis., 1st sess., No. 5, p. 14. All the above repealed Aug. 30, 1840.

4. An act relative to coroners and their duties, passed Dec. 23, 1838, took effect Jan. 23, 1839; I. T., 2d sess., chap. 10, p. 11; also Reprint of 1843, p. 194.

5. An act amending same, passed Feb. 15, 1844; I. T., 6th sess., chap. 35, p. 57.

## CHAPTER 28.

### COUNTY SURVEYOR.

[Code—Chapter 21.]

#### ARTICLE 1.

Duties.	<b>SEC. 413. (203.)</b> It is the duty of the county surveyor to make all surveys of land within his county which he may be called upon to make, and his surveys shall be held as <i>prima facie</i> correct.
Surveys.	<b>SEC. 414. (204.)</b> The field notes and plats made by the county surveyor shall be transcribed into a well bound book under the supervision of the surveyor, when desired by a person interested, and at his expense.
Field notes.	<b>SEC. 415. (205.)</b> Previous to making any survey, he shall furnish himself with a copy of the field notes of the original survey of the same

\* Board of supervisors, 312.

land, if there be any in the office of the county judge, and his survey shall be made in accordance therewith.

SEC. 416. (206.) He is required to establish the corners by taking bearing trees and noting particularly their course and distance, but if there be no trees within reasonable distance, the corners are to be marked by stones firmly placed in the earth, or by mounds. Corners.

SEC. 417. (207.) It is his duty when requested, to furnish the person for whom the survey is made, with a copy of the field notes and plat of the survey, and such copy certified by him, and also a copy from the record certified by the county judge or clerk with the seal, shall be prima facie evidence of the survey and of the facts herein required to be set forth and which are stated accordingly, between those persons who join in requesting it, and any other person then concerned who has reasonable notice that such a survey is to be made and of the time thereof. Plat and copy, evidence.

SEC. 418. (208.) The county judge\* is required to furnish a substantial, well bound book, where it is not now done, in which the field notes and plats made by the county surveyor may be recorded. Book.

SEC. 419. (209.) The plat and record shall show distinctly of what piece of land it is a survey, at whose personal request it was made, the names of the chainmen, and that they were approved and sworn by the surveyor, and the date of the survey; and the courses shall be taken according to the true meridian, and the variation of the magnetic, from the true, meridian stated. Entries.

SEC. 420. (210.) The necessary chainmen and other persons must be employed by the person requiring the survey done, unless otherwise agreed; but the chainmen must be disinterested persons, and approved of by the surveyor, and sworn by him to measure justly and impartially to the best of their knowledge and ability. Chainmen, &c.

ARTICLE 2.

An Act to amend Chapter 21st of the Code of Iowa, in relation to County Surveyors.

[Passed Jan. 15, 1855, took effect July 1, 1855; Laws of Fifth General Assembly, Chapter 21, page 33]

SECTION 421. (1.) *Be it enacted by the General Assembly of the State of Iowa,* As follows: That every surveyor is hereby authorized to appoint a deputy; and such deputy, after being duly sworn, may perform any of the duties pertaining to the office of county surveyor, and all the doings of such deputy may be recorded in the same manner and shall have the same effect and validity as if made by the county surveyor himself. Surveyors appoint deputy.

PRIOR LAWS. 1. An act concerning district surveyors, passed April 23, 1833; M. D., 1833, p. 536; repealed Aug 30, 1840.

2. An act defining the duties of county surveyors, passed Dec. 25, took effect Jan. 25, 1838; I. T., 1st sess., p. 450; amended Dec. 21, 1840, took effect Aug. 1, 1841; I. T., 3d sess., chap. 10, p. 8; repealed by Reprint, chap. 146, p. 604.

3. An act among other things for the election of surveyors, passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 56, p. 78.

4. An act supplementary to that of Dec. 25, 1838, passed Dec. 21, 1840, took effect Aug., 1st Monday, 1840; I. T., 3d sess., chap. 10, p. 8; repealed by reprint, chap. 146, p. 604.

5. An act defining the duties of county surveyor, passed Feb. 9, took effect July 4, 1843; Reprint, chap. 146, p. 604.

\* Probably board of supervisors, 312.

## CHAPTER 29.

## SALARY OF CERTAIN COUNTY OFFICERS.

[Code—Chapter 22.]

## ARTICLE 1.

- Rate of salary**      **SECTION 422. (211.)** The *county judge, the clerk of the district court,\** and the recorder, are each entitled to receive as the only compensation for the performance of the several duties of their offices (unless as otherwise expressed) an annual salary, to be paid quarterly from the county treasury, and to be ascertained and graduated as follows: it shall in no case be less than fifty dollars nor more than eight hundred dollars; and if the last census taken by the state or the United States shows a population in the county of between five and seven hundred inhabitants, the salary shall be one hundred dollars; if between seven hundred and one thousand inhabitants, the salary shall be one hundred and fifty dollars; if between one thousand and fourteen hundred inhabitants, the salary shall be two hundred dollars; if between fourteen hundred and two thousand inhabitants, the salary shall be two hundred and fifty dollars; if between two and three thousand inhabitants, the salary shall be three hundred dollars; if between three and four thousand inhabitants, four hundred dollars; if between four and five thousand inhabitants, five hundred dollars; if between five and six thousand inhabitants, five hundred and fifty dollars.†
- Account of fees**      **SEC. 423. (212.)** Each of the above officers is required to keep an account of all the fees received by him as prescribed by law for his office, entering the date, amount, and name of the person paying them, and the book containing such account shall be open to the inspection of any person and be permanently preserved in his office ‡
- Disposition of fees.**      **SEC. 424. (213.)** The said officers may receive such fees to their own use jointly, to the extent of their several salaries; and to that end shall have an accounting together as often as once in each quarter, and at the sessions of the county court in January, April, July, and October, when they shall make an exhibit of the amount of money received by each, which shall be entered in the minute book. If the money is less than the amount due them in any quarter, they may draw the balance due for the quarter from the county treasury or they may await the event of future accountings and draw at any future quarter. Each of them shall make a general settlement of the above accounts at the end of his term of office §
- Accounts examined**      **SEC. (214.)** [Repealed by chapter 25.]  
**SEC. 425. (215.)** The above accounts of fees shall be examined and approved, at least once in each year, which shall be at the *July session of the county court,*|| or at such other time after that as the court directs. The judges' account shall be examined and approved by the *prosecuting attorney.*¶

\* This section now only applies to recorder; for county judge, see section 436; for clerk see section 430.

† The omitted part of this section is supplied by laws of sixth general assembly, chapter 226, page 388, being article 2 hereof.

‡ Does this section apply to any but recorder?

§ Does part hereof yet apply to recorder?

|| Board of supervisors' section 312.

¶ District attorney is substituted by chapter 25.



SEC. 426. (216.) The *judge*\* of any county may submit to the people of the county the question whether the salary of the above or any of them, shall be raised, in the manner provided for submitting other questions. Salary increased.

SEC. 427. (217.) Any change in salary, as herein authorized, shall commence on the first day of August next after the taking of a vote as contemplated in the previous section, or next after the returns of the census are filed in the office of the secretary of state. Time of.

ARTICLE 2.

An Act to amend Section 211 of Chapter 22 of the Code of Iowa.

[Passed January 29, 1857, took effect February 4, 1857: *Laws of Sixth General Assembly, Chapter 226, page 388.*]

SECTION 428. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all section two hundred and eleven of chapter twenty-second of the code of Iowa, after the words "five hundred and fifty dollars," be and the same is hereby repealed, and that the following shall be substituted for the part of said section thus repealed: when the population amounts to six thousand, the salary shall be increased fifty dollars for each additional thousand inhabitants, until the salary reaches the sum of twelve hundred dollars, which shall be the highest salary paid to any of the officers named in said section.† Amendment to code.

SEC. 429. (2.) That all parts of said chapter twenty-two conflicting herewith, be and the same are hereby repealed. Repeal.

ARTICLE 3.

An act to abolish the Salary of the Clerk of the District Court, and to regulate his Fees and Compensation.

[Passed April 3, 1860, took effect January 1, 1861; *Laws of Eighth General Assembly, Chapter 159.*]

SECTION 430. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the salary of the clerk of the district court is hereby abolished, and that said clerk shall receive in lieu thereof the fees and compensation hereinafter provided, namely: Fees of clerk.

For filing any petition, appeal, or docketing same on appearance docket, . . . . .	\$1.50
For every attachment, . . . . .	.50
When a case is tried by a jury, a trial fee of . . . . .	1.50
When tried by the court, . . . . .	.75
Trial fee in chancery cases, when contested, . . . . .	1.50
When not contested, . . . . .	.75
For writs of injunction or other extraordinary process, . . . . .	1.00
For all causes continued on the application of a party by affidavit, . . . . .	.50
When continued by consent or otherwise, . . . . .	.15
For entering judgment on decrees, . . . . .	.75
Taxing costs, . . . . .	.50
For issuing execution or other process after judgment or decree, . . . . .	.50
For certificate and seal, . . . . .	.50
For all copies of records or papers filed in his office, transcripts and making complete record, ten cents per folio.	

\* But see section 312.

† This whole chapter and its amendment applies to recorder.

For taking and approving a bond, recognizance or securities authorized by law, . . . . .	\$0.50
In case of estrays for all services, . . . . .	.75
For declaration of intentions by alien to become a citizen, . . . . .	.25
For all services on naturalization of alien including oaths and certificate, . . . . .	.50
In all criminal causes and in all causes in which the state or county is a party plaintiff, the same fees for same services as in suits between private parties.	

When judgment is rendered against defendant the fees shall be collected from such defendant.

In cases where the state fails, the clerk shall receive no fees.

For making out transcripts in criminal causes, appealed to supreme court, when defendant is unable to pay, for each folio ten cents, to be paid by the county.

The word "folio" is intended to mean one hundred words—eight figures making one word.

For all services rendered as clerk of the board of supervisors whether rendered during their sessions or in vacation, such reasonable sum as said board shall consider a fair compensation.

For the services rendered to be paid out of such fund as shall be properly chargeable therewith.

Clerk's duty.

SEC. 431. (2.) It is hereby made the duty of said clerk to report to the board of supervisors of his county at each regular session thereof, a full and complete statement of the amount of fees charged, and for whole services, the amount received, and for what service rendered, which report shall be sworn to by said clerk.

Total fees not to exceed.

SEC. 432. (3.) The total amount of fees, compensation and income of said clerk for all official services, shall not exceed the sum of two thousand dollars in any one year; and if the fees herein above established shall amount in the aggregate to more than two thousand dollars for any one year, the excess shall be paid into the county treasury, except so much thereof as may be derived from the temporary school fund, that portion of such excess as may be derived from such school fund shall be paid to said fund.

And it is further provided that in case the total amount of fees and compensation received by said clerk in any one year, shall be deemed by said board an inadequate compensation for the services rendered, said board may allow such additional compensation as they may deem just.

What clerk shall furnish at his own expense.

SEC. 433. (4.) The necessary office room, books, stationery, fuel and lights, for said clerk, shall be provided at the expense of the county; but said clerk shall furnish at his own expense all necessary deputies, and all assistance for the prompt and faithful discharge of all his official duties.

He shall be responsible for the acts, default or misconduct of his deputies.

SEC. 434. (5.) This act shall take effect on the first day of January, 1861.

SEC. 435. (6.) All laws and acts inconsistent with this act are hereby repealed.

ARTICLE 4.

An act regulating the Compensation of County Judges.

[Passed March 29, 1860, took effect 1st Monday of January, 1861; Laws of Eighth General Assembly, Chapter 73.]

SECTION 436. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the county judges of the several counties of this state, are authorized to charge and collect the following as full compensation for their services, to wit:

Judge's fees.

Issuing marriage licenses and recording same, . . . . .	\$1.00
Solemnizing rites of matrimony, . . . . .	2.00
For granting letters of administration, or probate of will, . . . . .	.50
When the same is contested, . . . . .	1.00
Hearing complaint against lunatic, . . . . .	1.00
Appointing guardian for lunatic, . . . . .	.50
Decree for probate of will, . . . . .	.50
When contested, . . . . .	1.00
Decree for settlement of an estate, . . . . .	.50
Order of distribution, . . . . .	.50
Examining and allowing inventory, for first page, . . . . .	.25
Each succeeding page, . . . . .	.10
Any writ or process issued under seal, . . . . .	.25
Examining and allowing accounts, first page, . . . . .	.25
Each additional page, . . . . .	.10
Warrant to appraise or divide estate, . . . . .	.25
Allowing an appeal, . . . . .	.25
Approving security of executors, . . . . .	.25
Assignment of dower, . . . . .	1.00
Disallowance of application for letters of administration or probate of will, to be paid by the losing party, . . . . .	1.00
For every continuance when asked by party, . . . . .	.25
Order for sale of personal estate, . . . . .	.25
For certificate and seal, . . . . .	.25
Extending letters of administration, . . . . .	.25
Granting a reference of executor acts, or allowing report thereon, . . . . .	.50
For bonds upon letter of administration, or appointment of guardian, . . . . .	.50
Drawing a decree respecting the probate of will or codicil, . . . . .	.50
Bond for the execution, . . . . .	.25
Filing each paper, . . . . .	.05
Recording all papers required by law to be recorded, for one hundred words, . . . . .	.10
Appeal or other bonds, . . . . .	.25
A citation or summons, for the first person named therein, . . . . .	.25
Each other person named therein, . . . . .	.10
Apportion an insolvent estate among the creditors, . . . . .	1.00
And when a translation of any will or other instrument is required, he shall be entitled, for each one hundred words, . . . . .	.25
Issuing subpoena, in any case, . . . . .	.10
Hearing cases of bastardy, one day, . . . . .	1.00
Granting writ of habeas corpus, . . . . .	.50
Hearing and determining same, . . . . .	1.00
Taking acknowledgment of instrument, . . . . .	.35

Hearing application for injunction, one day, . . . . .	\$1.00
Hearing application to dissolve same, . . . . .	1.00
Hearing of any case which is not provided for in this section, for each day, . . . . .	2.00

Other compensa-  
tion.

SEC. 437. (2.) When any county judge shall be called upon to perform any duties, the fees for which have not been provided for in the above section, he shall charge and collect such fees as are allowed to other officers for similar service, and shall act in all cases as his own clerk.

SEC. 438. (3.) All acts and parts of acts conflicting with the provisions of this act, be and the same are hereby repealed.

SEC. 439. (4.) This act to be in force from and after the first Monday in January, 1861.

PRIOR LAW. An act fixing salaries, passed Feb. 4, took effect Feb. 17, 1847; 1st sess., chap. 27, p. 39.

## CHAPTER 30.

### TOWNSHIPS AND TOWNSHIP OFFICERS.

[Code—Chapter 23.]

Townships re-  
main.

SECTION 440. (218.) The townships now defined and established shall remain, subject to alteration as provided in this chapter.

County divided.

SEC. 441. (219.) The county *court*\* of each organized county shall divide the same into townships, as the convenience of the citizens may require, accurately defining the boundaries thereof, and may from time to time make such alterations in the number and boundaries of the townships as it may deem proper, but, when practicable, it is required to conform to the congressional townships.

Record.

SEC. 442. (220.) The description of the boundaries of each township, and of all alterations in them, and of all new townships, shall be recorded in full in the records of the county *court*, and of the township.

Officers.

SEC. 443. (221.) There shall be in each township three trustees, one clerk, two constables, and two justices of the peace, except that where any township includes an incorporated town either two, three, or four constables and justices, as the trustees may order, may be elected in such township, two at least of whom shall reside in such town.

Trustees.

SEC. 444. (222.) The trustees are empowered to call meetings of the township, in which one of them shall preside; to direct the place of holding elections; to order the notifying of elections, in which they shall be the judges; and to cause any matter to be inserted in the notices of the meetings or elections for action at such meeting.

SEC. 445. (223.) They shall cause the clerk to keep a record of their proceedings.

SEC. 446. (224.) The township trustees are the overseers of the poor and the fence viewers.

\* The word *court* in this chapter when italicised, should read board of supervisors; section 312.

SEC. 447. (225.) Any person elected to a township office and refusing to qualify and serve shall forfeit the sum of five dollars, which may be recovered by action in the name of the county to the use of the school fund in the county, but no person shall be compelled to serve as a township officer two terms in succession. Refusal to serve.

*Clerk.\**

SEC. 448. (226.) It is the duty of the township clerk to keep accurate records of the proceedings and orders of the trustees, and to perform such other acts as may be required of him by law. Duty.

SEC. 449. (227.) He is authorized to administer the oath of office to all the township officers, and he shall make a record thereof, and also of all who file certificates of their having taken the oath before any other officer authorized to administer the same. Oaths of office.

SEC. 450. (228.) The clerk, immediately after the election of justices of the peace in his township, shall send a written notice thereof to the county judge, stating the names of the persons elected, and the time of the election, and shall enter the time of the election of each justice in the township record.† Justice's election.

*Constables.*

SEC. 451. (229.) The constables shall serve all warrants, notices, and other process, lawfully directed to them by the trustees or clerk of the township, or any court, and perform such other duties as are or may be required by law. Duty.

SEC. 452. (230.) Constables are ministerial officers of justices of the peace, and they shall attend upon the district court when notified therefor by the sheriff.

*Organization of new Townships.*

SEC. 453. (231.) When the county court has formed a new township; it shall call the first township election, to be holden on the day of the annual township elections, and at such place as it may name; other township meetings may be holden as provided hereafter. First election.

SEC. 454. (232.) The court shall issue its warrant for such first election, stating the time and place of the same, the officers to be elected, and any other business which is to be attended to; and no other business shall be done than such as is so named. Warrant for.

SEC. 455. (233.) Such warrant may be directed to any constable of the county, or to any citizen of the same township by name, and shall be served by posting up copies thereof in three of the most public places in the township fifteen days before the day of the meeting; the original warrant shall be returned to the presiding officer of the meeting (to be returned to the clerk when elected) with a return thereon of the manner of service, verified by oath if served by any other than an officer. How notified.

SEC. 456. (234.) The electors when assembled at the time and place appointed, shall, by nomination or by ballot, elect a chairman for Conduct of election.

\* The clerk was required to give bond by the 9th section of chapter 48 of 4th session, which was superseded by the 31st section of chapter 154 of the 7th session, which is probably superseded by 312.

† See section 910.

the time being, and then proceed to elect by ballot three persons having the qualification of voters, as judges of the election, who shall appoint two clerks of the election, and both judges and clerks shall be sworn faithfully to discharge the duties of their respective offices.

Same.

SEC. 457. (235.) The election shall be conducted as other township elections, and the electors shall proceed to elect the officers named in this chapter.

Future meetings.

SEC. 458. (236.) The electors may, at this meeting, determine in what manner the future meetings of the township, other than for elections, shall be called; and such manner may be changed at any subsequent meeting regularly called.

PRIOR LAWS. 1. An act relative to the duties and privileges of townships, passed April 17, 1833; M. D. 1833, p. 74; amended Dec. 6, 1836; Wis., 1st sess., No. 16, p. 43; repealed Dec. 20, 1837; Wis., 2d sess., No. 7, p. 16, by

2. An act organizing a board of county commissioners in each county in this territory.

3. An act to authorize the board of supervisors to ascertain township lines in certain cases, passed June 26, 1832; M. D., 1833, p. 116.

4. An act amending several acts of Michigan, making a county equal to a township, for certain organic purposes, passed Dec. 6, 1836; Wis., 1st sess., No. 16, p. 43; all the above repealed August 30, 1840.

5. An act for the election of constables, and defining their duties, passed Jan. 24, took effect Feb. 24, 1839; I. T., 1st sess., p. 71; also, reprint of 1843, p. 118.

6. An act to provide for the organization of townships, passed Jan. 10, took effect Feb. 10, 1840; I. T., 2d sess., chap. 37, p. 47; repealed by No. 8.

7. An act to amend an act providing for the organization of townships, passed Jan. 15, took effect Feb. 15, 1841; I. T., 3d sess., chap. 82, p. 92; repealed by No. 8.

8. An act for the organization of Townships, passed Feb. 17, 1842; I. T., 4th sess., chap. 117, p. 97; also reprint of 1843, p. 617.

9. An act to amend an act entitled "an act for the election of constables, and defining their duties," passed Jan. 24, 1839, took effect Feb. 5, 1844; I. T., 6th sess., chap. 3, p. 2.

10. An act amending that of Feb. 17, 1842, passed June 5, 1845; I. T., 7th sess., chap. 11, p. 27.

11. An act defining the term of office of constables, passed Jan. 13, took effect April 1, 1846; I. T., 8th sess., chap. 12, p. 11.

12. An act amending that of Feb. 17, 1842, passed Jan. 21, 1847; 1st sess., chap. 11, p. 29.

## TITLE IV.

ON ELECTIONS, QUALIFICATIONS FOR OFFICE, CONTESTED  
ELECTIONS, ETC.

## CHAPTER 31.

## ELECTIONS, OFFICERS AND THEIR TERMS.

[Code—Chapter 24.]

This chapter of code was repealed by the following act :

An Act revising and amending title four of the code, and further providing for elections, filling vacancies in office, resignations, and contesting elections.

[Passed March 23, 1858 ; took effect July 4, 1858 ; *Laws of Seventh General Assembly, Chapter 159, page 402.*]

SECTION 459. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That there shall be held throughout the state, on the second Tuesday of October in each year an election for all officers required by law to be chosen at such election, to be called the general election, except the years of the presidential election, when the general election shall be held on the Tuesday next after the first Monday in November. General election established.

SEC. 460. (2.) Special elections are such as are held in pursuance of a special law, and such as are held to supply vacancies in any office, whether the same be filled by the vote of the qualified voters of the state, or any district, county or township, and may be held at such time as may be designated by such special law, or the proper officer duly authorized to order such election. Special election may be held.

SEC. 461. (3.) All vacancies which are about to occur in office by the expiration of the full term thereof, shall be supplied at the general election next preceding the time at which such term will expire. Vacancies filled.

SEC. 462. (4.) The term of office, of all state, district, county and township officers, except supervisors chosen at a general election, shall commence on the first Monday of January next thereafter, except it be otherwise provided by the constitution or the provisions of this act ; and except, also, a person be chosen to fill the vacancy in any public office, in which case his term of office shall commence as soon as he shall qualify for the performance of the duties of the office to which he may be elected ; *provided, however,* that any person elected to any public office prior to the adoption of the new constitution, may hold his office for the full term prescribed by the laws in force at the time of his election (unless otherwise provided by the constitution or laws of the state), and the term of office of his successor shall expire at the same time as if it had commenced on the first Monday of January next after his election. It shall be the duty of the governor, at least thirty days before any general election, to issue his proclamation designating all the offices to be filled by the vote of all the electors in the state, or by the electors of any judicial district, and to transmit a copy thereof to the sheriff of each county of the state. Terms of office.  
Full terms served out.  
Proclamation.

- Sheriff's notice of election.** SEC. 463. (5.) It shall be the duty of the sheriff to give at least ten days notice thereof, by causing a copy of such proclamation to be published in some newspaper published in the county, if any be published therein, and if not, by posting a copy of the proclamation in not less than five of the most public places in the county.
- Notice of special election.** SEC. 464. (6.) Whenever a special election shall be ordered by the governor, he shall issue his proclamation in like manner as provided in regard to general elections designating therein the time at which such special election shall be held; and the sheriff of each county in which such election is to be held, shall give notice thereof as required by the provisions of this act in relation to the general election.
- Election of governor.** SEC. 465. (7.) The governor and lieutenant governor shall be chosen at the general election of the year one thousand eight hundred and fifty-nine, and every second year thereafter; and shall hold their offices for the term of two years from the second Monday of January next after their election, and until their successors shall be elected and qualified.
- Election of state officers.** SEC. 466. (8.) The secretary of state, auditor of state, treasurer of state, attorney general, register of state land office, and the *commissioners of the Des Moines river improvement*,\* shall be chosen at the general election of one thousand eight hundred and fifty-eight, and every second year thereafter, and shall hold their offices for the term of two years, and until their successors are elected and qualified.
- Election of judges of supreme court.** SEC. 467. (9.) Three judges of the supreme court shall be chosen by the qualified voters of the state at the general election of one thousand eight hundred and fifty-nine, who after being elected, and before entering upon the discharge of their duties as judges, shall be classified, so that one judge shall go out of office every-two years. And for the purpose of determining such classification, the persons elected judges shall meet, and determine by lot in such manner as they may agree upon, the term each shall hold his office, as required by section three, article five of the constitution. A certificate of such classification, stating the term of office of each of said judges, shall be signed by the persons so chosen as judges, and filed with the secretary of state, and by him recorded. At every second general election after that of one thousand eight hundred and fifty-nine, there shall be chosen by the qualified voters of the state, one supreme court judge, who shall hold his office for the term of six years, and until his successor is elected and qualified.
- Classification of terms.** SEC. 468. (10.) Judges of the district court and district attorneys shall be chosen by the vote of the qualified voters of each judicial district at the general election of one thousand eight hundred and fifty-eight, and every fourth year thereafter, for the term of four years, and until their successors are elected and qualified.
- One judge elected.** SEC. 469. (11.) One member of the board of education shall be chosen by the qualified electors of each judicial district at the general election of one thousand eight hundred and fifty-eight; five of whom shall hold their offices for the term of two years; and six of whom shall hold their offices for the term of four years, and until their successors are elected and qualified. At the first session of the board it shall be determined by lot which members shall hold their offices for the term of four years, and which for the term of two years. A certificate of such classification containing the names and term of office of each member of the board shall be signed by the secretary of the board and filed with
- Election to board of education.**
- Terms of office determined.**

\* Obsolete.



the secretary of state, and by him recorded, successors to the members of the board of education.

SEC. 470. (12.) Members of the house of representatives shall be chosen by the vote of the qualified voters of the respective representative districts, at the general election of one thousand eight hundred and fifty-nine, and every second year thereafter, for the term of two years, and until their successors are elected and qualified. Election of representatives.

SEC. 471. (13.) Senators in the general assembly to succeed those whose term of office is about to expire, shall be chosen by a vote of the qualified voters of the proper senatorial districts, at the same time that the members of the house of representatives are chosen, and for the term of four years. Election of senators.

SEC. 472. (14.) Clerks of the district court shall be chosen by a vote of the qualified voters, in the several counties at the general election of one thousand eight hundred and fifty-eight, and every second year thereafter; and shall hold their offices for the term of two years, and until their successors are elected and qualified. Election of county clerk.

SEC. 473. (15.) County judges, sheriffs, treasurers and recorders, surveyors, drainage commissioners and coroners, shall be chosen by the vote of the qualified voters of the respective counties at the general election of one thousand eight hundred and fifty-nine, and every second year thereafter, and shall hold their offices for the term of two years, and until their successors are elected and qualified. Election of county officers.

SEC. 474. (16.) Two justices of the peace shall be chosen by the qualified voters of each township at the general election of one thousand eight hundred and fifty-eight, and every second year thereafter, who shall hold their offices for the term of two years, and until their successors are elected and qualified. Election of justices of the peace.

SEC. 475. (17.) Three township trustees, a township clerk and two constables, one assessor and a supervisor of roads for each district, shall be chosen by the qualified voters of each township at the general election of one thousand eight hundred and fifty-eight, and annually thereafter, and shall hold their offices for the term of one year, and until their successors are elected and qualified. Election of township officers.

SEC. 476. (18.) In case any public office, now required by law to be filled by the vote of the qualified voters of any county or township, shall not be specifically provided for by this act, then an election to such office may be had at the general election next preceding the expiration of the term of office of the incumbent and with the like effect, as if specially provided for in this act. Election of other officers.

SEC. 477. (19.) One or two additional justices of the peace and one or two additional constables may be elected in each township if the trustees so direct, by posting notices of the same in three of the most public places in the township, at least ten days before election. Additional justices.

SEC. 478. (20.) Justices of the peace and constables shall be considered as county officers under the provisions of this act, except they shall be voted for by the voters of their respective townships. Definition of offices.

## CHAPTER 32.

## THE GENERAL ELECTION.

*Manner of conducting the General Election and the Canvass of the Votes.*

[Code—Chapter 25.]

- Unorganized counties.** SEC. 479. (244.) The provisions of this title so far as applicable, and qualified by the provisions of the chapter relating to counties, are applied to unorganized counties.
- Polls.** SEC. 480. (245.) At the general elections a poll shall be opened at the place of election in each township of each county.
- Trustees.** SEC. 481. (246.) The trustees of each township are the judges of election in the same.
- Vacancy.** SEC. 482. (247.) If any one of the trustees does not attend in time, or refuses to be sworn, his place shall be filled by an elector to be appointed by the trustees who do attend; and if none of the trustees attend at the time for opening the polls the electors present shall choose three qualified persons from their number to act as judges of election.
- Clerks.** SEC. 483. (248.) There shall be two clerks of the election, one of whom shall be the township clerk, and the other some elector named by him and approved by the judges of election, and if the township clerk does not attend then the two clerks shall be appointed by the judges of election.
- Oath.** SEC. 484. (249.) Before opening the polls each of the judges and clerks shall take the following oath: I, A. B., do solemnly swear, that I will impartially and to the best of my knowledge and ability perform the duties of (judge or clerk) of this election, and will studiously endeavor to prevent fraud, deceit, and abuse, in conducting the same.
- Oath.** SEC. 485. (250.) The township clerk may administer the oath to each of the other persons, and one of the trustees if he be present (and if not present any one of the judges) may administer it to the clerk, and the oath shall be entered in the poll books, subscribed by the persons taking it, and certified by the officer administering it.
- Polls opened.** SEC. 486. (251.) The polls shall be opened at nine o'clock in the forenoon unless vacancies have to be filled as above, in which case they are to be opened as soon thereafter as may be, and they shall be kept open until six o'clock in the afternoon; and if the judges deem it necessary for receiving the ballots of all the electors, they may keep them open until nine o'clock in the evening. Proclamation thereof shall be made at or before the opening of the polls, and half an hour before closing them.
- Preservation of order.** SEC. 487. (252.) Any constable of the township who may be designated by the judges of election is directed to attend at the place of the election, and he is authorized and required to preserve order and peace at and about the same; and if no constable be in attendance the judges of the election may appoint one specially by writing, and he shall have all the powers of a regular constable.
- Same.** SEC. 488. (253.) If any person conducts in a noisy, riotous, or tumultuous, manner at or about the polls so as to disturb the election, or insults or abuses the judges or clerks of election, the constable may forthwith arrest him and bring him before the judges, and they, by a warrant under their hands, may commit him to the jail of the county for a

term not exceeding twenty-four hours; but they shall permit him to vote.

SEC. 489. (254.) The county *judge*\* shall provide for each township in his county and at the expense of the county, for the purpose of elections, one box with lock and key. Boxes.

SEC. 490. (255.) The county clerk shall prepare and furnish to the judges of election in each township in his county two poll books having each of them a sufficient column for the names of the voters, a column for the number, and sufficient blank leaves to contain the entries of the oaths, certificates, and returns. Poll books

SEC. 491. (256.) The ballots shall designate the office for which the persons therein named are voted for. Ballots.

SEC. 492. (257.) In voting, the electors shall deliver their ballots to one of the judges who shall deposit them in the ballot box, but no person is entitled to vote at any other place than in the township in which he resides at the time he offers to vote. Voting.

SEC. 493. (258.) Any person offering to vote may be challenged, as unqualified, by either of the judges or by any person who is an elector in this state, and it is the duty of each of the judges to challenge any person offering to vote whom he knows or suspects not to be duly qualified. Challenge.

SEC. 494. (259.) When any person is so challenged, the judges shall explain to him the qualifications of an elector and may examine him as to his qualifications, and if the person insists that he is qualified and the challenge is not withdrawn, one of the judges shall tender to him the following oath: Same

“You do solemnly swear that you are a citizen of the United States, that you are a resident of — (town or township) in this county, that you are twenty-one years of age as you verily believe, that you have been a resident of this county “sixty days, and of this state six months, next preceding this election, and that you have not voted at this election”—and if he takes such oath his vote shall be received † Oath.

SEC. 495. (260.) The name of each person, when his ballot is received, shall be entered by each of the clerks in the poll book kept by him, so that there may be a double list of voters. Poll books how kept.

SEC. 496. (261.) When the poll is closed the judges shall proceed to canvass and ascertain the result of the election unless they determine to adjourn the canvass to the next day—which they may do, but no longer—and if the canvass be so adjourned, the opening in the lid of the ballot box shall be closed and sealed, the box locked, and the key delivered to one of the judges, and the box and poll books to one of the clerks, to be securely kept until they meet on the next day. Canvass. or adjournment.

*The Canvass by the Judges of Election.*

SEC. 497. (262.) The canvass shall be public, and shall commence by a comparison of the poll lists from the beginning and a correction of any errors which may be found therein, until they shall be found or made to agree. If two or more ballots are found so folded together as to present the appearance of a single ballot and to convince the judges that they were cast as one they shall not be counted, but they shall have the words “rejected as double” written upon them, be folded together again, and kept as herein directed. Canvass, ballots double.

\* Board of supervisors, section 312.

† This section was changed from “twenty days” to “sixty days” by laws of seventh general assembly, chapter 159, section 21.

**Ballots exceeding voters.** SEC. 498. (263.) If the ballots for any officer are found to exceed the number of the voters in the poll lists, that fact shall be certified with the number of the excess in the return, and if it be found that the vote of the township where the error occurred would change the result in relation to a county officer if the person elected were deprived of so many votes, then the election shall be set aside as to him and a new election ordered; but if the error occur in relation to a township officer the trustees may order a new election or not, in their discretion. If the error be in relation to a district or state officer the error and the number of the excess are to be certified to the canvassers, and if it be found that the error would affect the result as above a new vote shall be ordered in the county where the error happened and the canvass be suspended until such new vote is taken and returned. When there is a tie vote and such an excess there shall be a new election as above directed.

**Ballot to name office.** SEC. 499. (264.) If, at any stage of the canvass, a ballot not stating for what office the person therein named is voted for is found in the box when officers of different kinds are to be elected, it is to be rejected.

**Ballots containing too many.** SEC. 500. (265.) If a ballot be found containing the names of more persons for an office than can be elected to that office and such ballot form an excess above the number of voters, it shall be rejected as to that office (the cause of rejection being endorsed thereon) and disposed of as hereafter directed; and if it does not form such excess, so many of the names first in order, as are required, shall be counted.

**Tally lists.** SEC. 501. (266.) As a check in counting, each clerk shall keep a tally list.

**Return.** SEC. 502. (267.) A return in writing shall be made in each poll book setting forth, in words written at length, the whole number of ballots cast for each officer, (except those rejected,) the name of each person voted for, and the number of votes given to each person for each different office, which return shall be certified as correct, signed by the judges, and attested by the clerks. Such return shall be substantially as follows:

**Form.** At an election at the house of —, in — township, in — county, state of Iowa, on the — day of —, A. D. — there were — ballots cast for the office of (governor) of which  
 A — B —, had, - - - - - votes.  
 C — D —, had, - - - - - votes.  
 (and in the same manner for any other officer.)

A TRUE RETURN, L — M —, }  
 N — O —, } Judges of the election.  
 P — Q —, }

ATTEST, R — S —, }  
 T — U —, } Clerks of election.

**Disposition of poll books.** SEC. 503. (268.) One of the poll books containing such return shall be delivered to the township clerk and be by him filed and preserved in his office. The other poll book with its return shall be enclosed, sealed, superscribed, and delivered to one of the judges\* of election who shall deliver the same within five days after the day of election to the county judge,\* who, after the county canvass, shall file and preserve the same in his office.<sup>1</sup>

**Ballots preserved.** SEC. 504. (269.) When the result of the election is ascertained the

\* Changed by chapter 22, article 15.

judges shall cause all the ballots, including those rejected, with the tally lists, to be placed in some convenient condition for preservation and deposited with the township clerk, who is to keep them until the time is passed which is allowed for contesting the election of any officer voted for.

*The County Canvass.*

SEC. 505. (270.) If the returns from all the townships are not made to the county judge\* by the sixth day after the election, on the seventh day he shall send messengers to obtain them from those townships whose returns are wanting, the expense of which shall be paid out of the county treasury on allowance. Returns not made.

SEC. 506. (271.) As soon as the returns from all the townships are received, the county judge† \* \* \* \* shall open and examine the several returns and make abstracts, stating, in words written at length, the number of ballots cast in the county for each office, the name of each person voted for, and the number of votes given to each person for each different office. Abstracts.

SEC. 507. (272.) The abstract of the votes for each of the following classes, shall be made on a different sheet. Form of abstract.

1. Governor and lieutenant governor.
2. All state officers not otherwise provided for.
3. Representatives in congress.
4. Senators and representatives in the general assembly from the county alone.
5. Senators and representatives in the general assembly by districts comprising more than one county.
6. Judges of the district court, district attorneys and members of the board of education.
7. County officers.

Two abstracts of all the votes cast for any state or judicial district officer shall be made, and one forwarded to the secretary of state and the other filed by the county judge.‡

SEC. 508. (273.) The person having the greatest number of votes for any office is to be declared elected. Who elected.

SEC. (274.) [Is superseded by chapter 22, article 15.]

SEC. 509. (275.) Each abstract of the votes for such officers as the county alone elects, shall contain a declaration of whom the canvassers determine is elected, except when two or more persons receive an equal and the greatest number of votes. Declare who elected.

SEC. 510. (276.) The county judge shall cause each of the abstracts mentioned in the preceding section to be recorded in a book to be kept by him for recording the result of county elections and to be called the "election book." Election book.

SEC. 511. (277.) When any person thus elected has appeared and given bond and taken the oath of office as directed in this title, the county judge shall deliver him a certificate of election under his official seal, in substance as follows : Certificate.

STATE OF IOWA, }  
 \_\_\_\_\_ County, }

At an election holden in the said county, on \_\_\_\_\_ day \_\_\_\_\_  
 A. D. \_\_\_\_\_.

\* See chapter 22, article 15.

† Board of county canvassers, see section 323 and chapter 22, article 15.

‡ Section 272, thus amended by section 22 of chapter 159 of laws of seventh general assembly, page 407, passed March 23, 1858, took effect July 4, 1858.

A. B. was elected to the office of \_\_\_\_\_ of the above county, for the term of two years from that day (or if he was elected to fill a vacancy, say, until such an election,) and until his successor is elected and qualified, and he has qualified by giving bond and taking the oath of office as required by law.

C. D. county judge.

Which certificate shall be *prima facie* evidence of his election and qualification.

Of senators, &c. SEC. 512. (278.) The certificate of senators and representatives in the general assembly may vary from the foregoing according to the nature of the case and the requirements of this title in relation to their offices, and is to be delivered to them on request.

Of county judge SEC. 513. (279.) The certificate of the county judge is to be signed by the clerk.

Vacancy. SEC. 514. (280.) When the person elected is chosen to fill a vacancy, the certificate shall state for what time he is elected.

Tie vote. SEC. 515. (281.) When two or more persons receive an equal and the highest number of votes for an office to be filled by the county alone, the judge shall issue a notice to such persons of such tie vote, and require them to appear at the county office on a day named in the precept within twenty days from the election day and determine by lot which of them is to be declared elected.

Lot. SEC. 516. (282.) The county judge shall notify the persons who were the canvassers with him, or, in case of their absence or inability, the *prosecuting* attorney, recorder, or sheriff, of such lot, and on the day fixed the parties interested shall determine, by a lot fairly arranged by the three officers, which of them is to be declared elected; and the three officers shall certify such lot and its result under their official names and the seal of the county, (to be affixed by the county judge or clerk), and the certificate shall be recorded in the election book, and the judge shall deliver to the person elected his certificate of election on the terms prescribed in this chapter.\*

SEC. 517. (283.) Within ten days after the election day, the county judge and clerk shall envelop and seal up by itself, one of the abstracts of votes for governor and lieutenant governor, and indorse upon it in substance "abstract of votes for governor and lieutenant governor, from \_\_\_\_\_ county," and address it to the speaker of the house of representatives. The abstract of votes for other state officers, and for such district officers as are to be returned to the secretary's office, are to be enveloped, sealed, and indorsed in like manner, and directed to the secretary of state. The several packages shall then be placed in one envelop and addressed to the secretary.†

Same. SEC. 518. (284.) The above abstracts shall be transmitted to the secretary, which may be done by mail, and in such case they shall be deposited in the post office by the twelfth day after the election day; but if there be no regular mail by which the returns may be safely sent, the county judge may send a special messenger to bear them.

#### *The State Canvass.*

Same. SEC. 519. (285.) If the abstracts from any county are not received

\* See chapter 22, article 15. Is this duty imposed on the canvassers upon notice and is district substituted for prosecuting attorney?

† Thus amended by section 23, of chapter 159, of laws of seventh general assembly, page 407, passed March 23, 1858, took effect July 4, 1858.

at the office of the secretary of state by the fourth Monday after the day of election, the secretary is authorized to send a messenger to the judge of such county, who shall furnish such messenger with the abstracts (or, if they have been sent, with a copy of them), and he shall return them to the secretary without delay.

SEC. 520. (286.) The abstracts, when received by the secretary, Same. shall be kept in his office unopened until the day appointed for opening them, and shall be opened only in the presence of the board of canvassers.

SEC. 521. (287.) The governor, the secretary, and auditor of state Canvassers. constitute a board of canvassers for the state. In case of the absence or interest of any of them, or his inability to act, the treasurer of state or clerk of the supreme court at the seat of government shall act in his place.

SEC. 522. (288.) On the Thursday following the fourth Monday When opened. after the day of the election, the board of state canvassers shall open and examine the returns, if they are received from all the counties, and if not all received they may adjourn to such day as they deem necessary not exceeding twenty days, for the purpose of obtaining the returns from all the counties, and when received shall proceed with the canvass.

SEC. 523. (289.) They shall make an abstract stating the number Abstracts. of ballots cast for each office, the names of all the persons voted for, for what office they respectively received the votes, and the number of votes each received, in words at length, and stating whom they declare to be elected to each office; which abstract shall be signed by the canvassers in their official capacity and as state canvassers, and have the seal of the state affixed by the governor or secretary.

SEC. 524. (290.) The secretary shall record the abstract in a book Election book. to be kept by him for recording the result of state elections and to be called the election book, and also file the abstract.

SEC. 525. (291.) A certificate shall be prepared for each person Certificate. elected, in substance as follows:

STATE OF IOWA.

At an election holden on the \_\_\_\_\_ A. B. was elected to the office of \_\_\_\_\_ of said state, for the term of \_\_\_\_\_ years, (if to fill a vacancy say, until such an election.)

Given at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_.

Which certificate shall be signed by the governor if present, if not, by the secretary, with the seal of the state affixed in either case, and be attested by the other two canvassers, but in the absence of the governor the secretary's certificate shall be signed by the auditor.

SEC. 526. (292.) Such certificate of election shall be delivered to When delivered. the person elected when he has qualified as provided in this title.

SEC. 527. (293.) The governor is required to cause the persons Notice to persons elected. elected to any of the proper state offices to be notified thereof immediately by a sheriff or constable, who shall return his doings to the secretary's office.

SEC. 528. (294.) The certificate of the election of a representative Representative in congress. in congress shall be signed by the governor, with the seal of the state affixed, and be countersigned by the secretary of state, and the governor shall cause it to be delivered to the person elected.

SEC. 529. (295.) Sheriffs or messengers sent for or with the returns Messenger's pay.

of elections under the provisions of this title will be entitled to eight cents a mile going and returning, to be audited and paid from the state or county treasury respectively.

## CHAPTER 33.

### THE ELECTION OF SENATORS AND REPRESENTATIVES BY DISTRICTS.

[Code—Chapter 26.]

- Proceedings. SECTION 530. (296.) When a senator or representative in the general assembly is to be elected by a district formed of more than one county, the abstract of votes in each county for such office shall be made as directed in section two hundred and seventy-two of the code, and delivered to the *county judge*,\* and on the second Monday, after the day of the election the *judges* of the several counties, constituting the district shall meet at the county seat of the oldest county.†
- Oldest county. SEC. 531. (297.) That is held to be the oldest county which was first organized; if two or more were organized on the same day, that is to be held the oldest which had the largest population, at the taking of the last preceding census.
- Canvass. SEC. 532. (298.) When the *judges of the several counties*‡ of the district are assembled, they shall canvass the returns of the several counties, and make as many abstracts as there are counties in the district, in manner as similar to that directed in section two hundred and seventy-two of the code, as the case requires; sign them in their official capacity and as “district canvassers,” and seal them with the seal of the county where the canvass is held.§
- Abstracts. SEC. 533. (299.) Each of the *judges*|| shall take one of the abstracts and cause it to be filed in the office of his county and preserved.
- Certificate. SEC. 534. (300.) The canvassers shall make and cause to be delivered to the person elected, a certificate of his election.¶

## CHAPTER 34.

### THE ELECTION OF ELECTORS OF PRESIDENT AND VICE PRESIDENT.

[Code—Chapter 27.]

- Time. SECTION 535. (301.) On the Tuesday next after the first Monday

\* “County judge” should be “member of county board,” and “judges” should be “district canvassers;” see chapter 22, article 15.

† Thus amended by section 24 of chapter 159 of the laws of seventh general assembly, page 407, passed March 23, 1858, took effect July 4, 1858.

‡ “District canvassers;” see chapter 22, article 15.

§ Thus amended by section 24 of laws of seventh general assembly, chapter 159, page 407, passed March 23, 1858, took effect July 4, 1858.

|| “District canvassers;” see chapter 22, article 15.

¶ Section 300 of the code amended by section 25, of the laws of seventh general assembly, chapter 159, page 407, passed March 23, 1858, took effect July 4, 1858.



in the month of November in the year eighteen hundred and fifty-two, and every four years thereafter, (or on such day as the congress of the United States may direct,) a poll shall be opened in each of the townships of the state for the election of electors of president and vice president of the United States, the number of whom is to be equal to the number of senators and representatives in congress to which this state may be entitled.

SEC. 536. (302.) The names of all the electors to be chosen shall Ballots. be written on each ballot, and each ballot shall contain the name of at least one inhabitant of each congressional district into which the state may be divided, and against the name of each person shall be designated the number of the congressional district to which he belongs.

SEC. 537. (303.) This election shall be conducted, and the returns Proceedings. made, as nearly as may be as directed in relation to the election of state officers and representatives in congress, except as herein otherwise expressed.

SEC. 538. (304.) The returns from the township judges of election Returns. to the county judge shall be made *within three days after the day of election, and on the fourth day after the day\** of election the county canvassers shall meet, examine the returns, make the abstract, and sign and seal it with the county seal.

SEC. 539. (305.) The judge shall envelop and seal up the abstracts Same. and indorse and direct them as provided in other cases, and before ten o'clock A. M. of the sixth day after the day of the election shall deliver the same to the sheriff of his county, whose duty it is to deliver the abstract to the secretary of state within ten days including the day he receives it.

SEC. 540. (306.) On the twentieth day after the day of election, State canvass. (or if that day be Sunday, then on the following day,) or before that time if the returns are received from all the counties, the board of state canvassers named in this title shall open and examine the returns and make an abstract as directed in regard to the general elections, which shall be recorded by the secretary in the election book.

SEC. 541. (307.) The election shall be public, and in canvassing Same. the returns the persons having the greatest number of votes are to be declared elected; and if more than the requisite number of persons are found to have the greatest and an equal number of votes, the election of one of them shall be determined by lot to be drawn by the governor in the presence of the canvassers.

SEC. 542. (308.) The governor, or in his absence the secretary, Certificate. shall issue a certificate of election under his hand and the seal of the state and cause it to be served on each person elected, notifying him to attend at the seat of government at noon of the Tuesday preceding the first Wednesday of December next after his election and report himself to the governor as in attendance.

SEC. 543. (309.) The electors so attending shall meet at the earliest Vacancies. convenient hour after the noon of the said Tuesday, and the governor shall provide them a list of all the electors elected, and in case of the absence of any elector chosen, or if the proper number of electors shall for any cause be deficient, those present shall forthwith elect from the citizens of the state so many persons as will supply the deficiency.

SEC. 544. (310.) Such choice being certified to the governor he Notice. shall cause the person chosen to be notified immediately.

SEC. 545. (311.) The college of electors being full shall meet at Election.

\* See chapter 22, article 15.

the capitol at noon of the said first Wednesday of December, and proceed to the election in conformity with the constitution of the United States.

Compensation. SEC. 546. (312.) The electors shall receive the same compensation for their travel and attendance as the members of the general assembly.

## CHAPTER 35.

[Code—Chapter 28.]

SECTIONS (313, (314,) (315) [are repealed by laws of seventh general assembly, chapter 159, section 27, passed March 23, 1858, took effect July 4, 1858.]

Tie. SEC. 547. (316.) When there is a tie between two persons for a township office the clerk shall notify them to appear at his office at a given time to determine the same by lot before one of the trustees and the clerk, and the certificate of election is to be given accordingly. If either party fail to appear or to take part in the lot one of the trustees shall draw for him.

Notice to persons elected. SEC. 548. (317.) The ballots for township officers having been canvassed, the clerk shall, through a constable, immediately notify the persons chosen of their election, and require them (except justices of the peace and constables,) to appear and qualify within nineteen days from the election day; and when qualified they are entitled to their certificates of election, which are to be signed by the clerk.

SEC. (318) [repealed by laws of seventh general assembly, chapter 159, section 27, passed March 23, 1858, took effect July 4, 1858.]

## CHAPTER 36.

QUALIFICATION FOR OFFICE.

[Code—Chapter 29.]

General provisions. SECTION 549. (319.) No civil officer, elected by the people, is empowered to enter on the duties of the office to which he is elected until he has qualified himself as required in this chapter.

Governor. SEC. 550. (320.) The governor, by taking an oath in the presence of both houses of the general assembly administered by the presiding officer of such convention, to the effect that he will support the constitution of the United States and the constitution of the state of Iowa, and will faithfully, impartially, and to the best of his knowledge and ability discharge the duties incumbent upon him as the governor of this state.

Members of general assembly. SEC. 551. (321.) Members of the general assembly, by taking the oath prescribed for them in the fourth article of the constitution.

Judges. SEC. 552. (322.) The judges of the supreme and district courts, by taking and subscribing an oath in writing to the effect that they will

support the constitution of the United States and that of the state of Iowa, and that, without fear, favor, affection, or hope of reward, they will to the best of their knowledge and ability administer justice according to the law equally to the rich and the poor; and they shall likewise be commissioned by the governor.

SEC. 553. (323.) *County judges\** and township officers are not County judge. required to give bond.

SEC. 554. (324.) Every civil officer not before mentioned in this chapter, (except the members of congress,) is required to give bond with surety, and in a penal sum as hereafter required, with a condition in substance as following: General provision bond.

That as —— (naming the office) in —— county (or state of Iowa) he will render a true account of his office and of his doings therein to the proper authority when required thereby or by law; that he will promptly pay over to the person or officer entitled thereto all money which may come into his hands by virtue of his office; that he will promptly account for all balances of money remaining in his hands at the termination of his office; that he will hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers, securities, or other property appertaining to his said office, and deliver them to his successor or to any other person authorized to receive the same; and that he will faithfully and impartially, without fear, favor, fraud, or oppression, discharge all other the duties now or hereafter required of his office by law.

SEC. 555. (325.) The bonds of state and district officers shall be given to the state, those of county officers to the county.

SEC. 556. (326.) The bond of the treasurer of state shall be in Penal sum. the penal sum of fifty thousand dollars;

That of the auditor of public accounts, in the sum of ten thousand dollars;

[*Obsolete officers omitted.*]

Those of the secretary of state and the clerks of the district court, in the sum of five thousand dollars each;

Those of recorders of counties, in the sum of two thousand dollars each;

Those of coroners and surveyors, in the sum of one thousand dollars each.†

SEC. 557. (327.) County recorders shall give separate bonds as County treasurer Sheriff, &c. treasurers; and the bonds of such treasurers, and of the sheriffs, justices of the peace, and constables, shall each be in a penal sum to be fixed by the county *judge*‡ by an order of record, but those of the treasurers and sheriffs shall not be in a less sum than five thousand dollars each, nor those of justices of the peace and constables in a less sum than five hundred dollars each.

SEC. 558. (328.) The bond of *the superintendent of public instruction*,§ of the treasurer of state, and of each county treasurer, shall be given with at least four sureties; and every other official bond shall be given with at least two sureties. Sureties.

SEC. 559. (329.) The sureties in all official bonds shall be free- Same.

\* Repealed as to county judges by laws of fourth general assembly, chapter 40, p. 70, passed Jan. 29, 1853, took effect July 1, 1853. See chapter 22, article 2.

† For the bond of district attorney see section 377, for that of attorney general, see section 128.

‡ Board of supervisors.

§ Obsolete.

	holders, except in those counties where lands of the United States have not been sold.
Approval of bonds.	SEC. 560. (330.) The bonds of the state officers are required to be approved by the governor before they can be filed, and those of the county officers by the county <i>judge</i> ;* which approval shall be indorsed upon the bond and signed by the approving officer.
Oath of office.	SEC. 561. (331.) Every civil officer who is required to give bond shall take, and subscribe on the back of his bond or on a paper attached thereto, to be certified by the officer administering it, an oath that he will support the constitution of the United States and that of the state of Iowa, and that to the best of his knowledge and ability he will perform all the duties of the office of (naming it) as provided by the condition of his bond within written.
Same.	SEC. 562. (332.) Those civil officers who are not required to give bond (except the governor, members of the general assembly and of congress, and judges of the supreme and district courts) are required to take and subscribe in like manner an oath the same in substance with the condition of the official bond before provided for.
Bonds where filed.	SEC. 563. (333.) The bonds and oaths of the state officers shall be filed and kept in the office of the secretary of state, except those of the secretary which shall be filed and kept in the office of the auditor; those of the county officers in the <i>county judge's office</i> , † except those of the clerk of the district court and of the county judge which shall be kept in the county treasurer's office; and those of the township officers in the township clerk's office.
Time to qualify.	SEC. 564. (334.) The several officers shall qualify within the times herein mentioned. The secretary, treasurer and auditor of state, attorney general, register of state land office, commissioner of Des Moines river improvement, judges of the supreme and district courts, district attorneys, and all county and township officers, by the first Monday of January following their election. The governor and lieutenant governor within three days after the result of the election shall be declared by the general assembly, <i>provided</i> , that should any person elected to any of the above offices, not qualify within the time prescribed above or within ten days thereafter, unless the person elected shall signify his acceptance in writing, he shall be deemed as declining the office, and the office shall be deemed vacant. [Section 334 of the code, as amended by section 28, of chapter 153, of laws of seventh general assembly, page 407, passed March 23, 1858, took effect July 4th, 1858.]
Same.	SEC. 565. (335.) When any election is contested, the person elected shall have twenty days in which to qualify after the day of the decision.
Effect.	SEC. 566. (336.) The bonds of officers shall be construed to cover duties required by law subsequent to giving them.
None void.	SEC. 567. (337.) No official bond shall be void for want of compliance with the statute, but it shall be valid in law for the matter contained therein.
Re-election.	SEC. 568. (338.) When the incumbent of an office is re-elected he shall qualify as above directed, and when it is ascertained that the incumbent holds over another term by reason of the non-election of a successor or for the neglect or refusal of the successor to qualify, he shall qualify anew within a time to be fixed by the officer who approves of the bonds of such officers.

\* Probably board of supervisors, 312-10.

† Should not this now read office of the clerk of the board of supervisors?

CHAPTER 37.

CONTESTING ELECTIONS.

[Code—Chapter 30.]

*Contesting the Election of County Officers.*

SEC. 569. (339.) The election of any person declared duly elected By whom. to a county office may be contested by any elector of the county:

1. For mal-conduct, fraud, or corruption, on the part of the judges of Causes, mal con- election in any township, or of any of the boards of canvassers, or on duct. the part of any member of either of those boards;

2. When the incumbent was not eligible to the office at the time of Ineligibility. the election;

3. When the incumbent has been duly convicted of an infamous Conviction. crime before the election, and the judgment has not been reversed, annulled, or set aside, nor the incumbent pardoned, at the time of the election;

4. When the incumbent has given or offered any elector, or any judge, Bribery. clerk, or canvasser of the election, any bribe or reward in money, property, or thing of value, for the purpose of procuring his election;

5. When illegal votes have been received, or legal votes rejected, at Illegal votes the polls, sufficient to change the result;

6. For any error or mistake in any of the boards of canvassers in Errors. counting the votes, or in declaring the result of the election, if the error or mistake would affect the result;

7. For any other cause (though not enumerated above) which shows Other causes that another was the person legally elected.

SEC. 570. (340.) The term "incumbent," in this chapter, means the Incumbent. person whom the canvassers declare elected.

SEC. 571. (341.) The matter contained in the first ground of con- Qualification. test above named shall not be held sufficient to set aside an election, unless the mal-conduct, fraud, or corruption, be such as to procure or cause the incumbent to be declared duly elected when he has not received the highest number of legal votes.

SEC. 572. (342.) When the misconduct complained of is on the Same. part of the judges of election in a township, it shall not be held sufficient to set aside the election, unless the rejection of the vote of that township would change the result as to that office.

SEC. 573. (343.) The court for the trial of contested county elec- Court for trial. tions shall be thus constituted: The county judge shall be the presiding officer, and the contestant and incumbent may each name a person who shall be associated with him. But when the county judge is one of the parties the prosecuting attorney shall preside.

SEC. 574. (344.) The county clerk shall be the clerk of this court, Clerk. and keep all papers, and record the proceedings in the election book, in manner similar to the record of the proceedings of the district court. But when the person who holds the offices of clerk of the district court and of county clerk is one of the parties in either of those capacities, the county judge shall appoint a suitable person as clerk for the time being, whose appointment shall be recorded.

SEC. 575. (345.) The contestant shall file in the county office, Statement. within twenty days after the day when the votes are canvassed, a writ-

- ten statement of his intention to contest the election, setting forth the name of the contestant and that he is an elector of the county, the name of the incumbent, the office contested, the time of the election, and the particular causes of contest; which statement shall be verified by the affidavit of the contestant, or some other elector of the county, that the causes set forth are true as he verily believes; but before the county judge, or in case of his interest the prosecuting attorney, is required to take jurisdiction of the contest, the contestant must file with such judge or attorney a bond, with security to be approved by said judge or attorney, and conditioned to pay all costs in case the election be confirmed, or the statement be dismissed, or the prosecution fails.
- Same.** SEC. 576. (346.) When the reception of illegal, or the rejection of legal votes, is alleged as a cause of contest, the names of the persons who so voted, or whose votes were rejected, with the township where they voted or offered to vote, shall be set forth in the statement.
- Nomination.** SEC. 577. (347.) The judge shall then issue a precept containing a copy of the statement, with a requisition that the incumbent file in the county office a written nomination of one of the judges of the election within five days after service of the statement upon him.
- Same.** SEC. 578. (348.) If either the contestant or the incumbent fail to nominate, the county judge shall appoint for him.
- Time.** SEC. 579. (349.) As soon as the judges are nominated, the county judge shall fix a day for the trial not more than thirty, nor less than twenty, days from the notice contemplated in this section, which notice, addressed to the usual officers of the law, shall contain the names of the contestant and the incumbent, and of the judges named by each party, a brief statement of the causes of contest, and the day set for trial.
- Notice.** SEC. 580. (350.) The notice shall be served on the incumbent within five days, and on the two nominated judges within fifteen days, from the day it is issued.
- Testimony.** SEC. 581. (351.) The testimony may be oral or by depositions, and depositions may be taken on four days notice in the same manner, and for the same causes, as in an action in the district court.
- Subpœnas.** SEC. 582. (352.) The county judge and clerk, as well when interested as otherwise, may issue subpœnas for witnesses under the county seal.
- Postponement.** SEC. 583. (353.) The trial shall proceed at the time appointed unless postponed for good cause shown by affidavit, the terms of which postponement are in the discretion of the court.
- Proceedings.** SEC. 584. (354.) The proceedings shall be under the control and direction of the court, but shall be assimilated to the proceedings in an action as far as practicable.
- Want of form.** SEC. 585. (355.) The statement shall not be dismissed for want of form if the particular causes of contest are alleged with such certainty as will sufficiently advise the incumbent of the real ground of contest. If any part of the causes are held insufficient they may be amended, but the incumbent will be entitled to an adjournment if he state on oath that he has matter of answer to the amended causes for the preparation of which he needs further time. Such adjournment shall be upon such terms as the court deem reasonable; but if all the causes are held insufficient and an amendment is asked, the adjournment shall be granted on motion and at the cost of the contestant.
- Process.** SEC. 586. (356.) The style and form of process, the officers by whom served, and the manner of service of process and papers, and the fees of officers and witnesses, shall be the same as in the district court

so far as the nature to the case permits. The command to a witness may be, to appear at \_\_\_\_\_ on \_\_\_\_\_ to testify in relation to a contested election wherein A. B. is contestant and C. D. is incumbent.

SEC. 587. (357.) The trial of contested county elections shall take place at the county seat, unless adjourned to some other place within the county by the concurrence of the court and the parties, which may be done before the commencement of the trial. Where tried.

SEC. 588. (358.) This court shall have all the powers incident to the district court which may be necessary to the right hearing, conduct, and determination, of the matter; to compel the attendance of witnesses, to swear them and direct their examination, to punish for contempt in its presence, to adjourn from day to day, and to make any order concerning intermediate costs and enforce it by attachment. Powers of court.

SEC. 589. (359.) The court or the county judge may direct the attendance of the sheriff or a constable when deemed necessary. Sheriff.

SEC. 590. (360.) It shall be lawful to require any person called as a witness, who voted at such election, to answer touching his qualifications as a voter; and if he was not a qualified voter in the county where he voted, then to require him to answer for whom he voted; and if the witness answer such questions, no part of his testimony on that trial shall be used against him in any criminal action. Compelling answer.

SEC. 591. (361.) The court shall be governed, in the trial and determination of contested elections, by the usual rules of law and evidence so far as applicable, except as herein otherwise expressed, and may dismiss the proceedings if all the causes of contest are insufficient and not amended, or for want of prosecution. Rules of law to govern.

SEC. 592. (362.) The court shall pronounce judgment whether the incumbent or any other person was duly elected, and the person so declared elected will be entitled to his certificate upon qualification. If the judgment be against the incumbent and he has already received the certificate, the judgment annuls it. If the court find that no person was duly elected, the judgment shall be that the election be set aside. Judgment.

SEC. 593. (363.) The nominated judges shall be entitled to receive two dollars a day for the time occupied by the trial. Pay.

SEC. 594. (364.) The contestant and the incumbent are liable to the officers and witnesses for the costs made by them respectively. But if the election be confirmed, or the statement be dismissed, or the prosecution fail, judgment shall be rendered against the contestant for costs; and if the judgment be against the incumbent, or the election be set aside, it shall be against him for costs also. Costs.

SEC. 595. (365.) The county judge is authorized to issue execution for costs to run against personal property, and a transcript filed and recorded in the office of the district court, as provided in relation to transcripts from the county court, shall have the same effect as there provided, and execution may issue thereon against real or personal estate. Execution.  
Transcript.

SEC. 596. (366.) The county judge shall have authority to carry into effect any order of the court, after the adjournment thereof, by attachment or otherwise. Power of judge.

SEC. 597. (367.) If notice of contesting the election of an officer is filed before the certificate of election is delivered to him, it shall be withheld until the determination of the contest. Certificate of election.

*Contesting the Election of certain State Officers.*

SEC. 598. (368.) The election of any person declared duly elected to the office of secretary, treasurer, or auditor of state, attorney general Secretary, judges, &c.

	register of the state land office, commissioner of the Des Moines improvement, judge of the supreme court, or any other state officer except that of governor or lieutenant governor, or of the office of district judge or district attorney, may be contested by an eligible person, who received votes for the office contested, for any of the causes before contemplated.*
Court.	SEC. 599. (369.) The court for the trial of contested state elections shall consist of three judges, not interested, of either the supreme or district court, or part from the one and part from the other as may be convenient.
Clerk.	SEC. 600. (370.) The secretary of state shall be the clerk of this court. But if the person holding that office is a party to the contest, the clerk of the supreme court at the seat of government, or in case of his absence or inability a person appointed by the auditor or treasurer of state, shall be clerk.
Statement.	SEC. 601. (371.) The statement must be filed with the secretary of state within thirty days from the day when the votes are canvassed. If the secretary be a party it must be filed with the clerk of the supreme court, and if he be absent or unable to act then with the auditor or treasurer, who shall immediately appoint, in writing, some suitable person as clerk and file the statement with him.
Time.	SEC. 602. (372.) The clerk shall, as soon as practicable, ascertain which three of the judges residing nearest the seat of government can attend the trial, fix a time therefor and notify the judges, and issue a notice of the time to the sheriff of the county where the contestant resides who shall serve it upon the contestant within three days after it is received; and the clerk shall issue a precept, containing a copy of the statement and a notice of the time fixed for trial, to the sheriff of the county where the incumbent resides which the sheriff shall serve upon the incumbent within three days after receiving it. The sheriffs in these cases shall return their doings to the officer or person who issues the precept. When convenient, the service of any of the above papers may be made by the clerk of this court. The time for the trial shall not be set beyond the last Monday of <i>January</i> following the election.†
Subpœnas.	SEC. 603. (373.) The secretary of state, the several clerks of the supreme and district courts, and any county judge, under their respective seals of office, and either of the judges of the supreme or district courts under their hands, may issue subpœnas for witnesses to attend this court; and disobedience to such process may be treated as a contempt as if it had been issued by the court itself. This section does not diminish the power of any officer to summon witnesses before him to give his testimony by deposition.
Process.	SEC. 604. (374.) Process and papers may be issued to, and served by, the sheriff of any county.
Trial where.	SEC. 605. (375.) The trial shall take place at the seat of government unless in a case such as provided for in relation to county elections.
Pay.	SEC. 606. (376.) The judges shall be entitled to receive, for their travel and attendance, the highest compensation allowed to members of the general assembly, to be paid from the state treasury.
Transcript and lien.	SEC. 607. (377.) A transcript filed in the office of the clerk of the supreme court, as provided in relation to the district court, shall have

\* Section 368 of the code as amended by section 29 of chapter 159, of laws of seventh general assembly, page 407, passed March 23, 1858, took effect July 4, 1858.

† Thus amended by section 30 of chapter 159, of laws of seventh general assembly, page 407, passed March 23, 1858, took effect July 4, 1858.



the like force and effect of a judgment of the supreme court, and execution may issue therefrom in the first instance, and against the party's property generally.

SEC. 608. (378.) The presiding judge of this court shall have Powers of judge. authority to carry into effect any order of the court, after the adjournment thereof, by attachment or otherwise.

SEC. 609. (379.) The provisions of this chapter in relation to contested county elections are applied to contested state elections when applicable, except as herein otherwise directed.

*Contesting Elections for Members of the General Assembly.*

SEC. 610. (380.) The election of any person declared duly elected By whom. to a seat in the senate or house of representatives of the general assembly may be contested by any qualified voter of the county or district to be represented by such senator or representative.

SEC. 611. (381.) The contestant shall, within thirty days after the Statement. declaration of the canvassers, serve on the incumbent a statement as required in relation to county officers, except the list of illegal votes which shall be served with the notice of taking depositions relative to them, and if no such deposition is taken then twenty days before the day of hearing.

SEC. 612. (382.) The county judge and clerk may issue subpoenas Subpoenas. in the above cases as in those before provided, and when a witness is summoned to give his deposition before the judge or clerk the judge shall have the power to compel his attendance.

SEC. 613. (383.) The previous provisions of this chapter shall be Depositions. applicable to, and govern, similar cases in taking depositions in the cases now contemplated, except that the causes of taking depositions do not apply.

SEC. 614. (384.) A copy of the statement and of the notice for Depositions, &c. taking depositions with the service indorsed, and verified by affidavit if not served by an officer, shall be returned to the officer taking the depositions, and then with the depositions shall be sealed up and transmitted by mail or otherwise to the secretary of state with an indorsement thereon showing the nature of the papers, the names of the contesting parties, and the branch of the general assembly before which the contest is to be tried.

SEC. 615. (385.) The secretary shall deliver the same unopened to Same. the presiding officer of the house in which the contest is to be tried, on or before the second day of the session (regular or special) of the general assembly next after taking the depositions, and the presiding officer shall immediately give notice to his house that such papers are in his possession.

SEC. 616. (386.) Nothing herein contained shall be construed to abridge the right of either branch of the general assembly to grant commissions to take depositions, or to send for and examine any witnesses it may desire to hear on such trial.

*Contesting the Election of Governor.*

SEC. 617. (387.) The election of any person declared duly elected to the office of governor or lieutenant governor may be contested by an eligible person who received votes for the office contested.\*

\* 387 of code thus amended by laws of seventh general assembly, chapter 159, section 31, passed March 23, 1858, took effect July 4, 1858.

Notice, &c.	SEC. 618. (388.) The contestant shall, within thirty days after the proclamation of the election, deliver to the presiding officer of each house of the general assembly a notice of his intent to contest and a specification of the grounds of such contest as before directed.
Notice to incumbent.	SEC. 619. (389.) As soon as the presiding officers have received the notice and specifications, they shall make out a notice directed to the incumbent and including a copy of the specifications, which shall be served by the sergeant-at-arms.
Court.	SEC. 620. (390.) The presiding officers shall also immediately make known to their respective houses that such notice and specifications have been received. SEC. 621. (391.) Each house shall forthwith proceed separately to choose seven members of its own body in the following manner: 1. The names of the members of each house, except the presiding officer, written on similar paper tickets shall be placed in a box, the names of the senators in their presence by their secretary, and the names of the representatives in their presence by their secretary; 2. The secretary of the senate in the presence of the senate, and the secretary of the house of representatives in the presence of the house, shall draw from their respective boxes the names of seven members each; 3. As soon as the names are thus drawn the names of the members drawn by each house shall be communicated to the other, and the fourteen names thus drawn shall be entered on the journal of each house.
Authority of committee.	SEC. 622. (392.) The members thus drawn shall constitute a committee to try and determine the contested election, and for that purpose shall hold their meetings publicly at the place where the general assembly is sitting at such time as they may designate; and may adjourn from day to day or to a day certain not more than four days distant, until such trial is determined; shall have power to send for persons and papers and to take all necessary means to procure testimony, extending like privileges to the contestant and the incumbent; and shall report their judgment to both branches of the general assembly, which report shall be entered on the journals of both houses.
Testimony.	SEC. 623. (393.) The testimony shall be confined to the matters contained in the specifications.
Judgment.	SEC. 624. (394.) The judgment of the committee pronounced in the final decision on the election shall be conclusive.
Same.	SEC. 625. (395.) If the decision be that no person was duly elected, the office of governor will be filled in the mode required by the constitution until the general election next preceding the next regular session of the general assembly, at which election there shall be an election holden for governor to fill the vacancy during the remainder of the term of that office.
Previous provisions.	SEC. 626. (396.) The provisions of this chapter in relation to contested county elections are applied to a contested election for governor when applicable, except as herein otherwise directed.
Election of school officer contested.	SEC. 627. (32.) The election of any person declared duly elected a member of the board of education may be contested in the manner provided for contesting the elections of members of the general assembly; and the board of education shall possess the same powers in relation to contested seats in that body, as either branch of the general assembly.*

\* Section (32,) passed March 23, 1858, took effect July 4, 1858; laws of seventh general assembly, chapter 159, section 32, page 409.

## CHAPTER 38.

## REMOVAL FROM OFFICE.

[Code—Chapter 31.]

SECTION 628. (397.) All county officers, including justices of the peace, may be charged, tried, and removed from office for official misdemeanors in the manner and for the causes following: Causes.

1. For habitual or wilful neglect of duty ;
2. For gross partiality ;
3. For oppression ;
4. For extortion ;
5. For corruption ;
6. For wilful mal-administration in office ;
7. Conviction of a felony.

SEC. 629. (398.) Any person may make such charge, and the district court shall have exclusive original jurisdiction thereof by a summons. B, whom.

SEC. 630. (399.) The proceedings shall be as nearly like those in other actions as the nature of the case admits excepting where otherwise provided in this chapter. Proceedings.

SEC. 631. (400.) The complaint shall be by an accuser against the accused, and shall contain the charges with the necessary specifications under them, and be verified by the affidavit of any elector of the state that he believes the charges to be true. Complaint.

SEC. 632. (401.) It will be sufficient that the summons require the accused to appear and answer the complaint of A. B., (naming the accuser) for "official misdemeanors;" but a copy of the complaint must be served with the summons. Summons.

SEC. 633. (402.) No answer or other pleading after the complaint is necessary, but the defendant may move to reject the complaint or demur thereto upon any ground rendering such motion or demurrer proper, and he may answer if he desires, and if he answer the accuser may reply or not, but if there be an answer and reply the provisions of this statute relating to the pleadings in actions shall apply except that the pleadings after the complaint need not be sworn to. Pleadings.

SEC. 634. (403.) If the person who holds the offices of clerk of the district court and of county clerk is the accused in either of those capacities, the complaint may be filed with the county judge, and he may issue the summons and copy under the county seal, and both he and the clerk may issue subpoenas for witnesses, and the county judge shall deliver the papers to the judge of the district court on its sitting. County clerk.

SEC. 635. (404.) If a continuance of the action take place beyond the return term the court may suspend the accused from the functions of his office until the determination of the matter, if sufficient cause appear from testimony or affidavits then presented; and if such suspension take place in any office other than that of county judge *that officer*\* shall temporarily fill the office by appointment similar to appointments provided for hereafter in this title. Suspension.

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\* The board of supervisors, 312-19.

Trial.	SEC. 636. (405.) The questions of fact shall be tried as in other actions, and if the accused is found guilty judgment shall be entered removing the officer from his office and declaring the latter vacant; and the clerk shall enter a copy of the judgment in the election book, or, if he be the accused, a copy of the judgment shall be certified to the county judge whose duty it will be to cause it to be entered as above directed.
Costs	SEC. 637. (406.) The accuser and the accused are liable to costs as in other actions.
Appointment	SEC. 638. (407.) When the accused is an officer of the court and is suspended, the court may supply his place by appointment for the term.

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## CHAPTER 39.

### SUSPENSION OF CLERKS AND SHERIFFS BY THE JUDGES OF THE DISTRICT COURT.

[Code—Chapter 32.]

Causes.	SECTION 639. (408.) The judges of the district court in their respective districts shall have authority, on their own motion, to suspend from office any clerk of that court or sheriff of a county for any of the causes mentioned in the chapter relating to removals from office coming to their own knowledge, or manifestly appearing from the papers or testimony in any proceeding in court.
Complaint	SEC. 640. (409.) Upon such suspension the court may direct the <i>prosecuting*</i> attorney to file a complaint, which shall be in the name of the county upon the relation of the attorney, but it need not be verified by affidavit.
Order	SEC. 641. (410.) Such order of suspension shall be entered in the election book by the clerk, or if he be the accused it shall be certified to the county judge and be by him entered.

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## CHAPTER 40.

### DEPUTIES.

[Code—Chapter 33.]

By whom made, recd., &c.	SECTION 642. (411.) The secretary, auditor and treasurer of state, each clerk of the district court,† sheriff, and recorder shall appoint a deputy for whose acts he shall be responsible and from whom he shall require
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\* District, chapter 25.

† See section 433.

bond; which appointment must be in writing and be approved by the officer who has the approval of the principal's bond, and shall be revocable by writing under the principal's hand; and both the appointment and the revocation shall be filed and kept in the office of the secretary of state, and county judge, respectively.

SEC. 643. (412.) In the absence or disability of the principal, and in the cases provided for in the chapter relating to vacancies, the deputy shall perform the duties of his principal pertaining to his own office, but when any officer is required to act in conjunction with, or in the place of, another officer his deputy can not supply his place. Duties.

SEC. 644. (413.) The secretary, treasurer, and auditor, of state can neither of them appoint either of the others his deputy; nor can either the clerk of the district court, recorder, or sheriff, of a county appoint either of the others. Disqualification.

SEC. 645. (414.) The deputy recorder shall be deputy treasurer also; and the deputy of the clerk of the district court shall be his deputy as county clerk.

SEC. 646. (415.) The sheriff may appoint such number of deputies as he sees fit.\* Sheriff

SEC. 647. (416.) Each deputy shall take the same oath as his principal (reciting the condition of his principal's bond) which shall be indorsed upon and filed with the certificate of his appointment. Oath.

SEC. 648. (417.) When a county officer receiving a salary is compelled by the pressure of the business of his office to employ a deputy, the county court may make a reasonable allowance to such deputy. Allowance.

## CHAPTER 41.

### ADDITIONAL SECURITY AND THE DISCHARGE OF SURETIES.

[Code—Chapter 34.]

#### ARTICLE 1.

SECTION 649. (418.) The officer who has the approval of another officer's bond, when he is of opinion that the public security requires it and upon giving the officer ten days notice to show cause to the contrary, may require such officer to give such additional security as may be deemed requisite within a reasonable time to be prescribed. When required.

SEC. 650. (419.) Such additional security shall be by giving a new bond. How.

SEC. 651. (420.) If such requisition be complied with both the old and new security shall be in force; and if not complied with the office shall become, and be declared, vacant, and the proceeding be certified to the proper officer to be recorded in the election book or township record. Effect.

SEC. 652. (421.) When any of the sureties on the bond of a civil officer conceives himself in danger of suffering by remaining surety and desires to be relieved of his obligation, he may petition the approving Sureties petition

\* Sheriff no longer assessor, chapter 45.

- officer above referred to for relief stating the ground of his apprehension.
- Notice.** SEC. 653. (422.) The surety shall give the principal at least twenty-four hours notice of the presenting and filing of the petition with a copy of the grounds of his apprehension. At the expiration of twenty-four hours from the notice the approving officer may hear the matter or may postpone the hearing, as the case permits or requires.
- Testimony.** SEC. 654. (423.) The testimony of both parties as well as that of witnesses may be heard in proceedings under this chapter.
- Order Effect.** SEC. 655. (424.) If, upon the hearing, there appears substantial ground for apprehension the approving officer may order the principal to give a new bond and to supply the place of the petitioning surety within a reasonable time to be prescribed, and on such new bond being given the petitioning surety upon the former bond shall be declared discharged from liability on the same for future acts, which order of discharge shall be entered in the proper election book, but the bond will continue binding upon those who do not petition for relief.
- Failure to give.** SEC. 656. (425.) If the new bond is not given as required, the office of the principal shall be declared vacant and the order to that effect entered as directed in the preceding section.
- Justice.** SEC. 657. (426.) If the proceeding relate to a justice of the peace and he is removed from office the county *judge*\* shall notify the proper township trustees or clerk of the removal.
- Powers.** SEC. 658. (427.) The approving officer herein contemplated shall possess all the powers of a justice of the peace to issue subpoenas in his official name for witnesses, to compel their attendance, and to swear them.
- Consent.** SEC. 659. (428.) Where an officer consents to give new security in the above cases it may be taken without farther proceeding and with the same effect as above provided.

## ARTICLE 2.

An Act in relation to the Bonds of State Officers.

[Passed January 25, 1855, took effect February 28, 1855: Laws of Fifth General Assembly, Chapter 97, page 158.]

- Increase of penalty.** SEC. 660. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That hereafter, whenever the executive of the state shall deem it advisable or necessary that the bonds of any state officer should be increased, and the security enlarged, or a new bond given, he shall notify said state officer of the fact, the amount of new or additional security to be given, and the time when the same shall be executed, which said new security shall be approved by said executive, and filed as now provided by law.
- Refusal.** SEC. 661. (2.) If the officer thus notified, shall neglect or refuse to give such new security as required, said office shall be vacant, and said officer disqualified from acting as such officer, which vacancy shall be filled by appointment by said executive until the succeeding *April* or *August*† election, at which election said office shall again be filled, by election by the people.

\* Should this be board of supervisors, 312 ?

† Should not these words be substituted by general ? See section 459.

## CHAPTER 42.

## VACANCIES AND SPECIAL ELECTIONS

[Code—Chapter 35.]

SECTION 662. (429.) Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, to wit:

1. The resignation of the incumbent;
2. His death;
3. His removal from office;
4. His refusal or neglect to take the oath of office, and also to give bond (when a bond is necessary) in the time prescribed by law;
5. The decision of a competent tribunal declaring his election or appointment void of his office vacant;
6. His ceasing to be a resident of the state, district, county or township, in which the duties of his office are to be exercised, or for which he may have been elected;
7. A failure to elect at the proper election, there being no provision for the incumbent to continue in office until his successor is elected and qualified nor other provision relating thereto;
8. A forfeiture of office as provided by any law of the state;
9. Conviction of an infamous crime or of any public offense involving the violation of his oath of office.

SEC. 663. (430.) Resignations of public officers may be made as follows:

1. By the governor or lieutenant governor, to the general assembly, if in session; if not, to the secretary of state;
2. By senators and representatives in congress, and by all state officers elected by a vote of the qualified voters of the state at large; the judges of the supreme and district courts, and district attorneys to the governor.
3. By senators and representatives in the general assembly, and members of the board of education, to the presiding officer of their respective bodies, if in session, who shall immediately transmit information of the same to the governor, if not in session to the governor.
4. By the county judge to the clerk, and by all other county officers including justices of the peace and constables to the county judge.
5. By all township officers, to the township clerk.
6. By all officers holding by appointment, to the officer or body by whom they were appointed.\*

Sections (431,) (432,) (433,) (434) and (435,) [repealed by section 33 of chapter 159 of seventh session.]

SEC. 664. (436.) Until such election, vacancies, except in the offices of governor and county judge, shall be filled by appointment as follows:

In state offices by the governor;

In county offices by the *county judge*;†

In township offices by the trustees; but when the offices of the three trustees are vacant the clerk shall appoint.

\* Section 430 of the code, as amended by section 33 of chapter 159, of laws of seventh general assembly, page 409, passed March 23, 1858, took effect July 4, 1858.

† Board of supervisors, 312-19.

- Vacation of office.** SEC. 665. (437.) When a civil officer who is authorized or required to appoint a deputy vacates, or is about to vacate, his office by resignation or by removal he shall remain responsible for the performance of the duties, and may receive the emoluments, of his office until his successor by election or by appointment has qualified; but he shall not be so responsible beyond the day when the result of an election to fill his office is declared.
- Same.** SEC. 666. (438.) In the case contemplated in the preceding section, if the vacancy occurs within thirty days previous to an election day at which it may be filled, no appointment shall be made.
- Appointments** SEC. 667. (439.) Appointments under the provisions of this chapter shall be made in writing and made to continue until the next election at which the vacancy can be filled and until a successor is elected and qualified, and be filed with the secretary, or proper township clerk, or in the proper county office, respectively.
- Qualification.** SEC. 668. (440.) Persons appointed to office as herein provided shall qualify in the same manner as is required of those elected, the time for which shall be prescribed in their appointment; and the provisions of the chapter relating to qualification for office are extended to them.
- Removal.** SEC. 669. (441.) A person appointed as herein contemplated may be removed by the officer appointing; and no person can be appointed who has been removed from office within one year.
- Senators in congress.** SEC. 670. (442.) A vacancy in the office of senator in congress shall be filled whenever the general assembly is in session after the vacancy occurs.  
[Section (443.) code, repealed by section 34 of chapter 159, laws of seventh general assembly, page 409, passed March 23, 1858, took effect July 4, 1858.]
- Possession of office.** SEC. 671. (444.) When a vacancy occurs in a public office (except by the resignation or removal from the territory of his office of an officer who is authorized or required to appoint a deputy) possession shall be taken of the office-room and of the books, papers, and all things pertaining to the office, as follows, to be held until the election or appointment and qualification of a successor:  
Of the office of the county judge, by the county clerk;  
Of that of the county clerk or treasurer, by the county judge;  
Of any of the state officers, by the governor; or in his absence or inability at the time of the occurrence, as follows:  
Of the secretary, by the treasurer;  
Of the auditor, by the secretary;  
Of the treasurer, by the secretary and auditor; who shall make an inventory of the money and warrants therein, sign the same and transmit it to the governor if he be in the state, and the secretary shall take the keys of the safes and desks after depositing the books, papers, money, and warrants therein, and the auditor shall take the key of the office-room.
- Time of filling vacancies.** SEC. 672. (35.) Vacancies occurring in township offices, ten days; in county offices, fifteen days; and in all other public elective offices, thirty days prior to the day of a general election; shall be filled at such general election: *provided*, that should a vacancy occur in the office of representative in congress, senator or representative in the general assembly, member of the board of education, and the body in which the vacancy exists will convene in a general or extra session prior to such election, then it shall be the duty of the governor to order a special



election to fill such vacancy, to be held at the earliest practicable time; and ten days notice of such election shall be given.\*

*Special Elections.*

SEC. 673. (26.) The provisions relating to general elections shall govern special elections except where it may be otherwise provided by law.† Provisions for special election

## CHAPTER 43.

### UNITED STATES SENATORS.

An Act to provide for the election of United States Senators and other officers.  
[Passed February 23, 1847, took effect April 14, 1847; Laws of First General Assembly, Chapter 77, page 92.]

SECTION 674. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That at each and every regular session of the general assembly of this state, next preceding the expiration of the constitutional term of service of a United States senator, or at any session when a vacancy shall exist, at an hour to be designated by a resolution of either branch, with the concurrence of the other branch of the general assembly, the members of both houses thereof shall meet in convention in the hall of the house of representatives, for the purpose of electing a senator or senators, by joint vote, in pursuance of the constitution of the United States, to represent this state in the senate of the United States. Election.

SEC. 675. (2.) The president of the senate, or in his absence, the speaker of the house of representatives, shall preside over the deliberations of the convention; and in the absence of both, a president pro tempore shall be appointed by joint vote. Presiding officer.

SEC. 676. (3.) At any time prior to meeting in convention aforesaid, after the time for meeting has been designated as aforesaid, each branch of the general assembly shall appoint one teller, and the two tellers thus appointed shall act as judges of the election. Judges of election.

SEC. 677. (4.) The secretary of the senate, and the chief clerk of the house of representatives, shall each keep a fair and correct record of the proceedings of the convention, which shall be entered upon the journals of each branch of the general assembly. The chief clerk of the house of representatives shall act as secretary to the convention. Record.  
Secretary.

SEC. 678. (5.) The names of the members of the general assembly shall be arranged, by the secretary, in alphabetical order, and each member shall vote in the order in which his name stands when thus arranged. Names arranged

SEC. 679. (6.) When the convention shall be organized as aforesaid, the members present shall proceed to choose, *viva voce*, a senator or senators, as the case may be, to represent this state in the senate of Vote how taken.

\* Section (35,) of chapter 159, of laws of seventh general assembly, page 407, passed March 23, 1858, took effect July 4, 1858.

† Section (26,) of chapter 159, of laws of seventh general assembly, page 407, passed March 23, 1858, took effect July 4, 1858.

- the United States. The name of the person voted for, and of the members voting, shall be entered in writing by the tellers, who shall, after the secretary shall have called the names of the members a second time, and the name of the person for whom each member has voted, report to the president of the convention the number of votes given for each candidate.
- Second election, &c. SEC. 680. (7.) If neither of the candidates shall receive the votes of a majority of the members present, a second poll may be taken, and so from time to time, until some one of the candidates shall receive a majority of the votes of the members present.
- Adjournment. SEC. 681. (8.) If the election shall not be completed at the first meeting, the president shall adjourn the convention whenever and to such time as a majority of the members then present shall determine, and so from time to time until some one of the candidates shall receive a majority as aforesaid.
- Certificates of election. SEC. 682. (9.) When any person shall have received a majority of the votes as aforesaid, the president of the convention shall declare him to be duly elected a senator to represent the state in the senate of the United States; and he shall, in the presence of the members of both houses, sign two certificates of the election, attested by the tellers, one of which he shall transmit to the governor, and the remaining one shall be preserved among the records of the convention, and entered at length on the journals of each house of the general assembly.
- Duty of governor. SEC. 683. (10.) Upon the reception of said certificate, the governor shall cause a credential to be made out, with the great seal of the state affixed thereto, and cause it to be delivered to such senator elect, which credential shall be in form following:
- Credential. "STATE OF IOWA, *to wit*: The general assembly of this state, on the — day of —, one thousand eight hundred and —, having, in pursuance of the constitution of the United States of America, chosen — a senator to represent this state in the senate of the United States, I, —, governor of the state of Iowa, do, by these presents, certify the same to the senate of the United States.  
Given under my hand and the great seal of the state of Iowa, this — day of —, one thousand eight hundred and —."
- Temporary appointment. SEC. 684. (11.) When the executive shall, by virtue of the constitution of the United States, make a temporary appointment of a senator, he shall give to such a senator a credential in form following:
- Credential. "STATE OF IOWA, *to wit*: —, who was chosen United States senator from this state, in pursuance of the constitution of the United States of America, having died, (resigned, or otherwise, as the case may be,) during the recess of the general assembly of this state, I, —, governor of the state of Iowa, have, therefore, thought fit to appoint — to fill the vacancy.  
Given under my hand and the great seal of the state of Iowa, this — day of —, one thousand eight hundred and —."
- Election of judges. SEC. 685. (12.) That the [election of] *judges of the supreme court*,\* and all other officers required to be elected by joint vote of the general

\* Constitution, article 5, section 3.

assembly, shall be conducted according to the provisions of this act, as far as the same may be applicable.

SEC. 686. (13.) In the absence of other rules, the rules of parliamentary practice, comprised in Jefferson's Manual, shall govern the convention. Rules.

SEC. 687. (14.) This act to take effect and be in force from and after its publication in the weekly newspapers in Iowa City. To take effect.

DECISIONS. If county treasurer does not qualify in time, incumbent does not hold over, but a vacancy arises to be filled. *Wappello Co. v. Bigham, &c.*, Dec., 1859. A notice of an election made on the morning of the election is no sufficient notice. 4 C, 562.

## TITLE V.

### OF CERTAIN PROPERTY IN THE STATE.

#### CHAPTER 44.

##### THE STATE LIBRARY.

[Code—Chapter 36.]

[This chapter, except sections 448 and 453, is superseded by "an act regulating the state library."]

SEC. 688. (448.) He is directed to provide, at the seat of government, and as near as possible to the house occupied by the general assembly, a room for the library, with fuel and other conveniences therefor, the expenses of which shall be paid from the state treasury. Room.

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SEC. 689. (453.) The librarian is required to report to the general assembly at the commencement of each session a list of books and other property missing from the library, and an account of forfeitures imposed and those paid, with such other information in relation to the library as he deems expedient; and before the close of the session, to render an account of the expenses incurred since rendering the last preceding account. Report.

"An act regulating the State Library."

[Passed Jan. 25, 1855, took effect Jan. 31, 1855. *Laws of Fifth General Assembly, Chapter 157, page 232.*]

SECTION 690. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the library of the state shall be in the care and Librarian.

	custody of a librarian appointed by the governor, by and with the advice and consent of the senate.
Bond	SEC. 691. (2.) The librarian shall give bond to the state in the sum of five thousand dollars, for the faithful performance of his duties, for the preservation and safe delivery of all the property committed to his care, to his successor, or to the governor, and for the faithful paying over all moneys that may come into his hands from fines, forfeitures or otherwise, which bond is to be approved by the governor, or in his absence, by the secretary of state, and the bond filed in the secretary's office.
To have charge of library.	SEC. 692. (3.) The librarian shall have the custody and charge of all books, maps, charts, engravings, paintings, and all other things properly belonging to the library, or directed to be deposited therein.
Times of keeping library open.	SEC. 693. (4.) The library shall be kept open during the session of the general assembly and of the supreme court at the seat of government, from nine to twelve o'clock in the forenoon, and from two to nine o'clock in the afternoon, and at other times during the afternoon of each Wednesday and Saturday.
Salary.	SEC. 694. (5.) The compensation of the librarian shall be an annual salary of <i>one hundred and fifty dollars</i> ,* payable quarterly from the state treasury.
Persons entitled to take books.	SEC. 695. (6.) No person shall be permitted to remove from the library any book or other property belonging thereto, except the governor, the judges of the supreme and district courts, the judges of the district court of the United States, the United States district attorney, the heads of the departments of state, the members and officers of the general assembly, and attorneys of the supreme court during term times; but no one of said persons shall be allowed to take such books or property from the library without executing a receipt therefor, nor keep the same more than ten days at any one time.
Prohibition.	SEC. 696. (7.) No books or other property shall be removed from the seat of government, and no person shall be entitled to take from the library more than two books at the same time: <i>provided</i> , that during the terms of the supreme court of the state, or the federal court, the judges and attorneys may be permitted to take and use any number of books needed on the trial of causes: <i>provided</i> , said books shall not be taken from the seat of government, and shall be returned according to law.
Attorneys.	
Librarian permitting books to be taken.	SEC. 697. (8.) If the librarian shall permit or allow any person not authorized by this act, to remove a book or other property from the library, he shall be liable to pay a fine of ten dollars for every book or other article so taken, and it shall be the duty of the governor to direct the strict enforcement of this penalty.
Fine.	
Larceny.	SEC. 698. (9.) Any person not authorized by this act so to do, who shall take a book or other property from the library, either with or without the consent of the librarian, shall be deemed guilty of petit larceny, and shall be proceeded against and punished as is provided in the code for such offenses.
Catalogue.	SEC. 699. (10.) It shall be the duty of the librarian, before the first day of April next, to prepare a complete alphabetical catalogue of the library, with the number of the books as described in the succeeding section, and report the same to the governor, who shall cause the same to be published for the use of the library.
Report.	

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\* See the special law of eighth session, chapter 135, section 7.

SEC. 700. (11.) It shall also be the duty of the librarian, before Label.  
the said first day of April next, to cause each book in the library to be  
labeled with a printed label, to be pasted on the inside of the cover,  
with the words "Iowa state library," with the number of the volume in 30th page.  
the catalogue of said library inscribed on said label, and also to write  
the same words at the bottom of the thirtieth page of each volume.

SEC. 701. (12.) All books that may be hereafter added to the  
library, shall be labeled in the same manner, and entered on the cata-  
logue immediately on their receipt and before they can be taken there-  
from.

SEC. 702. (13.) Any person injuring, defacing, destroying or losing Injuring books ;  
a book, shall pay to the librarian twice the value of the book, or if it penalty.  
shall be one of a set, he shall be liable to pay the full amount of  
the value of the set, and it shall be the duty of the librarian to prosecute  
such person, upon such loss or injury coming to his knowledge: *pro-* May replace.  
*vided*, that if such person shall, within a reasonable time, replace the  
book so injured or lost, he shall not be liable to fine or prosecution under  
this section.

SEC. 703. (14.) The governor, secretary of state and librarian Rules.  
shall adopt such further regulations consistent with the provisions of  
this act as they see fit, for the preservation and management of the  
library, and may prescribe forfeitures for the breach of such regulations,  
which regulations and forfeitures being posted one week in the library  
room, shall have the force and effect of law, and such forfeitures may  
be recovered in the name of the state, and shall be for the use of the  
library.

SEC. 704. (15.) The librarian shall report to the governor, when- Librarian to re-  
ever called on, a list of books and other property missing from the port to governor.  
library, and account of fines and forfeitures imposed and collected, and  
the amount uncollected, a list of accessions to the library since the last  
report, and all other information in relation to the library that he may Report to general  
call for. He shall also make a full and specific report to the general assembly.

SEC. 705. (16.) It shall be the duty of the librarian to notify any Books now loan-  
person whose receipt or receipts for books or other articles in the library ed.  
are now in his hands, that unless the books or articles receipted for are  
returned to the library before the first day of March next, he will pro- To be returned  
ceed to collect from him or them the value of such books or articles, and before 1st March.  
the penalties of the law in such cases made and provided.

SEC. 706. (17.) On the said first day of March next, the librarian Delinquents.  
shall return to the governor and secretary of state, a list of all persons  
whose receipts are unsatisfied, their places of residence, if known, the  
books receipted for, the date of receipts, and the answers received to the Legal proceed-  
notifications of the librarian, and the governor and secretary shall direct ings.  
against what persons to institute legal proceedings.

SEC. 707. (18.) The governor, secretary of state and librarian may Reference.  
determine what books and articles may be taken from the library, and  
what shall remain in the library for reference.

SEC. 708. (19.) The room in which the library is kept, shall, in no Not to be used  
case and under no circumstances, be appropriated or used for any other for other pur-  
purpose so long as the library shall remain therein. poses

SEC 709. (20.) This act shall be posted in conspicuous places in Publication.  
the library, and shall take effect upon its publication in the Iowa City  
newspapers.

- PRIOR LAWS. 1. An act to provide for a Librarian, passed June 16, 1828; M. D., 1833, p. 544; repealed Aug. 30, 1840.  
 2. An act to provide for a Librarian and other purposes, passed Jan. 4, 1840; I. T., 2d sess., chap. 23, p. 28; also reprint of 1843, p. 375, repealed by No. 3.  
 3. An act to provide for a state library and election of librarian, passed Feb. 15, took effect March 18, 1847; 1st sess., chap. 48, p. 60.  
 4. An act amending same, passed Jan. 5, 1849; 2d sess., chap. 32, p. 52.

PRIOR LAWS CLASSED UNDER TITLE V.

1. An act to establish the seat of government of Wisconsin territory, and to erect public buildings, passed Dec. 3, 1836; Wis., 1st sess., No. 11, p. 32, repealed Aug. 30, 1840.
2. An act to locate the seat of government of territory of Iowa, passed Jan. 21, took effect Feb. 21, 1839; I. T., 1st sess., p. 435.
3. An act supplementary thereto, passed Jan. 21, took effect Feb. 21, 1839; I. T., 1st sess., p. 437.—"Iowa City."
4. An act for superintendent of public buildings at Iowa City, and territorial agent, passed Jan. 14, 1841; I. T., 3d sess., chap. 68, p. 59; also, reprint 1843, p. 597.
5. An act as to our money from the proceeds of the sales of the public lands, by act of congress, Sept. 4, 1841, passed Feb. 17, took effect March 17, 1842; I. T., 4th sess., chap. 96, p. 87; also, reprint 1843, p. 234.
6. An act amending the act on superintendent of public buildings, and agent of territory, passed Feb. 17, took effect March 17, 1842; I. T., 4th sess., chap. 109, p. 93.
7. An act to define the duties of territorial agent, &c., passed Feb. 13, took effect March 13, 1843; reprint, chap. 9, p. 68.
8. An act to provide for the payment of the debts of the territory, passed Feb. 17, 1843; reprint, chap. 62, p. 23.
9. An act repealing office of territorial agent, passed May 29, 1845; I. T., 7th sess., chap. 7, p. 24.
10. An act for a loan, passed Feb. 9, took effect Feb. 17, 1847; 1st sess., chap. 37, p. 47.
11. An act for location of capital, &c., passed Feb. 22, 1847; 1st sess., chap. 71, p. 85.
12. An act for state seal, passed Feb. 25, took effect March 3, 1847; 1st sess., chap. 112, p. 164.
13. An act to re-locate the seat of government; 5th sess., chap. 72.

## TITLE VI.

### REVENUE.

#### CHAPTER 45.

[Code—Chapter 37.]

##### ARTICLE 1.

An Act in relation to Revenue.

[Passed April 3, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 164.]\*

Tax levied.

SECTION 710. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the board of supervisors of each county in this state, shall

\* Almost none of chapter 37 of the code of 1851 is in force, by virtue of its original enactment, although most of it is by subsequent enactment. Some of it was repealed by act of fourth general assembly, chapter 69.

More of it was repealed, as well as of the last named act, by act of sixth general

annually as hereinafter provided, levy the following taxes upon the assessed value of the taxable property in the county :

1. For state revenue one and one-half mills on a dollar, when no rate is directed by the census board, but in no case shall the census board direct a levy to be made exceeding two mills on a dollar.

2. For ordinary county revenue, including the support of the poor, not more than four mills on a dollar, and a poll tax of fifty cents.

3. For support of schools not less than one nor more than two mills on a dollar.

4. For making and repairing bridges, not more than one mill on the dollar, whenever the board of supervisors shall deem it necessary.

SEC. 711. (2.) The following classes of property are not to be taxed, and they may be omitted from the assessments herein required. Exemption  
The property of the United States, and that of this state, including the university, agricultural college, and school lands, and including all property leased to the state, during the existence of such lease; the property of a county, township, incorporated town, or school district, when devoted entirely to the public use and not held for pecuniary profit. Public grounds, by whomsoever devoted to the public, including all places for the burial of the dead. Fire engines, and implements used for extinguishing fires, with the grounds used exclusively for their buildings, and for the meetings of the fire companies. All grounds and buildings of literary or scientific institutions, incorporated under the laws of this state, also the grounds and buildings of benevolent, agricultural and religious institutions and societies devoted solely to the appropriate objects of these institutions, not exceeding six hundred and forty acres in extent, and not leased, or otherwise used with a view of pecuniary profit.

1. The books, papers and apparatus belonging to the above institutions, and used solely for the purpose above contemplated, and the like property of students in any such institutions, used for their education.

2. Money and *credits* belonging exclusively to such institutions, and devoted solely to sustaining them, but not exceeding in amount or income, the sum prescribed by their charter.

-3. Animals not specified in the next section, the wool shorn from sheep, belonging to the person giving the list, his farm produce harvested for one year previous to the listing, private libraries not exceeding one hundred dollars in value, family pictures, libraries of clergymen, kitchen furniture of each family, beds and bedding requisite for each family, one bed and the bedding thereof for each single person not a member of another family, the apparel of every family and person actually used for wearing, and all food provided for each family; but no person from whom a compensation for board or lodging is received, or expected, is to be considered a member of a family within the intent of this clause.

4. The polls or estates, or both of persons, who by reason of age or infirmity may in the judgment of the assessor be unable to contribute to the public revenue, such opinion being subject to reversal by the board of supervisors.

5. Mutual insurance companies, incorporated under the laws of Iowa, and when the principal office of doing business is located in this state.

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assembly, chapter 146, and the last named act was largely repealed by act of seventh general assembly, chapter 152, while most of the code and of the act of the fourth general assembly were, either without or with modification, re enacted in the revenue law of the seventh session, chapter 152, which, with many amendments, reappears substantially in the above act.

6. The farming utensils of any person who makes his livelihood by farming, and the tools of any mechanic, not in either case to exceed one hundred dollars in value.

7. Government lands entered or located, or lands purchased from this state, shall not be taxed for the year in which the entry, location or purchase is made.

All else taxable. SEC. 712. (3.) All other property real and personal within the state, is subject to taxation in the manner directed, and this section is intended to embrace lands and lots in towns, including lands bought from the United States and from this state, and whether bought on credit or otherwise. Ferry franchises and toll bridges which for the purposes of this act are considered as real property. Horses, cattle, mules, asses, sheep, swine, and money, whether in possession or on deposit, and including bank bills, money, property or labor due from solvent debtors on contract or on judgment, mortgages and other like securities, and accounts bearing interest, property situated in this state, belonging to any bank, or company incorporated or otherwise, whether incorporated by this or any other state, public stocks or loans, household furniture, including gold and silver plate, musical instruments, watches and jewelry, private libraries for their value exceeding one hundred dollars, carriages, stages, hacks, wagons, carts, drays, sleighs, sleds and every description of vehicle, farming utensils, machines and machinery, and mechanics' tools for their aggregate value over one hundred dollars, boats and vessels of every description wherever registered or licensed, and whether navigating the waters of this state or not, if owned either wholly or in part by persons who are inhabitants of this state, to the amount owned in this state. Annuities but not including pensions from the United States or any state, nor salaries or payments expected for services to be rendered.

Credit means. SEC. 713. (457.) The term "credit" as used in this title includes every claim and demand for money, labor, or other valuable thing, and every annuity or sum of money receivable at stated periods, and all money in property of any kind and secured by deed, mortgage, or otherwise; but pensions from the United States, or any of them, and salaries or payments expected for services to be rendered are not included in the above term.\*

Duty of party to list. SEC. 714. (4.) Every inhabitant of this state of full age, and sound mind, shall assist the assessor in listing all property subject to taxation in this state of which he is the owner, or has the control or management in the manner hereinafter directed; the property of a ward is to be listed by his guardian, of a minor by his father if living, if not, then by his mother if living, and if not, then by the persons having the property in charge; of a married woman, by herself or husband; of a beneficiary for whom property is held in trust, by the trustee, and the personal property of a decedent, by the executor; of a body corporate, company, society, or partnership, by its principal accounting officer, agent, or partner. Property under mortgage or lease is to be listed by and taxed to the mortgagor or lessor unless it be listed by the mortgagee or lessee.

Commission merchants. SEC. 715. (5.) Commission merchants and all persons trading and dealing on commission, and assignees authorized to sell, when the owner of the goods does not reside in the county, are for the purposes of taxation, to be deemed the owners of the property in their possession.

\* Section (457) of code of 1851 defines credits as used in title 6, which meant the act on revenue, and seems unrepealed, and is as above.



SEC. 716. (6.) Any person required to list property belonging to another, shall list it in the same county in which he would be required to, if it were his own, (except as herein otherwise directed) but he shall list it separately from his own, giving the assessor the name of the person or estate to whom it belongs, but the undivided property of a person deceased belonging to his heirs, may be listed as belonging to his heirs without enumerating them. Where and how to be listed.

SEC. 717. (7.) When a person is doing business in more than one county, the property and credits existing in any one of the counties, shall be listed and taxed in that county, and the credits not existing in or pertaining especially to the business in any one county, shall be listed and taxed in that where the principal place of business may be. Any individual of a partnership is liable for the taxes due from the firm. Where listed and taxed.

SEC. 718. (8.) Insurance companies of every description, existing in other states and operating in this, shall be taxed one per cent. for company purposes, and one per cent. for state purposes, upon the amount of the premiums taken by them during the year previous to the listing in the county where the agent conducts that business; and the agent shall render the list and shall be personally liable for the tax; and if he refuses to render the list or to swear as herein required, the amount may be assessed according to the best knowledge and discretion of the assessor. Insurance companies.

SEC. 719. (9.) All personal property shall be listed, assessed and taxed in the name of the owner thereof, on the first day of January of the then current year, and each owner shall be required to pay taxes thereon; but if the owner resides out of the county, it shall be listed by the agent or person having charge of the same. In whose name.

SEC. 720. (10.) All taxable property shall be taxed each year, and personal property shall be listed and assessed each year; real property shall be listed and valued in the year 1861, and each second year thereafter, and shall be assessed at its true cash value, having regard to its quality, location, natural advantages, the general improvement in the vicinity, and all other elements of its value, and in each year in which real estate is not regularly assessed, it shall be the duty of the assessor to list and value any real property not included in the previous assessment. Real property, when valued.

SEC. 721. (11.) Depreciated bank notes and the stock of corporations and companies, shall be assessed at their cash value; credits shall be listed at such sum as the person listing them believes will be received or can be collected thereon, and annuities at the value which the person listing believes them to be worth in money. Credits, how listed.

SEC. 722. (12.) In making up the amount of money and credits which any person is required to list or have listed and assessed, he will be entitled to deduct from the gross amount all bona fide debts owing by him, but no acknowledgment of indebtedness not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the intent of this section, and so much only of any liability of such person as security for another shall be deducted, as the person making the list believes he is equitably or legally bound to pay, and so much only as he believes he will be compelled to pay on account of the inability of the principal debtor, and if there are other sureties able to contribute, then so much only as he in whose name the list is made will be bound to contribute; but no person will be entitled to any deduction on account of any obligation of any kind given to any insurance company for the premiums of insurance, How to estimate the money and credit.

nor on account of any unpaid subscription to any institution, society' corporation or company.

Who held a merchant.

SEC. 723. (13.) Any person owning or having in his possession or under his control within this state, with authority to sell the same, any personal property purchased either in or out of this state, with a view of its being sold at an advanced price or profit, or which has been consigned to him from any place out of this state, for the purpose of being sold within the same, shall be held to be a merchant for the purposes of this act; such property shall be listed for taxation, and in estimating the value thereof, the merchant shall take the average value of such property in his possession or under his control during the next year previous to the time of assessing, and if he has not been engaged in the business so long, then he shall take the average during such time as he shall have been so engaged, and if he be commencing, he shall take the value of the property at the time of assessment.

Who held manufacturer

SEC. 724. (14.) Any person who purchases, receives or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, refining, purifying, or by the combination of different materials with the view of making gain or profit by so doing, and by selling the same, shall be held to be a manufacturer for the purposes of this act, and he shall list for taxation the average value of such property in his hands, estimated as directed in the preceding section; but the value shall be estimated upon those materials only which enter into the combination or manufacture.

Case of agent.

SEC. 725. (15.) Any person acting as the agent of another, and having in his possession or under his control or management, any money, notes, credits, assets or personal property, belonging to such other person, with a view to investing or loaning or in any other manner using the same for pecuniary profit, shall be required to list the same at the real value, and such agent shall be personally liable for the tax on the same, and if he refuse to render the list or swear to the same, the amount of such money, property, notes or credits may be listed, and valued according to the best knowledge and judgment of the assessor, subject to the provisions of section twenty-five (25) of this act.

Township assessor.

SEC. 726. (16.) There shall be elected at the general election in each year by the qualified voters of each township in this state, one township assessor, who shall hold his office for one year, and until his successor is elected and qualified.

Shall give bond.

SEC. 727. (17.) Each assessor before entering upon the duties of his office, shall give bond with two or more sureties to be approved by the township trustees, or in counties not organized into townships, by the board of supervisors, in the sum of five hundred dollars, payable to said trustees or board of supervisors, conditioned for the faithful and impartial discharge of the duties of his office, which bond shall be filed and preserved by the township clerk or clerk of the county board of supervisors.

In case he fails.

SEC. 728. (18.) If any assessor shall fail to give the bond and surety as required in the preceding section, or shall fail to take the oath of office as required by the constitution, on or before the first Tuesday after the first Monday of January following his election, the office shall be considered vacant, and in all cases of vacancies in such office, the trustees or board of supervisors, as the case may be, shall appoint some suitable person to fill the vacancy, which appointee shall hold said office until the next succeeding election, and until his successor is elected and qualified.

SEC. 729. (19.) Any person elected or appointed an assessor as herein provided, shall take and subscribe on his bond, an oath as required by the constitution of the State of Iowa, and in substance the same as the condition of his bond. His oath.

SEC. 730. (20.) The assessor shall be allowed two dollars for each day he shall have been faithfully employed in discharging the duties of his office, to be paid out of the county treasury. His pay.

SEC. 731. (21.) The several assessors in each county shall meet at the office of the clerk of the county board of supervisors of their county, on the second Monday in January of each year, and classify the several descriptions of property to be assessed for the purpose of equalizing such assessment. Equalization meeting.

SEC. 732. (22.) On or before the second Monday of January in each year, the board of supervisors shall furnish each assessor in their county with suitable books in duplicate, properly ruled and headed, in which to enter the following items: Book of assessor, what it shall contain.

1. The name of the individual, corporation, company, society, partnership or firm, to whom any property shall be taxable.

2. His or their lands by township, range, section or part of section, and when such part is not a congressional division or subdivision, some other description sufficient to identify it; and town lots, naming the town in which they are situated, and their proper description by number and block or otherwise according to the system of numbering in the town.

3. Personal property as follows: Number of cattle, number of horses, number of mules, number of sheep, number of swine over six months of age, number of carriages and vehicles of every description, with a separate column for the value of each; amount of capital employed in merchandize, amount of capital employed in manufacture, amount of money and credits, amount of taxable furniture, amount of stock or shares in any corporation or company not required by law to be otherwise listed and taxed, amount of taxable farming utensils or mechanics' tools, amount of all other personal property not enumerated, and the number of polls, and a column for remarks. But no entry shall be made on said book of any animal under the age of one year except as is above provided.

SEC. 733. (23.) Each assessor shall enter upon the discharge of the duties of his office within six days after the second Monday in January in each year, and shall with the assistance of each person assessed, or who may be required by law to list property belonging to another, enter in the books furnished him for that purpose, the several items specified in the preceding section; entering the names of the persons assessed in alphabetical order so far as practicable, by allotting to each letter its requisite number of pages in each of said books. He shall also be furnished with a suitable plat of his township on which to check the several parcels of land, and each town or city lot by him assessed, to avoid omissions or double assessments. Assessor begins when Has plat of townships.

SEC. 734. (24.) It shall be the duty of the assessor to list each and every person in his township, and to assess all the property, personal and real therein, and any person who shall refuse to assist in making out a list of his property, or of any property which he is required by law to assist in listing, or refuse to make the oath or affirmation required by this act, shall forfeit the sum of one hundred dollars to be recovered in the name of the county for the use of the common schools therein; His duty in listing

and where any person refuses to make out a list of his property, which by law he is required to do, the assessor shall assess such person according to the best information he can get, as to the amount of taxable property which such person has.

As to oath to persons assessed.

SEC. 735. (25.) The assessor is authorized, and he is hereby required to administer an oath or affirmation to each person assessed, to the effect that he has given in a full, true and correct inventory of all the taxable property owned by him, and all property held by him as agent, guardian or otherwise, and which he is required by law to list to the best of his knowledge and belief and in case any one refuses to make such oath or affirmation, the assessor shall note the fact in the column of remarks opposite such person's name; and should it afterwards appear that such person so refusing has not given a full list of his property, or that under his control, and which he was by law required to list, any property so omitted shall be entered on the book at double its ordinary assessable value, and taxed accordingly.

As to return of his book.

SEC. 736. (26.) Each assessor shall, on or before the third Monday in May in each year, return one of the assessment books of his township to the office of the clerk of the board of supervisors, with the several columns of numbers and values correctly footed up, and the amount of personal property of each person carried forward into a column under the head of total personal property, and the other book he shall on or before the second Monday in April of each year, deliver to the township clerk of his township, to be used by the trustees of the township as the township tax-book, for the levy of taxes for township revenue and road purposes.

Unknown owners.

SEC. 737. (27.) When the name of the owner of any real estate is unknown, and the assessor finds it impracticable to obtain the same, it shall be proper and lawful to assess such real estate without connecting therewith any name, but inscribing at the head of the page the words "owners unknown," and such property, whether lands or town lots, shall be listed as near as practicable in the order of the numbers thereof, and in assessing such real property, no one description shall comprise more than one town lot, or more than the sixteenth part of a section or other smallest sub-division of the land, according to the government surveys, except in cases where the boundaries are so irregular that it can not be described in the usual manner, in accordance with such surveys.

Penalty for failure of duty.

SEC. 738. (28.) If any assessor shall fail or neglect to perform any of the duties required of him by this act, at the time and in the manner specified, he shall be liable to a fine of not less than twenty nor more than five hundred dollars, to be recovered in an action brought in the district court by the board of supervisors, the judgment shall be against him and his bondsmen, and the proceeds of such fines to go to the school fund of the county.

Board of equalization.

SEC. 739. (29.) The board of supervisors of each county, shall constitute a board for the equalization of the assessment, and have power to equalize the assessments of the several persons and townships of the county, substantially in the same manner as is required of the state board of equalization to equalize among the several counties of the state so far as applicable, at their regular meetings in June and next succeeding the general election in each and every year; and at such meetings they shall add to said assessment any taxable property in the county not included in the assessment as returned by the assessors, placing the same in the list of the proper township, and shall assess the value thereof.

Right of one aggrieved by assessment.

SEC. 740. (30.) Any person who may feel aggrieved at anything in the assessment of his property, may appear before the board of equal-

ization either in person or by agent, at the times mentioned in the preceding section, and have the same corrected in such manner as to said board shall seem just and equitable.

SEC. 741. (31.) Each clerk of the county board of supervisors shall on or before the first day of July in each year, make out and transmit to the auditor of state by mail or otherwise, an abstract of the real property in this county in which he shall set forth:

1. The number of acres of land in his county, and the aggregate value of the same, exclusive of town lots, returned by the assessors, as corrected by the county board of equalization at their first meeting.

2. The aggregate value of real property in each town in the county, returned by the assessor as corrected at their first meeting by the county board of equalization.

3. The aggregate value of personal property in his county.

SEC. 742. (32.) The census board constitutes the state board of equalization, and shall meet at the seat of government on the first Monday of August in each year, in which real property is assessed, and shall take an oath faithfully and impartially to discharge the duties of their office. The auditor of state shall be ex-officio clerk of the board, and shall lay before it the abstracts transmitted to him by the county clerk as required by this act, and then the board shall proceed to equalize the valuation of real property among the several counties and towns in the state, in the following manner:

1. They shall add to the aggregate valuation of real property of each county, which they shall believe to be valued below its proper valuation, such per centum in each case as will raise the same to its proper valuation.

2. They shall deduct from the aggregate valuation of real property of each county, which they shall believe to be valued above its proper valuation, such per centum in each case as will reduce the same to its proper valuation.

SEC. 743. (33.) Said board shall keep a full record of their proceedings, and they shall finish their equalization on or before the third Monday of August, immediately after which the auditor of state shall transmit to each clerk of the board of supervisors a statement of the per centum to be added to, or deducted from the valuation of real property in his county. The clerk of the county board of supervisors shall add to, or deduct from the valuation of each tract or parcel of real property in his county, the required per centum on the same, and if the result shall in any case show a fraction of a dollar, such fraction, if less than fifty cents, shall be rejected, and if fifty cents or over, shall be counted as one dollar. And in each year the said board shall determine the rate of state tax to be levied and collected which shall not exceed two mills on the dollar, and the auditor of state shall notify the several county clerks of such rate at the time hereinbefore mentioned.

SEC. 744. (34.) If any clerk of the county board of supervisors shall neglect or refuse to transmit to the auditor of state, the abstract of the assessment of the real property in the county, or to add or deduct the per centum fixed by the state board of equalization, as required by this act, such county clerk shall be deemed guilty of misdemeanor for which he shall be prosecuted by indictment in the district court, and if found guilty, shall be fined in any sum, not more than one thousand dollars, and shall also be liable to an action on his official bond to any injured person.

SEC. 745. (35.) The board of supervisors shall furnish to the clerk

Abstract sent to auditor of state; contents.

State board of equalizat on.

Its duties, and that of auditor.

Penalty for not sending abstract to auditor.

Kind of book the clerk shall keep.

of each county a suitable book properly ruled and headed, with distinct columns in which to enter the names of tax-payers, descriptions of lands, number of acres and value, number of town lots and value, and value of personal property, and each description of tax, a column for polls, and one for payments, into which book the clerk shall after the equalization in June, as hereinbefore provided, and before the first Monday of November, transcribe from the assessment books of the several townships the names of tax-payers, with the description of property; but in cases where the owner is unknown no one description shall contain more than one town lot, or more than the sixteenth part of a section, or other smallest sub-division of the land according to the government surveys, except in cases where the boundaries are so irregular that it can not be described in the usual manner in accordance with said surveys.

When to levy taxes.

SEC. 746. (36.) At the regular meeting in June in each and every year the board of supervisors shall levy the requisite taxes for the current year, in accordance with law, and shall record the same in the proper book, and it shall be the duty of the clerk of the county board of supervisors, as soon as practicable, to complete the tax list by carrying out in a column by itself the amount of each different tax, and after adding up each column he shall carry forward the several amounts, showing a summary of the total amount of each distinct tax.

Clerk may correct error.

SEC. 747. (37.) The clerk of the county board of supervisors, may correct any clerical or other error in the assessment or tax book, and when any such correction affecting the amount of tax, is made after the books shall have passed into the hands of the treasurer, he shall charge the treasurer with all sums added to the several taxes, and credit him with all the deductions therefrom and report the same to the supervisors.

Entry on tax list; warrant; informality; pre-emption of regularity.

SEC. 748. (38.) An entry shall be made upon the tax list showing what it is, and for what county and year it is, and the clerk of the county board of supervisors under the direction of the board of supervisors, shall attach thereto a warrant under his hand and the official seal of said board in general terms, requiring the treasurer to collect the taxes therein levied according to law, and no informality in the above requirements, shall render any proceedings for the collection of taxes illegal. The clerk of the county board of supervisors shall cause the tax book to be delivered to the treasurer of the county by the first Monday of November, and his receipt taken therefor, and such list or book shall be full and sufficient authority for the collector to collect taxes therein contained. But if the list be delivered to the treasurer after the time above specified, the proceedings shall nevertheless be deemed regular so far as affecting the validity of taxes, or sales of land under this act. At the time of the delivery of said book to the treasurer, the clerk shall make to the auditor of state, a certified statement, showing, the aggregate valuation of lands, town property and personal property in the county each to itself, and also the aggregate amount of each separate tax as shown by said tax book.

Liability of clerk for failure of duty.

SEC. 749. (39.) If any clerk of the county board of supervisors shall fail or neglect to perform any of the duties required of him by this act, he shall be liable to a fine of not less than fifty nor more than five hundred dollars, to be recovered in an action brought in the district court, by the board of supervisors, or by the party injured thereby the judgment entered shall be against him and his bondsmen, and the proceeds of such fine to go to the school fund.

Delinquent tax.

SEC. 750. (40.) The treasurer on receiving the tax book for each

year, shall enter upon the same in separate columns, opposite each parcel of real property or person's name, on which, or against whom any tax remains unpaid for either of the preceding years, the year or years for which such delinquent tax so remains due and unpaid.

SEC. 751. (41.) The treasurer after making the above entry shall proceed to collect the taxes, and the list and warrant shall be his authority and justification against any illegality in the proceedings prior to receiving the list; and he is required to attend at his office from the second Monday in November to the first day of February following; and he is also authorized and required to collect so far as practicable the taxes remaining unpaid on the tax books of previous years.

Duty of treasurer to collect.

SEC. 752. (42.) It shall be the duty of the county treasurer to assess any real property subject to taxation, which may have been omitted by the assessors or the county clerk, and to collect taxes thereon, and in such cases he is required to note opposite the tract or lot assessed, the words "by treasurer."

And he may assess omitted property.

SEC. 753. (43.) In all cases where real property subject to taxation, shall not have been assessed by the township assessor, or other proper officer, it is hereby made the duty of the owner thereof, by himself or his agent, to have the same properly assessed by the treasurer, and to pay the taxes thereon; and no failure of the owner to have such property assessed, or to have the errors in the assessment corrected; and no irregularity, error or omission in the assessment of such property, shall affect in any manner the legality of any taxes levied thereon, nor affect any right or title to such real property which would have accrued, to any party claiming or holding under and by virtue of a deed executed by the treasurer as provided for by this act, had the assessment of such property been in all respects regular and valid—and in cases where the assessment of any real property subject to taxation shall have been omitted, the assessment thereof may be made by the county treasurer at any time before the sale of the property, and the taxes levied thereon; and in case it shall appear that the tax for which the property was sold was erroneous or irregular, the error or irregularity may be corrected as provided in section *fifty-four*\* of this act.

Owner's duty to have it assessed.

SEC. 754. (44.) Auditor's warrants shall be received by the county treasurer in full payment of state taxes, and county warrants shall be receivable at the treasury of the proper county for the ordinary county tax, but money only shall be receivable for the school tax. Road taxes may be discharged, and road certificates of work done, received as provided by law.

Auditor's warrants received for taxes.

SEC. 755. (45.) When a state or county warrant is received by the treasurer, he shall indorse on the face of it the amount for which it was received, and the date of reception, and from that date the warrant shall be regarded as canceled, and can not be reissued, but when the warrant amounts to more than is to be paid by the person presenting it, the treasurer shall give him a certificate of the remainder due him as directed in chapter of the code relating to the treasurer.

A received warrant how disposed of.

SEC. 756. (46.) No demand of taxes shall be necessary, but it is the duty of every person subject to taxation to attend at the office of the treasurer (unless otherwise provided) at some time during the time mentioned in a previous section of this act, and pay his or her taxes, and if any one neglects to pay them before the first day of February following the levy of the tax, the treasurer is directed to make the same by distress and sale of his or her personal property, excepting such as is

No demand of taxes needed.

\*Probably (52.)

exempt from taxation, and the tax list alone shall be sufficient warrant for such distress.\*

**Sale by treasurer.** SEC. 757. (47.) When the treasurer distrains goods, he may keep them at the expense of the owner, and shall give notice of the time and place of their sale within five days after the taking, in the manner constables are required to give notice of the sale of personal property under execution, and the time of sale shall not be more than twenty days from the day of the taking; but he may adjourn the sale from time to time not exceeding five days, and shall adjourn at least once when there are no bidders, and in case of adjournment, he shall put up a notice thereof at the place of sale. Any surplus remaining above the taxes, charges of keeping and fees for sale, shall be returned to the owner, and the treasurer shall on demand, render an account in writing of the sale and charges.

**Duty to assist treasurer.** SEC. 758. (48.) If the treasurer be resisted or impeded in the execution of his office, he may require any suitable person to assist him therein, and if such person refuse the aid, he shall forfeit a sum not exceeding ten dollars, to be recovered by civil action in the name and to the use of the county, and the person resisting shall be liable as in the case of resisting the sheriff in the execution of civil process.

**Taxes, lien when delinquent.** SEC. 759. (49.) On the first day of February, the unpaid taxes of whatever description, for the preceding year, shall become delinquent, and shall draw interest as hereinafter provided; and taxes upon real property are hereby made a perpetual lien thereupon against all persons except the United States and this state; and taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire a title. The treasurer shall in no case sell real property for delinquent tax, when personal property not exempt from taxation belonging to the individual can be found in the county, unless the owner shall in writing designate what piece of real property he prefers having sold rather than the personal property; and the sale of real property so designated shall be made at the regular annual sale of real estate as hereinafter provided.

**Penalty for non-payment when due.** SEC. 760. (50.) The treasurer shall continue to receive taxes after they have become delinquent, until collected by distress and sale; but if they are not paid before the first day of March, he shall collect as a penalty for non-payment, from each tax-payer so delinquent, one per cent. of the amount of his tax additional, and if not paid before the first day of April, he shall collect another one per cent. additional, and so for each full month which shall expire before the tax shall have been paid. The treasurer shall in all cases make out and deliver to the tax payer a receipt for taxes paid, stating the time of payment, the description of the land, the amount of each kind of tax, the interest on each, and costs, if any, giving a separate receipt for each year; and shall make the proper entries of such payments in the books of his office, and such receipt shall be in full, for his taxes that year: *provided*, that it shall be the duty of the county treasurer, to receive the full amount of any county, state, or school tax whenever the same is tendered and give a separate receipt therefor.

**Accounts of clerk of board of county supervisors.** SEC. 761. (51.) The clerk of the county board of supervisors shall keep full and complete accounts with the county treasurer, with each

\* Section (46) is substantially section 492 of code of 1851, which was amended by section 1 of chapter 162 of fifth session, which seems not repealed and reads thus: And the county treasurer is hereby authorized to appoint one or more deputies to aid and assist in collecting the taxes thus to be made by distress and sale.



separate fund or tax to itself, in each of which accounts he shall charge him with the amounts in his hands at opening of such account, whether it be delinquent taxes, notes, cash or other assets belonging to such fund or tax, the amount of each respective tax, for each year when the tax book is received by him, and all additions to each tax or fund, whether by additional assessments, interest on delinquent taxes, amount received for pedlers' license, or other items which are additions to the respective funds or taxes, and shall, on the first day of each month, ascertain the amount of delinquent and unpaid taxes of all classes on said day, and charge the treasurer in said account with one per cent. on the amount thereof, to be collected by him as provided in section *fifty-two*\* of this act. In these several accounts he shall credit the treasurer, by the proper vouchers, for money disbursed belonging to each, by double and erroneous assessments, and unavailable taxes. The term double and erroneous assessments includes all improper, incorrect and illegal assessments, the correction or remission of which, causes a diminution of the respective tax; and unavailable taxes, includes such as have been properly and legally assessed, but which there is no prospect of collecting.

SEC. 762. (52.) In all cases where any person shall pay any tax, interest or costs, or any portion thereof that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous or improper assessment, to the improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of supervisors shall direct the treasurer to refund the same to the tax payer—and in case any real property subject to taxation shall be sold for the payment of such erroneous tax, interest or costs as above mentioned, the error or irregularity in the tax may at any time be corrected as above provided, and shall not affect the validity of the sale or the right or title conveyed by the treasurer's deed; but the title so conveyed shall be deemed legal and valid provided that the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold, was levied, and that the taxes were not paid before the sale, and that the property had not been redeemed from sale.

Sale under improper levy.

Refunding.

SEC. 763. (53.) On the first Monday of October in the year 1860 and in each year thereafter, the county treasurer is required to offer at public sale at the court house, or, if there be no court house, at the office of the county treasurer, all lands, town lots or other real property, on which taxes of any description for the preceding year or years, shall have been delinquent and remain due and unpaid, and such sale shall be made for and in payment of the total amount of taxes, interest and costs due and unpaid on such real property.

Sale for unpaid taxes.

SEC. 764. (54.) The county treasurer is required to give notice of the sale, by publishing an advertisement thereof in some newspaper printed in his county, if any such there be, and if there be no such paper printed in his county, then in the newspaper in this state nearest the county seat, and by posting up a copy of said notice on the door of the court house in said county, at least four weeks before the day of sale, which publication is required to be made once in each week for three successive weeks, the last of which publications is required to be at least three weeks prior to the day of sale. It is required that such advertisement shall state the time and place of sale, and contain a description of the several parcels of real property to be sold as the same are recorded on the tax list, the amount of taxes for each year, and amount of interests and costs against each tract, and the names of owners when known, or persons, if any, to whom taxed. The treasurer is

Notice of sale.  
Cost thereof.

\*Probably (50.)

directed to charge and collect, in addition to the taxes and interest, the sum of twenty cents on each tract of real property advertised for sale when the same is included in one line of single column width of the paper in which the publication is made, but if the description occupies more than one line of such single column width, then the sum shall be thirty cents for each description, which sum shall go into the county treasury. The cost of the publication shall be paid out of the county treasury: *provided*, that if the publisher of such newspaper shall be unable, or unwilling, to publish the said notice accurately and properly, and at said rate of twenty cents for each tract of real property, the treasurer may select some other newspaper having the means and ability to make such publication at the price above specified in a satisfactory manner, having due regard to the circulation of such paper.

Sale.

SEC. 765. (55.) The county treasurer shall attend at the court house in his county, or at his own office as herein before provided on the day of sale, and then and there, at the hour of ten o'clock in the forenoon, proceed to offer for sale, separately, each tract or parcel of real property advertised for sale, on which the taxes and costs shall not have been paid.

Mode of sale and what division of land.

SEC. 766. (56.) The person who offers to pay the amount of taxes due on any parcel of land for the smallest portion of the same is to be considered the purchaser, and when such portion constitutes a half or more of the parcel, it shall be taken from the east side thereof, dividing it by a line running north and south, except that town or city lots are to be divided in such case lengthwise by a line parallel with the proper lines of the lots. If the portion taken be less than one half of the tract, it is to be taken from the south-east corner in a square form, as nearly as the form of the land will conveniently permit.—The preceding provisions of this section are subject to the following qualifications: the homestead is liable to be sold for no tax save that which is due on itself exclusively, and the above directions concerning the division of a tract of land shall be modified so as to meet this requirement, and to that end the quantity of land bid may be obtained by drawing the division line in any direction or form so as to avoid the homestead; and when the homestead constitutes part of the tract sold and is not yet ascertained, the court may, at the suggestion of either party, cause a proceeding to be had similar to that required in relation to mechanic's liens, for the ascertainment of the homestead, and in all cases of such sales it may take the requisite order and proceedings to ascertain the land sold, or to set it apart from the homestead.

Continuation.

SEC. 767. (57.) The treasurer shall continue the sale from day to day as long as there are bidders, or until the taxes are all paid.

Duty of vendee.

SEC. 768. (58.) The person purchasing any tract of land or town lot, or any part thereof, shall forthwith pay to the treasurer the amount of taxes and costs charged on said tract or lot, and on failure to do so the said land or lot shall at once again be offered for sale, in the same manner as if no such sale had been made. Such payment may be made in the same funds receivable by law in ordinary payments of taxes.

May pay any time before sale.

SEC. 769. (59.) Any person owning or claiming lands or town lots advertised for sale as aforesaid, may pay the taxes and interest due thereon to the county treasurer, at any time before the sale thereof; but in such case, such person shall pay the costs of advertising, and all other costs which may have accrued up to the time of such payment.

Figures may be used.

SEC. 770. (60.) In all advertisements for the sale of real property for taxes, and in entries required to be made by the clerk of the board of supervisors, treasurer, or other officer, letters and figures may be used

as they have been heretofore, to denote townships, ranges, sections, parts of sections, lots, blocks, dates and the amounts of taxes, interest and costs. And no irregularity, or informality, in the advertisements shall affect in any manner the legality of the sale, or the title to any real property conveyed by the treasurer's deed under this act; but in all cases the provisions of this act shall be deemed sufficient notice to owners of the sale of their property.

SEC. 771. (61.) The treasurer shall obtain a copy of said advertisement, together with a certificate of the due publication thereof, from the printer or publisher of the newspaper, in which the same shall have been published, and shall file the same in the office of the clerk of the board of supervisors and such certificate shall be substantially in the following form.

I, A. B., publisher (or printer) of the \_\_\_\_\_, a \_\_\_\_\_ newspaper printed and published in the county of \_\_\_\_\_, and state of Iowa, do hereby certify that the foregoing notice and list were published in said newspaper once in each week for three successive weeks, the last of which publications was made prior to the first \_\_\_\_\_ of \_\_\_\_\_, A. D. 18—, and that copies of each number of said paper in which said notice and list were published, were delivered by carriers, or transmitted by mail, to each of the subscribers to said paper, according to the accustomed mode of business in this office.

A. B.,  
Publisher (or printer) of the \_\_\_\_\_.

STATE OF IOWA, }  
\_\_\_\_\_ County, } ss.

The above certificate of publication, subscribed and sworn to before me by the above named A. B., who is personally known to me to be the identical person described in the above certificate, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

C. D.,  
Clerk of the board of supervisors of \_\_\_\_\_ county, Iowa.

SEC. 772. (62.) The clerk of the board of supervisors is required to attend all sales of real property for taxes made by the treasurer, and make a record thereof in a book to be kept by him for that purpose, therein describing the several parcels of real property on which the taxes and costs were paid by the purchaser, as they are described in the list or advertisement on file in his office, stating, in separate columns, the amount, as obtained from the treasurer's tax list, of each kind of tax, interest and costs for each tract or lot, how much and what part of each tract or lot was sold, to whom sold, and date of sale. The treasurer shall also keep a book of sales in which, at the time of sale, he shall make the same records which the clerk is required to make by the provisions of this section. He shall also note in the tax list, opposite the description of the property sold, the fact and date of such sale.

Record of all sales to be made by clerk.

SEC. 773. (63.) When all the parcels of real property advertised for sale shall have been offered for sale as provided for in this act, and a portion thereof shall remain unsold for the want of bidders, it shall be the duty of the treasurer to adjourn the sale to some day not exceeding two months from the time of adjournment; due notice of which day shall be given at the time of adjournment, and also by keeping a notice thereof posted in a conspicuous place in the treasurer's office. On the day fixed for the re-opening of the sale, the same proceedings shall be

What done with unsold parts.

had as provided for by this act in relation to the sales commencing on the first Monday of October. And further adjournments shall be made from time to time, not to exceed two months, as provided in this section, and the sales shall thus be continued until the next regular annual sale, or until all the taxes shall have been paid.

Liability to fine  
of treasurer and  
clerk, &c.

SEC. 774. (64.) If any treasurer or clerk shall fail to attend any sale of lands as required by this act, either in person or by a competent deputy, he shall be liable to a fine of not less than fifty nor more than three hundred dollars, to be recovered by an action in the district court by the board of supervisors; the judgment shall be against the treasurer and his bondsmen, and the proceeds go to the school fund. And if such officer, or deputy shall sell or assist in selling any real property, knowing the same to be not subject to taxation, or that the taxes for which the same is sold have been paid, or shall, knowingly and willfully sell, or assist in selling any real property for payment of taxes to defraud the owner of such real property or shall knowingly and willfully execute a deed for property so sold, he shall be liable to a fine of not less than one thousand nor more than three thousand dollars, or to imprisonment not exceeding one year, or to both fine and imprisonment, and to pay the injured party all damages sustained by any such wrongful act; and all such sales shall be void.

They must not  
purchase.

SEC. 775. (65.) If any county treasurer or clerk shall be hereafter, either directly or indirectly, concerned in the purchase of any real property sold for the payment of taxes, he shall be liable to a penalty of not more than one thousand dollars, to be recovered in an action in the district court brought by the board of supervisors; the judgment shall be against such treasurer or clerk, as the case may be, and his bondsmen, and the proceeds shall go to the school fund, and all such sales shall be void.

Sale delayed one  
month.

SEC. 776. (66.) If from neglect of officers to make returns, or from any other good cause, real property can not be duly advertised and offered for sale on the first Monday of October, it shall be the duty of the treasurer to make the sale on the first Monday of the next succeeding month in which it can be made, allowing time for the publication as provided in this act.

Certificate of  
purchase.

SEC. 777. (67.) The county treasurer shall make out, sign and deliver to the purchaser of any real property, sold for the payment of taxes as aforesaid, a certificate of purchase, describing the property on which the taxes and costs were paid by the purchaser, as the same was described in the record of sales, and also how much and what part of each tract or lot was sold, and stating the amount of each kind of tax, interest and costs for each tract or lot, for which the same was sold, as described in the record of sales, and that payment had been made therefor. If any person shall become the purchaser of more than one parcel of property, he may have the whole included in one certificate. For each certificate so delivered the purchaser shall pay a fee of fifteen cents to the clerk of the board of supervisors and thirty-five cents to the county treasurer.

Assignable.

SEC. 778. (68.) Such certificate of purchase shall be assignable by indorsement, and an assignment thereof shall vest in the assignee or his legal representative, all the right and title of the original purchaser.

Time of redemp-  
tion.

SEC. 779. (69.) Real property sold under the provisions of this act, may be redeemed at any time before the expiration of three years from the date of the sale, by the payment in specie, to the clerk of the board of supervisors of the proper county, to be held by him subject to the

order of the purchaser of the amount for which the same was sold and thirty per cent. on the same with ten per cent. interest per annum on the whole amount from the day of sale, and the amount of all taxes accruing after such sale, with ten per cent. interest per annum on such subsequent taxes, unless such subsequent taxes have been paid by the person for whose benefit the redemption is made; which fact may be shown by the treasurer's receipt: *provided*, that if real property of any minor married woman or lunatic be sold for taxes, the same may be redeemed at any time within one year after such disability be removed, upon the terms specified in this section, which redemption may be made by the guardian or legal representatives.

SEC. 780. (70.) The clerk of the board of supervisors shall, upon application of any party to redeem any real property sold under the provisions of this act, and being satisfied that such party has a right to redeem the same, and upon the payment of the proper amount, issue to such party a certificate of redemption, setting forth the facts of the sale substantially as contained in the certificate of sale, the date of the redemption, the amount paid, and by whom redeemed; and he shall make the proper entries in the book of sales in his office and shall immediately give notice of such redemption to the county treasurer. Such certificate of redemption shall then be presented to the treasurer, who shall countersign the same and make the proper entries in the books of his office, and no certificate of redemption shall be held as evidence of such redemption without such signature of the treasurer.

Certificate of redemption.

SEC. 781. (71.) Immediately after the expiration of the term of three years from the date of the sale of any land for taxes under the provisions of this act, the treasurer then in office shall make out a deed for each lot or parcel of land sold, and remaining unredeemed, and deliver the same to the purchaser upon the return of the certificate of purchase.

Deed in three years.

SEC. 782. (72.) The treasurer is required to demand twenty-five cents for each deed made by him on such sales, but any number of parcels of land bought by one person may be included in one deed, as may be desired by the purchaser.

Fee for deed.

SEC. 783. (73.) Deeds executed by the treasurer shall be substantially in the following form:

Form of deeds.

Know all men by these presents, that whereas, the following described real property, viz.: [here follows the description] situated in the county of ———, and state of Iowa, was subject to taxation for the year [or years] A. D. ———; and whereas the taxes, assessed upon said real property, for the year [or years] aforesaid remained due and unpaid at the date of the sale hereinafter named; and whereas, the treasurer of the said county did, on the ——— day of ———, A. D. 18—, by virtue of the authority in him vested by law, at [an adjourned sale of] the sale begun and publicly held on the first Monday of ———, A. D. 18—, expose to public sale at the court house [or office of the county treasurer] in the county aforesaid in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of the taxes, interest and costs then due and remaining unpaid on said property; and whereas, at the time and place aforesaid, A. B. of the county of ——— and state of ———, having offered to pay the sum of ——— dollars and ——— cents being the whole amount of taxes, interest and costs then due and remaining unpaid on said property, for [here follows the description of the prop-

erty sold] which was the least quantity bid for: and payment of said sum having been by him made to the said treasurer, the said property was stricken off to him at that price, [and whereas, the said A. B. did on the \_\_\_\_\_ day of A. D., \_\_\_\_\_ duly assign the certificate of the sale of the property as aforesaid and all his right, title and interest to said property to E. F. of the county of \_\_\_\_\_ and state of \_\_\_\_\_] and whereas, three years have elapsed since the date of said sale and the said property has not been redeemed therefrom as provided for by law,

Now, therefore, I, C. D., treasurer of the county aforesaid, for and in consideration of the said sum to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said A. B. [or E. F.] his heirs and assigns, the real property last hereinbefore described to have and to hold unto him the said A. B. [or E. F.] his heirs and assigns forever: subject however, to all the rights of redemption provided by law. In witness whereof I, C. D. treasurer as aforesaid by virtue of the authority aforesaid, have hereunto subscribed my name on this \_\_\_\_\_ day of \_\_\_\_\_ 18—.

C. D. Treasurer.

STATE OF IOWA, }  
County, } ss.

I hereby certify that before me \_\_\_\_\_ in and for said county, personally appeared the above named C. D., treasurer of said county personally known to me to be the treasurer of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance as treasurer of said county and who acknowledged the execution of the same to be his voluntary act and deed as treasurer of said county, for the purposes therein expressed.

Given under my hand [and seal] this \_\_\_\_\_ day of \_\_\_\_\_ A. D., 18—.

\_\_\_\_\_,  
\_\_\_\_\_.

Deed is prima  
facie evidence of.

SEC. 784 (74.) The deed shall be signed by the treasurer in his official capacity, and acknowledged by him before some officer authorized to take acknowledgments of deeds; and when substantially thus executed and recorded in the proper record of titles to real estate, shall vest in the purchaser all the right, title, interest and estate of the former owner in and to the land conveyed, and also all the right, title, interest and claim of the state and county thereto, and shall be *prima facie* evidence in all courts of this state, in all controversies, and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts:

1. That the real property conveyed was subject to taxation for the year or years stated in the deed.

2. That the taxes were not paid at any time before the sale.

3. That the real property conveyed had not been redeemed from the sale at the date of the deed, and shall be conclusive evidence of the following facts:

1. That the property had been listed and assessed at the time and in the manner required by law.

2. That the taxes were levied according to law.

3. That the property was advertised for sale in the manner and for the length of time required by law.

4. That the property was sold for taxes as stated in the deed.

5. That the grantee named in the deed was the purchaser.

6. That the sale was conducted in the manner required by law.

7. That all the pre-requisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or action in any transaction relating to or affecting the title conveyed, or purporting to be conveyed by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever, required by law to make a good and valid sale, and to vest the title in the purchaser were done, except in regard to the three points named in this section, wherein the deed shall be *prima facie* evidence only.

And in all controversies and suits involving the title to real property claimed and held under and by virtue of a deed executed substantially as aforesaid by the treasurer, the person claiming title adverse to the title conveyed by such deed, shall be required to prove, in order to defeat the said title, either that the said real property was not subject to taxation for the year or years named in the deed—that the taxes had been paid before the sale, or that the property had been redeemed from the sale according to the provisions of this act, and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of this state, but no person shall be permitted to question the title acquired by a treasurer's deed without first shewing that he or she, or the person under whom he or she claims title, had title to the property at the time of the sale, or that the title was obtained from the United States, or this state, after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he or she claims title as aforesaid: *provided*, that in any case where a person had paid his taxes and through mistake in the entry made in the treasurers books or in the receipt, the land upon which the taxes were paid was afterwards sold the treasurers deed shall not convey the title: *provided further*, that in all cases where the owner of lands sold for taxes shall resist the validity of such tax title such owner may show and prove fraud committed by the officer selling the same or in the purchaser to defeat the same and if fraud is so established such sale and title shall be void.

SEC. 785. (75.) When by mistake or wrongful act of the treasurer, land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless by paying him the amount of principal and interest and costs to which he would have been entitled had the land been rightfully sold, and the treasurer and his sureties will be liable to the county for the amount of his official bond, or the purchaser, or his assignee may recover directly of the treasurer in an action brought to recover the same in any court having jurisdiction of the amount, and judgment shall be against him and his bondsmen: *provided always*, that the treasurer or his sureties shall be liable only for his own or his deputies acts.

Liability of land sold when no tax was due.

SEC. 786. (76.) In all suits and controversies involving the question of title to real property held under and by virtue of a treasurer's deed, all acts of assessors, treasurers, clerks of boards of supervisors and other offices *de facto* shall be deemed and construed to be of the same validity as acts of officers *de jure*.

De facto officer.

Not invalid for wrong name.

SEC. 787. (77.) No sale of real property for taxes shall be considered invalid on account of the same having been charged in any other name than that of the rightful owner, if the said property be in other respects sufficiently described.

Evidence of books, &c.

SEC. 788. (78.) The books and records belonging to the offices of the clerk of the board of supervisors and the county treasurer, or copies thereof, properly certified, shall be deemed sufficient evidence to prove the sale of any real property for taxes, the redemption thereof or the payment of taxes thereon.

Entry in case of lot sold which was not subject to taxation.

SEC. 789. (79.) Whenever it shall be made to appear to the satisfaction of the county treasurer, either before the execution of a deed for real property sold for taxes, or if the deed be returned by the purchaser, that any tract or lot was sold which was not subject to taxation, or upon which the taxes had been paid previous to the sale, he shall make an entry opposite such tract or lot on the record of sales, that the same was erroneously sold, and such entry shall be evidence of the fact therein stated. And in such cases the purchase money shall be refunded to the purchaser as provided by this act.

Limitation five years.

SEC. 790. (80.) No action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within five years after the date of the sale thereof for taxes as aforesaid, (anything in the statute of limitations to the contrary notwithstanding:) *provided*, that where the owner or owners of such real property sold as aforesaid, shall at the time of such sale, be minor or minors, or insane, five years after such disability is removed shall be allowed such person or persons, their heirs or legal representatives, to bring their suit or action for recovery of the real property so sold.

Peddlers' tax.

SEC. 791. (81.) A tax for state purposes shall be levied upon peddlers of watches, jewelry and clocks, dry goods, fancy articles, notions, patent medicines or other merchandise not manufactured in this state; for a license to peddle throughout the state for one year as follows: upon each peddler of watches or jewelry, or either of them, thirty dollars; upon each peddler of clocks, fifty dollars; upon each peddler of dry goods, fancy articles, notions, or patent medicines, as follows: upon each peddler thereof, ten dollars; upon each peddler who pursues his occupation with a vehicle drawn by one animal, twenty-five dollars; if drawn by two and less than four animals, fifty dollars; if drawn by four or more animals, seventy-five dollars.

License obtained.

SEC. 792. (82.) Such license may be obtained from the clerk of the board of supervisors of any county, upon paying the proper tax to the treasurer thereof, and license may issue for a less period than one year, for the proportionate amount of tax, and all such license shall state the date of the expiration of the same, and any person so peddling without a license, or after the expiration of his license, is guilty of a misdemeanor, and the person actually peddling is liable, whether he be the owner of the goods or not.\*

\* Section 81 is substantially 17 of chapter 69 of the fourth session, and 64 of chapter 152 of seventh session, and the following act, I do not find repealed:

An Act to amend an Act entitled "An Act to amend Chapter Thirty-seven of the Code in relation to Assessors." Approved Jan. 22, 1853.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa, That if any peddler shall violate the seventeenth section of the act, to which this is amendatory, by peddling, selling or disposing of any of his goods, wares or merchandise, mentioned in said section, without a license, it shall be the duty of the county judge or sheriff of the county in which the offense was committed to arrest such offender*



SEC. 793. (83.) Each county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are certified to be unavailable, double or erroneous assessments as hereinafter provided. Each county responsible.

SEC. 794. (84.) If any county treasurer prove to be a defaulter to any amount for state revenue, such amount shall be made up to the state within the next three coming years, by additional levies in such manner as to annual amounts, as the board of supervisors may direct. In such cases the county can have recourse to the official bond of the treasurer for indemnity. Treasurer's defaulter.

SEC. 795. (85.) When interest is due and allowed by the treasurer of any county or the state treasurer on redemption of auditor's warrants, or county warrants, the same shall be received on the warrants by the holder of the same, with the date of the payment, and no interest shall be allowed by the auditor of state or board of supervisors, except such as is thus received. Interest.

SEC. 796. (86.) If the state treasurer or county treasurer discount auditor's warrants at less than the amount due thereon, either directly or indirectly or through third persons, they shall be liable to a fine not exceeding one thousand dollars, for the benefit of common schools, to be prosecuted as other fines, and the payee of the warrant may be a witness on the trial. Penalty for discounting warrants.

SEC. 797. (87.) County treasurers shall be liable to a like fine for loaning out, or in any manner using for private purposes, state or county funds in their hands, and the state treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor, to be prosecuted by the attorney general in the name of the state for the benefit of common schools. Same, fine against loaning.

SEC. 798. (88.) At their regular meetings in January and June, of each year, the board of supervisors shall make a full and complete settlement with the county treasurer as now required by the code, and they shall make and certify to the auditor of state, all credits to the treasurer for double or erroneous assessments, and unavailable taxes, also all dues for state revenue, interest or delinquent taxes, sales of land, peddlers' license and other dues, if any, also the amount collected for these several items, and revenue still delinquent, each year to itself. Said reports shall be forwarded by mail. Settlement with treasurer.

SEC. 799. (89.) The treasurer of each and every county, shall, on or before the tenth day of each month, prepare a sworn statement of the amount of money remaining in his hands on the first day of that month, received by him and belonging to the state treasury, and he shall, on said tenth day of each month, deposit a copy of such statement with the post master, at the county seat of his county, duly sealed and directed to the auditor of state, and have the same registered; and he shall each year, unless otherwise directed by the state auditor, pay into the state treasury, on or before the tenth day of February, all the money due the state, remaining in his hands on the first day of February; and on or before the tenth day of November, all the money due the state remaining in his hands on the first day of November; he shall, also, at any time when directed by the auditor of state, forthwith pay into the state Treasurer's monthly statement.

and prosecute him to final justice before any justice of the peace of the township, or district court of the county in which the offense was committed.

SEC. 2. Upon conviction of the offense as aforesaid, the offender shall forfeit and pay double the amount of license required in said section seventeen for peddling the description of goods which he may be convicted of so selling without a license.

treasury, or to the treasurer of any county, or to any bank incorporated under the laws of this state, any or all the money due the state and remaining in his hands. In case the treasurer of any county shall fail to prepare and deposit the statement required in this section as herein provided, he shall forfeit and pay for each and every failure a sum not less than one hundred dollars, nor more than five hundred, to be recovered in an action brought in the name of the state auditor, to recover the same in any court having jurisdiction of the amount. The judgment shall be against the treasurer and his bondsmen, and the amount recovered shall go to the state treasury.

Payment through bank.

SEC. 800. (90.) The state auditor may require any county treasurer to make his payment through any other county treasurer, or through any bank chartered by the laws of this state, but that no charge be made against the state by said bank, or said amounts to exceed one fourth of one per cent. for transportation: but any payment made in pursuance of such requirement of the auditor, shall be a release to the county of its liabilities to the state, to the amount so paid.

Revision of treasurer's account by supervisors.

SEC. 801. (91.) The state auditor shall make and transmit to each clerk of the board of supervisors on the first day of May each year a statement of the county treasurer's account with the state treasury, which account shall be submitted by said clerk to the board of supervisors, at their first meeting; and if they find the same to be incorrect in any particular, they shall forthwith certify the facts in relation to the same, to the auditor of state.

Treasurer going out of office.

SEC. 802. (92.) When a county treasurer goes out of office he shall make a full and complete settlement with the board of supervisors, and deliver up all books, papers, moneys and all other property appertaining to the office, to his successor, taking his receipt therefor; the board of supervisors shall make a statement (so far as state dues are concerned,) to the auditor of state, showing all charges for whatever purposes, which have been created against the treasurer during his term of office, and all credits which have been made; the delinquent taxes and other unfinished business charged over to his successor and the amount of money paid over to his successor, showing to what year and to what accounts the amount so paid over belongs. They shall also see that the books of the treasurer are correctly balanced before being passed into the possession and control of the treasurer elect.

Duplicate receipts for payments to treasurer.

SEC. 803. (93.) When any officer or other person pay the state treasurer any sum of money for revenue, or school purposes, he shall take duplicate receipts therefor, one of which he shall file with the auditor of state, who shall charge the same to the treasurer in account of the proper fund.

Each fund of treasurer to be kept distinct.

SEC. 804. (94.) The state treasurer shall keep each distinct fund coming into his possession as public money in a separate apartment of his safe, and at each quarterly settlement with the state auditor, he shall count each fund in the presence of the auditor, to see if the same agrees with the balance found on the books. The total amount acknowledged to belong to each fund shall be exhibited before the count, and county treasurers shall account with such person as the board of supervisors may direct in like manner, and a report of such accounting shall be made to the board at their next meeting, by the person so appointed by them.

Fine for disobedience.

SEC. 805. (95.) Any officer neglecting or refusing to comply with this act, for whose negligence no other penalty is provided by this act, shall be liable to a fine in any sum not exceeding one thousand dollars,

to be prosecuted by the attorney general, or district attorney, for the benefit of common schools.

SEC. 806. (96.) The treasurer of the state shall keep in the safe in his office all moneys received by him as such treasurer, until the same are withdrawn therefrom upon warrants issued by the auditor of state in accordance with law. The treasurer shall not deposit any of the moneys received by him as treasurer with, or lend any portion thereof to any person or persons, or associations of persons whatever, or to any company incorporated or unincorporated, nor shall he in any manner whatever, allow said moneys, or any part thereof, to be withdrawn from said safe or used in any manner whatever, otherwise than may be provided by law. Not to lend money

SEC. 807. (97.) Should the treasurer of state at any time violate any of the provisions of section ninety-six of this act, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five thousand dollars, nor more than twenty thousand dollars, and imprisoned in the county jail not less than one year, nor more than five years, or both at the discretion of the court. Penalty.

SEC. 808. (98.) Except for the purposes of the assessment equalization, and levy of the taxes for the year 1860, chapter 152 of the acts of the (seventh) general assembly is hereby repealed, and all other acts or parts of acts conflicting with this act are hereby repealed, so far as they conflict with this act. Repeal

SEC. 809. (99.) Where any duties, that by the provisions of this act are required to be performed by the clerk of the board of supervisors should be performed prior to the organization of said board they shall be performed by the clerk of the district court and all duties imposed by this act on the board of supervisors which are required to be performed before the organization of said board, shall, until such organization, be performed by the officers who are now required by law to perform them. Duties to be performed by clerk of law of supervisors takes

ARTICLE 2.

An Act exempting lands owned by the University from Taxation and protecting Real Estate on which the School or University Funds have liens from sale for Taxes.

[Passed April 2, 1860, took effect July 4, 1861], *Laws of Eighth General Assembly, Chapter 98.*

SECTION 810. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That any school or university lands of this state, bought on a credit, whenever the same is sold for taxes, the purchaser at such tax sale shall only acquire the interest of the original purchaser in such lands, and no sale of any such lands for taxes shall prejudice the rights of the state or university therein, or preclude the recovery of the purchase money or interest due thereon. Purchases of school lands at tax sale.

SEC. 811. (2.) That in all cases where real estate is mortgaged or otherwise encumbered to the school or university fund of this state, the interest of the person who holds the fee title shall alone be sold for taxes, and in no case shall the lien or interest of the state be affected by any sale of such-encumbered real estate made for taxes. Interest of state not sold

## ARTICLE 3.

An act to enforce the Collection of Delinquent Taxes for the year 1858.

[Passed April 2, 1860, took effect May 9, 1860; Eighth Session, Chapter 101.]

WHEREAS, Chapter 152 of the laws of the seventh general assembly went into force and effect on the fourth day of July, 1858, and made no provision for the assessment and levy of taxes for that year; and whereas, the taxes for that year were assessed and levied in pursuance of the laws in force prior to the taking effect of said chapter of the acts of the said assembly, and by reason thereof many persons against whose property said taxes are assessed refuse to pay the same, now, therefore,

Levy of 1858  
made valid.

SECTION 812. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That all assessments and levies of taxes in this state for the year 1858, made in pursuance of the laws in force prior to the fourth day of July, 1858, whether made before or after said fourth day of July, if the same were made in said year 1858, be and the same are hereby declared to be legal and valid, with like effect as if chapter 152 of the acts of the seventh general assembly had not been enacted.

Collectors must  
collect.

SEC. 813. (2.) That it shall be lawful for, and is hereby made the duty of the several collectors of taxes in this state to proceed and collect all taxes described and legalized in section first of this act, that may remain delinquent, together with like interest and costs, as in other cases of like delinquent taxes assessed in pursuance of law.

Title shall be  
good.

SEC. 814. (3.) That the title to all property, whether real or personal, that may be sold in the collection of the delinquent taxes in this act legalized shall vest in the purchaser with like effect as if said taxes had been legally assessed in the first instance, and said sales taken place in pursuance of law.

## ARTICLE 4.

An act to provide for a levy of Tax for State purposes for the year 1860.

[Passed April 2, 1860, took effect April 21, 1860; Eighth Session, Chapter 115.]

WHEREAS, By section thirty-four (34) and thirty-five (35) of an act in relation to revenues passed by the seventh general assembly of the state of Iowa, the census board are authorized to fix the rate of state tax to be levied for those years only in which real property is by law required to be assessed, and *whereas* the rate of levy fixed by law when no action of the said board is had, is three mills on the dollar valuation, and *whereas* the law requires no assessment of real property for the year 1860. Therefore

Applicable to  
1860.

SECTION 815. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That it shall be the duty of the several county clerks, to make and certify abstracts of the assessment for 1860 as provided by section thirty-three (33) of said act in relation to revenues, in the same manner as for years in which real property is assessed.

Meeting of cen-  
sus board.

SEC. 816. (2.) That the census board shall meet at the time specified in section thirty-four (34) of said act and shall determine the rate of tax that shall be levied for state purposes for said year, and it shall be the duty of the auditor of state to notify the several county clerks of the rate so fixed.

Transcript of  
assessment.

SEC. 817. (3.) That immediately before delivering the tax book to

the county treasurer, and after the same has been completed, it shall be the duty of the county clerk of each county to transmit to the auditor of state a certified transcript of the assessment in his county showing the aggregate value of lands assessed, the aggregate value of real property in towns, and the aggregate value of personal property, and also the aggregate amount of each separate tax on said tax book.

## ARTICLE 5.

An act to rebate Taxes assessed and levied upon Property destroyed by Fire.

[Passed April 3, 1860, took effect May 9, 1860; Laws of Eighth General Assembly, Chapter 145.]

SECTION 818. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That where property real has been or shall hereafter be destroyed by fire, after the same has been assessed for taxes, it shall be the duty of the county judge to ascertain the value of the property so destroyed, and rebate from the taxes assessed on said property the amount assessed against that part so destroyed: *provided,* that said taxes shall not have been due and delinquent for a period of thirty days: *provided further,* that there shall be no rebatements where the property is insured to the amount of two-thirds of its value, and where it is partially insured, then the rebatement shall be only for two-thirds of the amount for which it is not insured. Abatement of tax  
in case of fire.

PRIOR LAWS. 1. An act to provide for the assessment and collection of township and county taxes, passed April 22, 1833; M. D., 1833, p. 88.

*Amended* Dec. 6, 1836; Wis., 1st sess., No. 16, p. 43.

2. An act to provide for the defraying the public and necessary expenses in the respective counties of this territory, and for other purposes, passed March 6, 1833; M. D., 1833, p. 98; amended Dec. 6, 1836; Wis., 1st sess., No. 16, p. 43.

3. An act exempting sheep from taxation, passed March 2, 1831; M. D., 1833, p. 123.

4. An act to provide for the assessment and collection of territorial taxes, passed April 22, 1833; M. D., 1833, p. 165; amended Dec. 9, 1836; Wis., 1st sess., No. 41, p. 76.

5. An act making counties equal counties for certain organic purposes, passed Dec. 6, 1836; Wis., 1st sess., No. 16, p. 43.

6. An act amending "an act to provide for the assessment and collection of territorial taxes," passed Dec. 9, 1836; Wis., 1st sess., No. 41, p. 76.

7. An act for assessing and collecting county revenue, passed Jan. 18, 1838; Wis., 2d sess., No. 68, p. 213.

8. An act to provide for a territorial revenue, passed Jan. 19, 1838; Wis., 2d sess., No. 93, p. 303; all the above repealed Aug. 30, 1840.

9. An act to collect taxes of the half breed lands in Lee county, passed Jan. 24, took effect Feb. 24, 1839; I. T., 1st sess., p. 224.

10. An act for assessing and collecting county revenue, passed Jan. 24, took effect Feb. 24, 1839; I. T., 1st sess., p. 401; repealed by reprint, chap. 132, sec. 50, p. 562; also by No. 13.

11. An act to provide for a territorial revenue, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 418; repealed by reprint, chap. 132, sec. 58, p. 565.

12. An act regulating grocery licences, passed Jan. 4, took effect June 1, 1840; I. T., 2d sess., chap. 22, p. 27.

13. An act amendatory to "an act for assessing and collecting county revenue, passed Jan. 24, 1839," passed Jan. 14, took effect Feb. 14, 1840; I. T., 2d sess., chap. 49, p. 64; repealed by reprint, chap. 132, sec. 50, p. 562.

14. An act to provide for assessing and collecting county revenue, passed Jan. 15, took effect Feb. 15, 1841; I. T., 3d sess., chap. 70, p. 65; repealed by reprint, chap. 132, sec. 50, p. 562; also by No. 13.

15. An act to levy a territorial tax, passed Jan. 15, 1841; I. T., 3d sess., chap. 90, p. 100; repealed by reprint, chap. 132, sec. 58, p. 565.

16. An act to provide for assessing and collecting county and territorial revenue, passed Feb. 13, 1843; reprint, chap. 132, p. 544; repealed I. T., 6th sess., chap. 21, p. 26.

17. An act to amend same, passed Jan. 3, took effect Feb. 3, 1844; I. T., 6th sess., chap. 1, p. 1.
18. An act to provide for assessing and collecting public revenue, passed Feb. 15, took effect April 1, 1844; I. T., 6th sess., chap. 21, p. 26.
19. An act granting license to peddlers, passed Feb. 15, took effect April 1, 1844; I. T., 6th sess., chap. 25, p. 46.
20. An act for assessing territorial taxes and for other purposes, passed Feb. 15, took effect June 1, 1844; I. T., 6th sess., chap. 29, p. 52.
21. An act allowing collectors to make deeds, passed June 19, 1844; I. T., 6th sess. extra, chap. 6, p. 4.
22. An act to amend the act of Feb. 15, 1844, passed May 28, took effect June 28, 1845; I. T., 7th sess., chap. 5, p. 22.
23. An act amending that of Feb. 15, 1844, passed Jan. 2, 1846; I. T., 8th sess., chap. 6, p. 5.
24. An act amending act of May 28, 1845, passed Jan. 2, 1846; I. T., 8th sess., chap. 7, p. 5.
25. An act to levy an additional tax for territorial purposes, passed Jan. 16, 1846; I. T., 8th sess., chap. 13, p. 11.
26. An act to provide for collecting revenue for state and county purposes, passed Feb. 25, 1847? 1st sess., chap. 100, p. 136.
27. An act amending same, passed Jan. 25, 1848? 1st sess. extra, chap. 63, p. 63.
28. An act further amending same, passed Jan. 15, 1849? 2d sess., chap. 92, p. 123.

DECISIONS. Under the revenue law of 1844, the county treasurer was bound to receive the delinquent taxes unpaid for 1845 for two years, beginning on the first day of January after the filing of the delinquent lists, or for three years from the 1st of January next after the assessment, 5 Iowa, 284; value of decree in case of foreclosure, 6 Iowa, 179; appeal, form of, *Mass v. Lot No. 7, &c.*, June, 1859, and *Fuller v. N. W.  $\frac{1}{4}$  &c.*, Dec., 1859; what will avail to vacate a decree of foreclosure, 6 Iowa, 331; When lands subject to sale under the law of 1844; 3 G., 133; 1 G., 325; 5 Iowa, 284; 6 *ib.*, 150; no power under the code to sell for taxes under the law of 1847, 6 Iowa, 5; a school tax levied under sec. 31 of chap. 52, of 7th sess., is unconstitutional, *Louisa Co. v. Davison*, June, 1859; taxation not taking property for public use as requiring compensation under the constitution, 8 Iowa, 82; school tax, *Louisa Co. v. Davison*; right to distrain, 8 Iowa, 193; what the redemptioner need pay, *Byington v. Ryder*, Dec., 1859; who may redeem, 7 Iowa, 512; construction of tax titles, 6 Iowa, 179-331; 3 G., 133; foreclosure under chapter 74, of 4th sess., 6 Iowa, 179; chapter 152 of 7th sess., allows no foreclosure under its sales, as in chap. 37, code, *Byington v. Ryder*; in foreclosure, who made parties, 6 Iowa, 5; 4 G., 135; description of the land in such proceeding, 6 Iowa, 179; mode of appearance when land is sued by name, *Fuller v. N. W.  $\frac{1}{4}$ , of N. E.  $\frac{1}{4}$* , Dec., 1859; evidence of assessment book and tax deed, 3 G., 133; acceptance of assessment roll by county commissioners, *Rayburn v. Kuhl*, Dec., 1859

## TITLE VII.

### CHAPTER 46.

#### OF ROADS AND HIGHWAYS.

[Code—Chapter 38\*.]

##### ARTICLE I.

SECTION 819. (514.) The county *court* has the general supervision County court over the highways in the county with power to establish and change them as herein provided and to see that the laws in relation to them are carried into effect.

SEC. 820. (515.) County and state roads hereafter established must Width. be sixty-six feet in width, unless otherwise specially directed, but the *court* may for good reasons fix a different width not less than thirty-three feet.

SEC. 821. (516.) A county road may within the limits aforesaid be Changes. increased or diminished in width or it may be altered in direction or discontinued, by pursuing substantially the steps herein prescribed for opening a new road.

SEC. 822. (517.) Bridges are parts of the public highways and must Bridges not be less than sixteen feet in breadth.

SEC. 823. (518.) The county *court* may prohibit any person from Penalties riding or driving faster than a walk across any bridge maintained at the public charge and whose entire length is twenty-five feet or upwards, under the penalty of one dollar for each offense. Notices thereof must be conspicuously posted at each end of such bridge. The penalty may be recovered by civil action before any justice of the peace in the name and for the use of the county.

#### *Manner of establishing County Roads.*

SEC. 824. (519.) Previous to the presentation of a petition for the Notice establishment of a county road four weeks' notice thereof must be given by being posted up at the court house door and in three public places in each township through which it is to pass and in the neighborhood of the proposed road.

SEC. 825. (520.) Such notice must state the principal points through Same. which it will pass if any such are contemplated, and state the time at which application will be made to the county *court* for the appointment of a commissioner to examine and report upon the same.

SEC. 826. (521.) Security must be given to the satisfaction of the Security. *court* conditioned that all the expenses growing out of the application will be paid by the obligors in case the contemplated road is not finally established.

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\* Read sections 312-11-13, and 317, and chapter 22, articles 12, and 13, and then throughout this chapter read the words "court" and "judge," either "board of supervisors" or "clerk of the board of supervisors," as the sense or the powers to be conferred on the clerk may require.

Same.	SEC. 827. (522.) If the road is less than five miles in length the security given shall be for the absolute payment of such expenses.
Hearing.	SEC. 828. (523.) The <i>court</i> at the time of the application specified in the notices aforesaid (which must be on some of its regular days of session) or at some other time to be then fixed, shall proceed to the consideration of the case, and if satisfied that the above mentioned prerequisites have been complied with shall appoint some suitable and disinterested inhabitant of the county a commissioner to examine into the expediency of the proposed road and to report accordingly.
View.	SEC. 829. (524.) The time for the commencement of such examination shall be fixed by the <i>court</i> , and should the commissioner for any cause fail to commence on the day, the <i>court</i> may fix another for that purpose.
Same.	SEC. 830. (525.) The commissioner is not confined to the precise matter of the petition but may inquire and determine whether that or any road in the vicinity answering the same purpose and in substance the same be required, but such road must not be laid out through any burying ground which is by law exempt from execution.
Same.	SEC. 831. (526.) In forming his judgment he must take into consideration both the public and private convenience and inconvenience and also the expense of the proposed road.
Report.	SEC. 832. (527.) After a general examination, if he should not be in favor of establishing the proposed road he will so report and no further proceedings shall be had thereon.
Proceedings of viewer.	SEC. 833. (528.) If he deems such establishment expedient he may proceed at once to lay out the road as hereinafter directed and may report accordingly if the circumstances of the case are such as to enable him to do so without pursuing the course pointed out in the next section.
Same.	SEC. 834. (529.) But if the precise location of the road can not be otherwise given he must call to his aid a competent surveyor and the necessary assistants and cause the line of the road to be accurately surveyed and plainly marked out.
Same.	SEC. 835. (530.) The commissioner, surveyor and assistants must be sworn by some officer authorized to administer oaths, to the faithful and impartial discharge of their several duties, except that where the county surveyor is employed he need not be sworn.*
Same, marks.	SEC. 836. (531.) Mile posts must be set up at the end of every mile and the distance marked thereon, and stakes must be set at each change of direction on which shall be marked the bearing of the new course. Stakes must also be set at the crossing of fences and streams, and at intervals in the prairie not exceeding a quarter of a mile each; in the timber the course must be indicated by trees suitably blazed.
Bearings.	SEC. 837. (532.) Bearing trees must when convenient be established at each angle and mile post, and the position of the road relative to the corners of sections, the junction of streams, or any other natural or artificial monument or conspicuous object, must as far as convenient be stated in the field notes and shown on the plat.
Plat	SEC. 838. (533.) A correct plat of the road together with a copy of the field notes of the surveyor (if one has been employed) must be filed as a part of the commissioner's report.
Pay.	SEC. 839. (534.) The commissioner shall receive one dollar and fifty cents a day for his services, and the surveyor and assistants such

\* Thus amended by eighth session, chapter 23, passed March 2, 1860.



compensation as is agreed upon, being the lowest price for which competent persons can be employed and not exceeding three dollars a day for the surveyor and one dollar and twenty-five cents for the assistants.

SEC. 840. (535.) Upon the filing of the report in favor of the proposed road the *court* must appoint a day when the matter will be acted upon, which shall not be less than sixty nor more than ninety days distant. Hearing.

SEC. 841. (536.) Within thirty days after the appointment of the day all claims for damages in consequence of the establishment of the road must be made if at all, but where a sufficient excuse for not filing such claim within the time aforesaid is shown by affidavit the claim may be considered if made at any time before final action upon the road, and the time for such final action may thereupon be postponed to a future day if necessary. Damages.

SEC. 842. (537.) Such claims must be in writing and filed in the county office. Same.

SEC. 843. (538.) Upon the filing of such claim the *court* must appoint three suitable and disinterested voters of the county as appraisers to view the ground on a day fixed by the *court* and report upon the amount of damages sustained by the claimant after deducting therefrom the benefit he will receive from said road. Appraisers.

SEC. 844. (539.) The court shall cause notice of their appointment to be given to each of these appraisers, fixing the hour at which they are to meet at the office of the clerk of the *court* or of some justice of the peace therein named. Same.

SEC. 845. (540.) If the appraisers are not all present within one hour of the time thus fixed the *court* or the justice, as the case may be, may fill the vacancy by the appointment of others. Same.

SEC. 846. (541.) The number being completed they must be sworn to discharge their duty faithfully and impartially.

SEC. 847. (542.) They must file their report before the day appointed as aforesaid for final action upon the establishment of the road. Report.

SEC. 848. (543.) Should the report not be filed in time or should any other good cause for delay exist, the court may postpone the time for final action on the subject and may if expedient appoint other appraisers. Same.

SEC. 849. (544.) The appraisers shall each receive one dollar and fifty cents a day for the time actually employed in the performance of their duties. Pay.

SEC. 850. (545.) Should no damages be awarded to the applicant the whole of the costs growing out of the application for damages shall be paid by him. Costs.

SEC. 851. (546.) When the time for final action in relation to the road arrives, whether application for damages has been made or not, the *court* may hear testimony and receive petitions for and against the establishment of such road. It may establish or reject the road absolutely or it may make such establishment conditional upon the payment in whole or in part of the damages awarded or the expenses incurred in relation thereto, as the public good may seem to require. Hearing.

SEC. 852. (547.) In the latter case, if the condition is not performed by the time appointed the subject shall come up for a rehearing and new action thereon. Condition.

SEC. 853. (548.) If money is thus advanced to secure the opening of a road a memorandum thereof must be made in the record and the person so advancing it shall receive from the clerk a certificate of such Damages re-funded.

fact. The road shall not thereafter be discontinued without refunding to him or his legal representatives the amount so advanced, without interest.

Same      SEC. 854. (549.) When damages have been paid by the county or by an individual for injury to land in consequence of the establishment of a road the amount must be refunded whenever the road is discontinued, and the claim for such refunding is a lien upon the land for the taking of which damages were given, which may if necessary be sold to liquidate such claim.

Record, open-  
ing      SEC. 855. (550.) After the road has been finally established the plat and field notes must be recorded by the clerk, and the supervisor of roads shall be directed to have the same opened and worked according to law.

Opening      SEC. 856. (551.) A reasonable time must be allowed to enable the owners of land to erect the necessary fences adjoining the new road.

Crops      SEC. 857. (552.) Where crops have been sowed or planted before the road is finally established the opening thereof shall be delayed until the crop is harvested.

Con cert      SEC. 858. (553.) Roads may be established without the appointment of a commissioner, provided the written consent of all the proprietors of the land to be used for that purpose be first filed and recorded.

Survey      SEC. 859. (554.) If a survey be necessary to give the road a precise location the expense thereof shall be borne by the county if the road be more than three miles in length.

Minor &c      SEC. 860. (555.) The rights of married women and the interests of minors and insane persons are in such cases and for such purposes under the control of their husbands or guardians.

County line.      SEC. 861. (556.) The establishment of a road either along or across a county line may be effected by the concurrent action of the respective county *courts* in the mode above prescribed, the commissioners in such cases must act in concert and the road will not be deemed established in either county until it is so in both.

[557) to (612) inclusive are either expressly repealed or impliedly superseded by "an act providing for the election of supervisors and defining their duties," passed Jan. 22, 1853, took effect Feb. 2, 1853, laws of fourth general assembly, chapter 48, page 79, or by "an act to provide for the making and repairing of public highways, and prescribing the duties of township officers in certain cases," which superseded the former, or by "an act defining the mode of laying out, establishing, changing and vacating state roads."]

#### ARTICLE 2.

An act defining the mode of laying out, establishing, changing and vacating State Roads.

[Passed March 23, 1858, took effect July 4, 1858, Laws of Seventh General Assembly, Chapter 149, page 290 ]

Petition to coun-  
ty judge      SECTION 862. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all state roads, shall hereafter be established by petition to the county *court*, as hereinafter provided.

Point's designat-  
ed      SEC. 863. (2.) All petitions for any state road shall specify the place of beginning, the intermediate points, if any, and the place of termination of said roads.

(Com missioner  
appointed      SEC. 864. (3.) On application by petition, signed by at least twenty freeholders of each county, through which it is proposed to establish

any state road, the county *court* of each of said counties shall appoint one disinterested freeholder of his county as commissioner to view and survey said road.

SEC. 865 (4.) Previous to granting an order on any petition presented as aforesaid, one of the parties in each county through which such road may pass, shall execute a bond with two or more responsible freeholders in said county, as securities to the satisfaction of the county *court*, payable to the state of Iowa, and conditioned for the payment of all expenses which may accrue in the location of said road, in case the same shall not be established a public highway.

Bond given for expenses

SEC. 866. (5.) On the filing of a petition and bond, agreeable to the provisions of this act, which shall be at the same term of *court* in all the counties interested in the location of the road, the county *court* of each county, shall issue an order directing the commissioner by them appointed, to meet the commissioners of the other counties or county (as the case may be,) at the place of the beginning of said road, on the first Wednesday of the month then next ensuing, and the commissioners when met as before directed, shall employ a competent surveyor, chain-carriers and a marker, and other assistants, if necessary, and proceed to discharge the duties of their appointments, respectively: *provided*, that each commissioner, surveyor and chain-carrier, shall before entering on the duties of his appointment, take an oath or affirmation to discharge his duties faithfully, and according to law.

Commissioners meet.

Employ surveyor

Qualify

SEC. 867. (6.) Each state road shall be laid out from the place of beginning to the place of termination on the most practicable route, always having regard to suitable ground, improvements already existing, section lines and intermediate points, if any, and all state roads that shall hereafter be established, agreeable to the provisions of this act shall be opened and considered public highways, sixty-six feet wide: *provided*, that no road shall be laid out through any garden, orchard or ornamental grounds, contiguous to a dwelling house, or so as to cause the removal of any dwelling house or other building without the consent of the owner.

Routes determined

Gardens can not be divided

SEC. 868. (7.) The commissioner appointed to lay out and establish any state road, shall cause the same to be correctly surveyed and marked, through the whole distance, and at each angle of the same, and note the courses and distances thereof, and at the crossing of each road or stream, and at the end of each mile, shall mark the number thereof, on a tree or monument erected by them for that purpose. And the commissioners and surveyor of each ward, shall make a certified return of the survey and plat of the whole length of said road, specifying in said return the distance the same may have been laid out in each county, and whether in their opinion the public convenience requires the establishment of said road or any part thereof. One complete copy of which return shall be signed by a majority of the commissioners and surveyor, and immediately deposited in the office of the county *judge* of each county in which any part of said road shall be laid out, and the *judge* of the said county shall file the same in his office.

Manner of survey.

Certificate and plat made out and recorded

SEC. 869. (8.) In case the commissioners report in favor of the establishment of such road, the county *court* of the respective counties shall, at their next regular term after the filing of said report, cause a notice thereof to be published in one or more newspapers published in the county, or having a general circulation therein for six consecutive weeks before the term at which the matter will be heard, notifying all the parties interested in the establishment of the same, that the respect-

County judge determines the road, upon notice by publication.

- ive county *court* of the said counties, will hear the parties in favor of, or against the establishment of said road, and the application for damages of any person on account of the location of said road through his or their lands; *provided further*, that written notices, posted in one or more of the most public places near the line of said road, in each township through which the road may pass, and one such on the door of the court house of said county shall be given in all cases of publication under this act where no newspaper is established within the county.
- Written notices may be given.
- Aggrieved party indemnified.
- Jury appointed to assess damages.
- Jury report.
- County may pay damages.
- Petitioners pay damages
- Road established.
- Compensation of surveyor, &c.
- Paid by county.
- Right of appeal.
- Security given for costs.
- SEC. 870. (9.) If any person or persons shall consider themselves aggrieved by the location of said road through his or their lands, such person or persons shall file with the county *judge* of the proper county, a petition in writing, setting forth the premises on which they claim damages before the term of *court* designated in the publication of the notice provided in the preceding section, and said *judge* shall appoint a jury of three disinterested freeholders of the county, whose duty it shall be, after having taken an oath or affirmation, to faithfully and impartially discharge the duties imposed upon them by this act, to proceed to view the said road the entire distance, the same may have been located through the premises of the complainant or complainants, and of minors, idiots, lunatics or insane persons, and to assess the compensation to be paid in money for the property sought to be appropriated, without regard to the benefits resulting from the location of said road, and they shall report to the next regular term of said *court*, their doings in the premises, setting forth the amount of damages by them adjudged due to each person or company, and the description of such person or company's land so damaged.
- SEC. 871. (10.) If the county *court* shall be satisfied the amount so assessed and determined by the jury aforesaid be just and equitable, and that said road or any part thereof, will in their opinion, be of sufficient importance to the public to cause the damages to be paid by the county, they shall order the same to be paid the petitioner, from the county treasury, but if in their opinion the said road is not of sufficient importance to the public to justify the payment of the same by the county, they may refuse to establish the same a public highway, unless the damages and expenses are paid by the petitioners. But if there be no application of damages or the damages are paid by the county or petitioners, then and in either case, the *court* shall establish the same a public highway, and record the same in the proper record.
- SEC. 872. (11.) The following persons required to render services under this act shall receive compensation for each day they shall necessarily be employed, as follows, to wit: commissioners, two dollars per day, the surveyor three dollars, and chain-carriers, markers and other assistants, one dollar and fifty cents each, to be charged as costs and expenses, and such costs and expenses when so adjudged, shall be paid by the several counties in proportion to the length of time occupied on such road in each county.
- SEC. 873. (12.) An appeal from the final decision of the county *court* on any petition for damages sustained by the location of any state road, as provided by this act, shall be allowed to the district court of the county in which the land lies; but notice must be given of such appeal within twenty days after said decision was made, and no appeal shall be allowed until the appellant shall have filed a bond, with sufficient security, approved by the county *judge*, for the payment of all costs occasioned by such appeal, in case he does not obtain a better or more favorable judgment in said court than he obtained of the county *court*,

and the county *judge* shall, within ten days from the time such appeal was taken, deliver to said court a full transcript of all proceedings had before the county *court*, and on the receipt of such transcript, the court or clerk shall notify four of the petitioners whose names appear first upon the petition asking said road, that can be found in the county, and such notices may be served in the same manner as notices of appeal in other cases, and in such suits the appellant shall be plaintiff, and if the county *court* has ordered the damages to be paid from the county treasury, then the county shall be defendant, if not then the four petitioners above mentioned shall be defendants, and the final decision of said *court* shall be certified to the county *judge*, and by him recorded, which decision shall be final except as hereinafter provided.

Transcript of proceedings.

Plaintiff and defendant.

SEC. 874. (13.) In all cases of appeal from the final decision of the county *court*, as provided in the twelfth section of this act, the appellant or appellants shall pay all costs that may accrue in consequence of said appeal, unless the judgment in the district court shall exceed in amount the award rendered by the jury appointed by the county *court*.

Appellant pays.

SEC. 875. (14.) If upon the reception of the decision obtained in the district court, the county *court* shall not deem such road of sufficient importance to cause the expenses incurred and damages assessed in the district court, to be paid by the county, he may refuse to establish the same unless the parties interested in the location of said road, shall pay or cause to be paid, before the opening of said road, to the satisfaction of the county *court*, in case said road is established a highway, all expenses incurred and damages assessed: *provided however*, it shall be lawful for the county *court*, if in their opinion a part only of said road will be of public utility, to record and establish such useful part, and reject the residue, in case it be capable of division.

Excessive costs stops the road.

Portion of the road established.

SEC. 876. (15.) In case such expense and damages are paid or secured to be paid as aforesaid, or the county *court* order the same to be paid out of the county treasury, then, and in either case, he shall enter an order that said road be established a public highway.

Highway established.

SEC. 877. (16.) For their services required by the twelfth and thirteenth sections of this act, the officers and other persons required to perform services shall each be entitled to the same fees as they are entitled to by law for like services in other cases, to be taxed in the bill of costs in court.

Fees.

SEC. 878. (17.) It shall be lawful for the county *court* of any county in this state, on notice given in one or more newspapers in general circulation in the county, for four consecutive weeks, and on petition being presented to the county *court* signed by at least twelve freeholders of the county, for lessening or reducing the width of any state road, which now is or hereafter may be laid out and established, if the *court* shall deem just and proper so to do, to reduce the width of any such road or part thereof, to any width not less than thirty-three feet, and shall make a record of the same: *provided*, that the county *court* shall, previous to making an order lessening or reducing the width of any state road as provided by this section, appoint three disinterested citizens of the county, to view and report to them under oath or affirmation, and at the expense of the petitioners as to the utility or inutility of such proposed change, and also the width which in their opinion is necessary.

Reducing the width of roads.

Road viewers appointed.

Section (18) [obsolete.]

SEC. 879. (19.) The portion of a state road lying within any county, shall, from the time the same is established, be regarded and treated in all respects as a county road, and may be changed or altered in the same

State roads considered county roads.

Roads discontinued. manner as provided by law in case of county roads, and may be discontinued by the concurrent action of the county courts of the several counties in which the same may be situated.

## ARTICLE 3.

"An Act to provide for the making and repairing of public highways and prescribing the duties of township officers in certain cases."

[Passed March 23, 1858, took effect July 4, 1858; *Laws of Seventh General Assembly, Chapter 154, page 339.*]

Road districts formed. SECTION 880. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the township trustees of the several townships of this state shall meet on the first Monday of October, A. D., 1858, and every subsequent year thereafter, and divide their respective townships into such number of road districts as they may deem necessary for the public good.

Election of supervisor. SEC. 881. (2.) There shall be elected at the general election in the fall of 1858, and annually thereafter, one supervisor for each road district within the several townships of this state, who shall hold his office for one year, and until his successor is elected and qualified. Said supervisor must reside in the district for which he was elected, and in the election of said supervisor no elector shall vote for more than one supervisor, and none other than the one residing in the district where such elector resides, but no person shall be required to serve as supervisor who is exempt by this act from performing labor on the highway.

Supervisor notified and qualified. SEC. 882. (3.) Said election shall be conducted as other elections, and it shall be the duty of the township clerk to notify said supervisor elect, within five days after said election, and said supervisor elect, thus notified, shall appear before the township clerk within ten days thereafter, and give bond and take the oath of office as required by the constitution of the state of Iowa.

Penalty for refusing to qualify. SEC. 883. (4.) Any supervisor elect, after having been notified as required in section three of this act, who shall fail to appear before said township clerk (unless prevented by sickness) within the specified time, and give bond and take the oath of office as required by this act, shall forfeit and pay the sum of five dollars, and in case of his failing or refusing to pay the same, it shall be the duty of his successor in office to collect the said amount by suit or otherwise, and apply the same to the repairing of roads in his district.

Supervisor gives bond. SEC. 884. (5.) Each supervisor so elected shall be required to give bond in such sum and with such security as the township clerk may deem requisite, conditioned that he will faithfully and impartially perform all the duties devolving upon him, and appropriate all moneys that may come into his hands by virtue of his office according to law, which bond shall be kept by the township clerk among the papers of his office. And in the event of a vacancy occurring in any road district within his township, it shall be the duty of the township clerk to fill such vacancy by appointment as soon as notified of the same.

Men required to work on road. SEC. 885. (6.) Each supervisor shall require all the able-bodied male residents of his district between the ages of twenty-one and forty-five to perform two days' labor upon the public highway between the first day of April and the first day of July of each year as hereinafter provided.

Notice of commencement. SEC. 886. (7.) The supervisor shall be required to give at least three days' notice previous to the day or days designated to work the roads to all persons in his district subject to work, as required in section six of this act, what day he will superintend the work on the roads

within his district, and all persons so notified must meet said supervisor or at such time and place, and with such tools, implements and teams Tools brought as said supervisor may designate, and shall labor diligently under the direction of the supervisor, for eight hours each day, and for such two days' labor performed, the supervisor shall give to the person a certificate, which certificate shall be evidence that such person has performed labor on the public highway as required by section six of this act, and shall exempt such person from performing labor in payment of road-poll tax in that or any other road district within this state for this same year: *provided*, that any person furnishing a good team, consisting of two horses or their equivalent, shall be allowed the same for the team that is allowed for able-bodied men per day.

SEC. 887. (8.) Each person made liable to perform labor on the public highway by section six of this act, who shall fail or neglect to attend either in person or by satisfactory substitute at the time and place appointed with the designated tool, implement or team, having had three days' notice thereof, or having attended, shall spend his time in idleness, or disobey the supervisor, or [*fail to\**] furnish to said supervisor within five days thereafter some satisfactory excuse for not so attending, shall forfeit and pay to said supervisor the sum of one dollar and twenty-five cents for each day's delinquency, and in case of a failure to pay such forfeit within ten days, it is hereby made the duty of such supervisor to recover the same by action of debt in the name of the supervisor, before any justice of the peace in the proper township, which money when collected shall be immediately expended on the public highway. Penalty for absence, idleness and disobedience.

SEC. 888. (9.) The supervisor shall perform the same amount of labor as is required of an able-bodied man, for which he shall be allowed the sum of one dollar and fifty cents per day, including the time necessarily spent in notifying the hands and making out his returns, which sum shall be paid out of the road fund after deducting his two days' work required by section six of this act, and road tax for that year: *provided*, that where there is no money in the hands of the clerk with which to pay the said supervisor, he shall be entitled to receive a certificate from the township clerk for the amount of labor performed, after deducting as above required, which certificate shall be received in payment of his own road tax for any succeeding year. The pay of supervisor

SEC. 889. (10.) For the purpose of enabling the supervisors to determine the precise location of the various roads in their respective districts, it is hereby made the duty of the county *judge* of each county of this state to furnish each of the township clerks of his county within three months after the taking effect of this act, with a map on a scale of not less than two inches to the mile, of their respective townships, on which map shall be plainly marked all roads which are at the time of making such maps legal roads, which map shall be carefully preserved among the papers of his office. And it is further made the duty of the county *judge* immediately after the establishing of any new road, to notify the township clerks of the townships in which said road has been located, of the location of the same, and also to furnish a copy of the field notes thereof, and the clerk shall immediately mark the same on the map in his office. Maps of roads furnished  
Plan of new road furnished

SEC. 890. (11.) The township clerk shall furnish each supervisor of his township with a map of his district, which map shall contain all the legal roads in said district, and when any new road shall have been established, it shall be the duty of the township clerk to notify each of the supervisors whose district is affected by said new road, and also to Maps of districts furnished

\* Not in archives.

furnish a copy of the field notes of the same, which new road shall be immediately marked on the map of said district in his possession.

Road tax determined.

SEC. 891. (12.) The township trustees of each organized township, shall, at an annual meeting to be holden on the second Monday of April in each year, or as soon thereafter as the assessment book is received by the clerk, determine upon the additional amount of property tax to be levied for roads, bridges, plows and scrapers, and levy the same, which shall not be less than one nor more than three mills on the dollar on the amount of the township assessment of that year: *provided*, that when incorporated cities are by act of incorporation heretofore passed and made road districts, this act shall not interfere with such districts, but the same shall be under the control of such city.

Tax lists for each district made out

SEC. 892. (13.) The township clerk shall within four weeks after such levy make out a tax list for each road district in his township, which list shall be in tabular form and in alphabetical order, having distinct columns for lands, town lots and personal property, and carry out in a column the amount of the tax on each piece of land and town lot, and on the amount of personal property belonging to each individual, and to enable the township clerk to make out such tax list, it is hereby made the duty of the assessor to furnish the township clerk of each township in the several counties of this state, on or before the first day of April of each year, with a correct copy of the assessment lists of said township for that year, which list shall be the basis of such tax list. It shall be the duty of the county *judge* to furnish the several township clerks of his county with printed blanks necessary to carry into effect the provisions of this act.

Supervisor authorized to collect tax.

SEC. 893. (14.) The township clerk shall make an entry upon such tax list showing what it is, for what road district and for what year, and shall attach to the list his warrant under his hand, in general terms requiring the supervisor of such district to collect the taxes therein charged as herein provided, and no informality in the above requirements shall render any proceedings for the collection of such taxes illegal. The clerk is hereby required to cause such lists to be delivered to the proper supervisors of his township by the first day of May next after the levy, take his receipt therefor, and such list shall be full and sufficient authority for the supervisor to collect all taxes therein charged against resident property-holders in his district.

List delivered.

Road tax posted.

SEC. 894. (15.) The supervisor shall within ten days after receiving such tax list, post up in three conspicuous places within his district written notices of the amount of road tax assessed to each tax payer in said district.

Price of labor.

SEC. 895. (16.) The township trustees shall at their annual meeting on the second Monday of April in each year determine the sum that will be allowed for a day's labor, and also the sum that will be allowed for a man and team per day, and the township clerk shall immediately notify each of the supervisors in his township of such determination.

Notice of time to work roads.

SEC. 896. (17.) The supervisor shall be required to give at least three days notice previous to the day designated to work the roads to all persons in his district charged with a road tax, of the day or days he will superintend the work on the roads within his district, and all persons so notified must meet said supervisor at such time and place with such tools, implements and teams, as said supervisor may designate, having such tools and implements in his possession, and in case of a failure to attend either in person or by satisfactory substitute at such time and place, or send a reasonable excuse within five days thereafter for not so doing, the supervisor shall immediately commence suit for the collection

Penalty of non-attendance.



of the tax which such person is liable to pay, and expend the same as soon as collected on the public highways in his district.

SEC. 897. (18.) The supervisors of the several districts of each township shall report to the township clerk on the first Monday of October in each year, which report shall embrace the following items: Annual receipt of the supervisor.

1. The names of all persons in his district required by section six of this act to perform labor on the public highway, and the amount performed by each.

2. The names of all persons against whom suits have been brought, as required by section eight of this act, and the amount collected of each.

3. The names of all persons who have paid their property road tax in labor, and the amount paid by each.

4. The names of all persons against whom suits have been brought for the collection of road taxes, and the amount collected from each.

5. The names of all persons who have paid their road tax in money, and the amount paid by each.

6. A correct list of all non-resident lands and town lots on which the road tax has been paid, and the amount paid on each.

7. A correct list of all non-resident lands and town lots on which the road tax has not been paid, and the amount of tax on each piece.

8. The amount of all moneys coming into his hands by virtue of his office, and from what sources.

9. The manner in which the moneys coming into his hands by virtue of his office has been expended, and the amount, if any, in his possession.

10. The number of days he has been faithfully employed in the discharge of his duty.

11. The condition of the roads in his district, and such other items and suggestions as said supervisor may wish to make, which report shall be signed and sworn to by said supervisor and filed by the township clerk among the papers of his office.

SEC. 898. (19.) The township clerk shall immediately after the filing of the report as required in the foregoing section, make out a correct list of all non-resident land and town lots on which the road tax has not been paid, and the amount of tax charged on each piece of land and town lot, designating the district in which said land or town lot is situated, and transmit a certified copy of the same to the county judge of the proper county, which shall be immediately placed in the hands of the county treasurer, who shall collect the same in the same manner that county taxes are collected, and in case of the clerk failing or neglecting to make such return, he shall forfeit and pay to the use of the township for road purposes, a sum equal to the amount of tax on said land, which may be collected by suit on his official bond, commenced in the name of the township by the trustees thereof before any court having competent jurisdiction. Non-resident road tax collected

SEC. 899. (20.) The supervisor shall cause two-thirds of the property tax in his district to be worked out between the first day of May and the first day of July of each year, and the remaining one-third whenever he thinks the condition of the roads demand it, but in all cases before the first day of October of that year. Penalty for neglect to make return.

SEC. 900. (21.) Any supervisor failing or neglecting to perform the several duties required by this act, shall forfeit and pay for the use of the road fund in his district, the sum of one hundred dollars; and it is hereby made the duty of the township clerk in case of such failure or Time of working roads. Neglect of supervisor punished.

- neglect, to commence suit in his name for the collection of the same before any justice of the peace within the proper township.
- Timber may be taken.** SEC. 901. (22.) The supervisor is authorized to take timber or other material for the use of the road from any unenclosed lands in the neighborhood of which the road passes, but he is not permitted to cut down or injure any tree growing by the wayside which does not obstruct the road, and which stands in front of any town lot or enclosure or cultivated field, or any ground reserved for any public use, where such tree is intended to be preserved for shade or ornament by the proprietor of the land on or adjacent to which the tree is so standing, and the person owning such timber or material thus taken, shall be paid out of any of the road fund in the hands of the supervisor, a fair value therefor, and in case there be no money in the hands of such supervisor, then such supervisor shall give him a certificate stating the amount, kind and value of such material taken, which certificate shall be received for the payment of his road tax for that or any succeeding year, to the amount thereof.
- Shade trees protected.** SEC. 902. (23.) When notified in writing that any bridge or other portion of the public road is unsafe or impassable, the supervisor thus notified shall be liable for all damage resulting from the unsafe or impassable condition of the road or bridge, after allowing a reasonable time for repairing the same.
- Pay for timber.** SEC. 903. (24.) For making such extraordinary repairs, the supervisor may call out any or all the able bodied men of the district in which they are to be made, but not more than two days at any one time without their consent, and persons so called out shall be entitled to receive a certificate from the supervisor certifying the number of days of labor performed, which certificate shall be received for road tax for that or any succeeding year, at the rate per day established for that year.
- Damage for unsafe bridges.** SEC. 904. (25.) If any able bodied man when duly summoned for any such purpose, fails to appear and labor diligently by himself or his substitute, or send satisfactory excuse therefor, he is liable to a fine of ten dollars, to be recovered by suit before any justice of the peace in the name of the district and for the use of the road fund of said district: *provided*, in all cases, the person so notified shall have the privilege of paying the value of such work immediately in money.
- Persons summoned to repair bridge.** SEC. 905. (26.) It is the duty of the supervisor to remove obstructions in the public highways caused by fences or otherwise, but he must not throw down or remove fences which do not directly obstruct the travel upon the highway, until not to exceed six months' notice has been given to the owner of the land enclosed in part by such fence.
- Fine for neglect to attend.** SEC. 906. (27.) When any owner or occupant of land adjoining and abutting upon any road or highway, may desire to plant a hedge upon the line of any road, he shall be allowed to build or remove his fence upon such road or highway: *provided*, he shall not build or remove his fence more than ten feet within the outer line of said road, and that unless the said road be sixty feet wide the fence shall not be built or removed upon both sides at the same time. Such owner or occupant shall not be allowed to occupy such highway as aforesaid for more than five years, and not more than one year before such hedge shall be planted, and at the expiration of such time he shall remove such fence, upon the order of the supervisor of the district where such road is situated.
- Obstructions removed.** SEC. 907. (28.) It shall be the duty of the supervisor to keep the roads in as good condition as the funds at his disposal will permit, and to place guide boards at the forks of the roads in his district, and shall be furnished with money to do the same.
- Provision for growing hedges.**
- Condition of roads.**

SEC. 908. (29.) Persons meeting each other on any of the public highways of this state, shall give one-half of the same by turning to the right. All persons failing to observe the provisions of this section shall be liable to pay all damages resulting therefrom, together with a fine not exceeding five dollars, to be appropriated to the repairing of roads in the district where the violation occurred. Fine for not giving half the road.

SEC. 909. (30.) The supervisors are hereby required to meet the township trustees at their regular meeting on the first Monday in October of each year, and have a final settlement of all their accounts connected with the road fund and with the affairs of their office as supervisor; and after the payment of the supervisor, the trustees shall order the distribution of the road fund in the hands of the township clerk as they may deem expedient for road purposes, and the township clerk shall pay the same out as ordered by the trustees. The township clerk shall be entitled to five per cent. on all moneys coming into his hands by virtue of his office, and shall be required at least once in each year to make settlement with the county judge, producing vouchers for all moneys paid out by him, specifying for what, and to whom paid. Annual settlement of supervisor.  
Pay of clerk.

SEC. 910. (31.) The township clerk of each township shall be required by the county judge of his county to give bond, to be approved by the judge in the sum of twice the amount of the road tax in his township, when the county judge shall give an order to said clerk on the county treasurer for all moneys collected by him as road taxes upon all property within and for his township, upon the payment of which by the treasurer, he shall take from said township clerk duplicate receipts for the sum thus paid him, one of which receipts said treasurer shall deliver over to the county judge to be filed by him among the papers of his office, and said judge shall charge the same to the account of the said clerk upon the road book. Clerk gives bond and draws money.

SEC. 911. (32.) The township clerk shall be allowed the sum of one dollar and fifty cents per day for all days necessarily employed in the discharge of the duties of his office, which account after being signed and sworn to, shall be audited and paid out of the county treasury as other accounts are audited and paid. Pay of clerk.

SEC. (33.) [Obsolete.]

SEC. 912. (34.) All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. Conflicting acts repealed

ARTICLE 4.

An Act to authorize the Resurvey of Roads.

[Passed January 27, 1857, took effect February 31, 1857; Laws of Sixth General Assembly, Chapter 130, page 168.]

SECTION 913. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That when by reason of the loss or destruction of the field notes of the original survey, or in cases of defective surveys or record, or in cases of such numerous alterations of any public highway since the original survey, that its location can not be accurately defined by the papers on file in the proper office, that the county judge of the proper county may, if he deem it necessary, cause such road or roads to be re-surveyed, platted and recorded as hereinafter provided. Re-survey.

SEC. 914. (2.) That a copy of the field notes together with a plat of any highway surveyed under the provisions of this act, shall be filed in the office of the county judge, and thereupon the county judge shall give public notice by publication in some newspaper published within

the county, or if no paper is published in his county, by posting such notice in five of the most public places in the vicinity of such survey, that such survey has been made and that at some term of the county court not less than twenty days from the publication, he will unless good cause be shown against so doing, approve of such survey and plat, and order them to be recorded as in cases of the original establishment of a public highway.

County judge  
hear complaints.

SEC. 915. (3.) In case objections shall be made by any person claiming to be injured by the survey made, the county judge shall have full power to hear and determine upon the matter, and may, if deemed advisable, order a change to be made in the survey, upon the final determination of the county judge, or in case no objection be made at the term of the court named in the said notice of the survey, he shall approve of the same, and cause the field notes and plat of the highway to be recorded as in cases of the establishment or alteration of highways, and thereafter such record shall be received by all courts as conclusive proof of the establishment and existence of such highway, according to such survey and plat.

#### ARTICLE 5.

An Act for the regulation of State and County Roads within Towns and Cities.  
[Passed March 30, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 78.]

County and state  
roads must con-  
form to grade.

SECTION 916. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That such portions of all county and state roads as lie within the limits of any incorporated town or city, or in any town or city hereafter incorporated, shall conform to the direction and grade, and be subject to all the regulations of other streets in such town or city.

SEC. 917. (2.) All laws inconsistent with this act are hereby repealed.

PRIOR LAWS. 1. "An act to regulate highways," passed April 17, 1833; M. D., 1833, p. 102.

Amended Dec. 6, 1836; Wis., 1st sess., No. 16, p. 43.

2. An act defining the mode of laying out and establishing territorial roads, passed April 23, 1833; M. D., 1833, p. 173.

3. An act declaring the U. S. roads, within the territory, public highways, passed July 21, 1830; M. D., 1833, p. 174.

4. An act amending several Michigan acts, making county road township, &c., passed Dec. 6, 1836; Wis., 1st sess., No. 16, p. 43.

5. An act to establish a territorial road west of the Mississippi (from Farmington, via Augusta, Burlington, Wappello, Dubuque, McGregors,) passed Dec. 7, 1836; Wis., 1st sess., No. 20, p. 49.

6. An act to provide for laying out and opening territorial roads, passed Jan. 3, 1838; Wis., 2d sess., No. 20, p. 45.

7. An act for opening and repairing, and vacating public roads, passed Jan. 15, 1838; Wis., 2d sess., No. 57, p. 117; all the above repealed Aug. 30, 1840.

8. An act to provide for laying out and opening territorial roads, passed Dec. 29, took effect Jan. 29, 1839; I. T., 1st sess., p. 428; also reprint of 1843, p. 511.

9. An act defining the duties of supervisors of roads and highways, passed Jan. 17, took effect Feb. 17, 1840; I. T., 2d sess., chap. 80, p. 115; also reprint 1843, p. 512.

10. An act for opening and regulating roads and highways, passed Jan. 17, took effect Feb. 17, 1840; I. T., 2d sess., chap. 91, p. 133; repealed by reprint, chap. 125, p. 519.

12. An act defining the duties of supervisors of roads, passed Feb. 2, took effect March 2, 1842; I. T., 4th sess., chap. 32, p. 26; also reprint of 1843, p. 602.

13. An act to amend the act of Jan. 17, 1840, passed Feb. 2, took effect March 2, 1842; I. T., 4th sess., chap. 35, p. 27; repealed by reprint, chap. 125, p. 519.

14. An act declaring Maquoketa River a public highway, passed Feb. 16, took effect March 16, 1842; I. T., 4th sess., chap. 79, p. 67.

15. An act to provide for levying a tax on real and personal property for road purposes, passed Feb. 16, took effect March 16, 1842; I. T., 4th sess., chap. 83, p. 69; also reprint of 1843, p. 616.
16. An act for opening and regulating highways, passed Feb. 18, took effect July 4, 1843; also reprint, chap. 125, p. 519.
17. An act to amend certain acts relating to roads and highways, passed Feb. 14, 1844; I. T., 6th sess., chap. 19, p. 25.
18. An act amending the road acts of Feb. 1, 1843, passed June 19, took effect July 19, 1844; I. T., 6th sess., extra, chap. 11, p. 7.
19. An act amending an act to provide for laying a tax on property for road purposes, of Feb. 16, 1842, passed June 10, 1845; I. T., 7th sess., chap. 26, p. 47.
20. An act to prevent and punish the obstruction of roads and highways, passed June 11, 1845, took effect Sept. 1, 1845; I. T., 7th sess., chap. 27, p. 48.
21. An act relative to re location of territorial and county roads, passed Jan. 19, took effect June 1, 1846; I. T., 8th sess., chap. 35, p. 33.
22. An act to amend that of June 11, 1845, passed Jan. 1, 1846; I. T., 8th sess., chap. 38, p. 40.
23. An act to legalize roads informally made, passed Jan. 2, 1846; I. T., 8th sess., chap. 40, p. 41.
24. An act to regulate state roads, passed Feb. 24, 1847? 1st sess., chap. 85, p. 116; repealed by No. 25.
25. An act to repeal the above, passed Jan. 24, took effect Feb. 23, 1848; 1st sess., extra, chap. 47, p. 45.
26. Code of 1851, chap. 38.
27. An act making road certificates receivable for county taxes, passed Jan. 22, took effect July 1, 1855; 5th sess., chap. 52, p. 78.

**DECISIONS.** Definition and description of bridge, 6 Iowa, 443; duty of city respecting, 7 Iowa, 488; who has the fee in streets, *City of Dubuque v. Maloney*, Dec., 1859; report of appraisers not conclusive as to damages, *Deaton v. Polk Co.*, Dec., 1859; no deduction for benefit, *Ibid*; fee remains in owner, *Ibid*; and also 2d Iowa, 288; requisites of report of road viewers, 1 G., 158; construction of sec. 18, of art. 1, of constitution, as to compensation, 7 Iowa, 248-416-213; certiorari is the appliance of review, when, 4 Iowa, 500; 4 G., 204; 5 Iowa, 552; appeal, when, 7 Iowa, 248; *Spray and Burns v. Thompson et al.*, June, 1859; street may be used as wharf, 4 Iowa, 199; dedication generally, 4 Iowa, 215; 2 Iowa, 27; assessment, 1 Iowa, 386.

## CHAPTER 47.

### SWAMP LANDS.\*

#### ARTICLE 1.

An Act in relation to the Swamp Lands within the State of Iowa.

[Passed Feb. 5, 1851, took effect Feb. 26, 1851; Third Session, Chapter 69, page 169]

**SECTION 918. (1.)** *Be it enacted by the General Assembly of the State of Iowa,* That the commissioner of the state land office is authorized to take such steps as he thinks necessary, in order to secure to the state, the swamp lands granted by the act of congress of the 28th of September, 1850, entitled "An act to enable the state of Arkansas and other states, to reclaim the swamp lands within their limits." Commissioner to secure swamp lands.

**SEC. 919. (2.)** For this purpose the commissioner when he has reason to believe there is any tract of swamp land within this state not reported as such by the United States surveyor, sufficient to justify a Commissioner to direct county surveyors to examine, &c.

\* It is thought best to give all the laws upon this subject and they are here inserted.

more particular examination, he shall direct the county surveyor of any county, in which said lands may be located, to make the examination, and provide the proofs necessary to secure such lands to the state, a list of which shall be returned to the land commissioner, or the authority acting in that capacity, verified by affidavit, for which services the surveyor is entitled to two dollars per day for each and every day actually employed; and for the purposes of this act, any unorganized county attached to another for election purposes in which an election precinct is organized, is declared to be a part of such organized county.

Duties devolve  
on the governor.

SEC. 920. (3.) Previous to the election and qualification of the commissioner of the land office, the duties above prescribed shall devolve upon the governor, whose duty it shall be to procure from the surveyor general's office a list of the lands returned to that office as swamp lands, and take other steps in the premises as in his opinion are necessary to secure the best interests of this state.

Compensation,  
how paid.

SEC. 921. (4.) All compensation for services rendered, or expenses incurred, in carrying out the provisions of this act, must be made out of the proceeds of the sales of the said swamp lands.

Surveyor may  
contract for  
levies, &c.

SEC. 922. (5.) Subject to the approval of the governor, the county surveyor is authorized to contract with individuals or companies for making the levies or drains necessary to reclaim any of the swamp lands of the state, by giving them a portion of the lands thus reclaimed or a portion of the proceeds thereof.

Commissioner  
may dispose of  
lands.

SEC. 923. (6.) The commissioner may dispose of any of the swamp lands of the state, for such price as he may think them worth, as herein provided; for the purpose of ascertaining said value, the county surveyor and sheriff in any county in which such lands are located, may upon the direction of the commissioner, appraise such lands in such manner as the school lands are now appraised, for which they are to receive a sum not exceeding two dollars per day each, for all the time actually and necessarily expended in making examination and appraisal.

Proceeds.

SEC. 924. (7.) The proceeds of the sales of such lands after paying all expenses incurred in selecting, appraising, selling and reclaiming such lands as are deemed worthy of reclaiming, shall be paid into the state treasury, subject to the disposition of the general assembly.

## ARTICLE 2.

An Act to dispose of the swamp and overflowed lands within the state, and to pay the expenses of selecting and surveying the same.

[Passed Jan. 13, 1853, took effect Feb. 2, 1853; *Laws of Fourth General Assembly, Chapter 13, page 29*]\*

Swamp lands.

SECTION 925. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all the swamp and overflowed lands granted to the state of Iowa by the act of congress entitled an act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits, approved September 28th, 1850, be, and the same are hereby granted to the counties respectively in which the same may lie, or be situated, for the purpose of constructing the necessary levees and drains, to reclaim the same—and the balance of said lands, if any there be after the same are reclaimed as aforesaid, shall be applied to the building of roads and bridges, when necessary, through, or across said lands, and

Granted to the  
counties.

\* Does the act creating board of supervisors affect this chapter? See chapter 22, article 11.

if not needed for this purpose, to be expended in building roads and bridges within the county.

SEC. 926. (2.) Whenever it shall appear that any of the lands granted to the state by the aforesaid act of congress, shall have been sold by the United States since the passage of that act, it shall be lawful for the said counties to convey said lands to the purchasers thereof.

The deed shall be made by the county court as such, and countersigned by the clerk of said court, with the official seal thereof affixed, and on delivering said deed to the purchaser, the county court shall take from him an assignment of all his rights in the premises, and as such assignee, the said court shall be authorized to receive from the United States the purchase money of said land; and whenever any lands embraced by the said act have been located by bounty land warrants, since the passage thereof, it shall be lawful for such county in which the same are situated, to convey the same, in the manner aforesaid to the person, or persons who located said warrant, and take an assignment of the same to the county court which shall thereupon be considered as grantee of the state, and as such may locate said warrant on any of the public lands belonging to the United States, within the limits of said county.

SEC. 927. (3.) In all those counties where the county surveyor has made no examinations and reports of the swamp lands within his county, in compliance with the instructions from the governor, the county court shall at the next regular term thereof, after the taking effect of this act, appoint some competent person, who shall as soon as may be thereafter, after having been duly sworn for that purpose, proceed to examine said lands, and make due report, and plats, upon which the topography of the country shall be carefully noted, and the places where drains or levees ought to be made, marked on the said plats, to the county courts respectively, which courts shall transmit to the proper officers, lists of all said swamp lands in each of the counties in order to procure the proper recognition of the same, on the part of the United States, which lists, after an acknowledgement of the same by the general government shall be recorded in a well bound book provided for that purpose, and filed among the records of the county court.

SEC. 928. (4.) The said lands shall be under the care, and superintendence of the county courts of the counties respectively, in which the same are situated, and at the next April\* election, there shall be elected an officer to be styled drainage commissioner of the county of ———, who shall within twenty days after his said election, enter into a bond with good security, to be approved by the county court, payable to the people of the state of Iowa, for the use of the inhabitants of the county of ———, in the penal sum of ten thousand dollars, conditioned for the faithful performance of all the duties required of him, or which may hereafter be required of him by law.

SEC. 929. (5.) It shall be the duty of the surveyors in the several counties in this state who have surveyed, or shall survey the said swamp and overflowed lands in their respective counties, to make out plats of all the swamp, and overflowed lands in the several townships, and fractional townships within their counties, noting distinctly upon the same every tract, or parcel of swamp and overflowed land in each township, the quantity, and quality thereof, as to whether the same be first—second—or third rate, and it shall be his duty to return the same as soon as practicable, and in reasonable time to the clerk's office of the county

\* See section 473.

Valuation.	<i>court</i> , and the said <i>court</i> , at some regular term thereafter, or sooner if deemed necessary, shall fix a valuation upon each tract, according to its quality, but in no case shall any of said land be valued at less than twenty cents per acre—and the plat with the description and valuation marked thereon shall be recorded in said book, and filed away among the records of the office.
Minimum.	
Court to fix time of sale; order of sale of lands.	SEC. 930. (6.) After the surveyors have returned the plats aforesaid, the valuations have been made, and recorded as aforesaid, the said <i>court</i> shall fix upon the proper time for selling said lands, which shall in all cases be at the county seat, and at the court house door of the several counties. The said <i>courts</i> may order the whole of said lands to be sold, and the sale to be continued from day to day, or they may order a part only of said lands to be sold from time to time, as they may deem expedient, and all such orders, so made by them, shall be entered on record in said book.
Sale, notice of.	SEC. 931. (7.) The said drainage commissioner shall be notified in writing by the clerk of all such orders, and within reasonable time thereafter, not exceeding ten days, he shall give at least forty days' notice of the time, and place of sale thereof, by publishing the same in some newspaper printed in the county, or if there be no such newspaper, then by posting up two notices thereof in each election precinct in the county, for the like period of forty days before said day of sale. The said notices shall contain an accurate description of the lands to be sold, and shall specify the time, place, and terms thereof, and that the sale will be at public auction, between the hours of ten o'clock A. M. and five o'clock P. M. of the day fixed therefor, and that the same will be continued from day to day, if deemed necessary.
Contain.	
Order of sale.	SEC. 932. (8.) In conducting the sales the said commissioner shall sell the same in such order as may be directed by the county <i>court</i> . No tract shall be sold for less than its valuation, and the same shall be cried separately, and long enough to enable any one to bid who desires it.
Terms of sale.	SEC. 933. (9.) The terms of selling said lands shall be to the highest bidder, for cash, the amount of which, however, may be discharged by the purchaser in labor, to be performed, in manner and according to the terms hereinafter specified.
Labor.	
Payment.	SEC. 934. (10.) Upon closing the sales each day—the purchasers shall each pay, or secure the purchase money, according to the terms of sale, or in case of his failure to do so by ten o'clock the succeeding day, the tract purchased shall be again offered at public sale on the same terms as before, and if the valuation shall be bid, the same shall be, stricken off, but if the valuation be not bid, the tract shall be set down as not sold. If sale is not made, the former purchaser shall be required to pay the difference between his bid, and the valuation of the tract, and in case of his failure to make such payment, the drainage commissioner may forthwith institute an action of <i>debt, or assumpsit in his name</i> ,* for the use of the inhabitants of the proper county, for the required sum, and upon making proof, shall be entitled to judgment, with costs of suit, which when collected shall be applied as other moneys arising from the sale of lands.
Failure.	
Re-offer.	
Penalty.	
Suit.	
Judgment.	
Record.	SEC. 935. (11.) Upon the completion of every sale by the purchaser, the commissioner shall enter the same in a sale book kept for that purpose, and shall deliver to the purchaser a certificate of purchase,
Certificate.	

\* See sections 2608 and 2872.



stating therein the name and residence of the purchaser—describing the land sold and the price paid therefor, which certificate shall be evidence of the facts therein stated, and when presented to the county *court*, it shall be the duty of said *court* to execute to him a deed in fee simple for the land therein described, signed in the official capacity of said *court*, and countersigned by the clerk of said *court*, with the official seal thereto affixed, which said deed shall vest in the purchaser an absolute title in fee simple of said lands therein described.

Deed.

Title.

SEC. 936. (12.) The said county *courts* shall cause the said lands to be drained by the construction of proper levees and drains necessary to reclaim the same, and when it becomes necessary in the construction of levees and drains to pass through private property, a just compensation shall be made to the owner or owners thereof, if damage has been done such property, to be ascertained in the same manner as provided in the road law now in force in cases of roads.

Reclamation of  
swamp land.

Damages.

SEC. 937. (13.) The surveyors employed to survey and locate said swamp land, shall also report to the county *courts* all the land in their respective counties which are susceptible of being drained or reclaimed, in all cases where said information can not be satisfactorily had in some other way, with an estimate of the probable cost thereof, and at some regular term after said reports are received the said *courts* shall divide all such drainable lands in their counties into sections numbered one, two, three, etc., and whenever there shall be a sufficiency of lands sold to complete one or more sections, the same shall be as soon as practicable put under contract, and operation commenced thereon, and in like manner shall the work progress until the avails of said lands are exhausted or the work completed.

Report of lands  
reclaimable

Sections.

Contract.

SEC. 938. (14.) The said county *court* shall cause the work to be done on the said sections to be let out at public sale to the lowest responsible bidder, and it shall be the duty of the drainage commissioner, on being ordered by said *court* so to do, to give at least four weeks' notice of the time and place of such lettings, by putting up notices thereof in six of the most public places in the county, and in case there shall be a newspaper printed in the county, then, by causing a similar notice thereof to be published in the same, for a like period of four successive weeks before the day of such lettings, and the said notices shall contain specifications of the work to be done, to be made out under the direction and control of the county *court*, provided that two or more counties may reclaim swamp lands in conjunction, and in such case each county shall make payment in proportion to the amount of lands reclaimed in said county.

Lettings.

SEC. 939. (15.) The persons to whom said lettings shall be struck off shall enter into bond, with good security, payable to the said commissioner, for the use of the inhabitants of the county, in the penal sum of double the value of his bid, conditioned for the faithful performance of the work so undertaken by him, according to the specifications thereof, and on a failure to comply with the condition thereof said bond shall be forfeited, and suit brought upon the same to recover damages for non-compliance.

Bond

SEC. 940. (16.) The said county *courts*, in laying off said work into sections as aforesaid, shall make such division thereof as will enable purchasers of land to pay for the same in necessary work, and if said purchasers shall be the lowest bidders at the lettings, the land so purchased shall be paid for in work, but if any other responsible person or persons shall be lower bidders, the same shall be struck off to him or them, and the purchasers aforesaid shall be forthwith required to pay

Paying by labor

for their lands in cash, or credit by giving mortgage and good security for the purchase money, at the discretion of the said drainage commissioner. But no such credit shall be given for a greater length of time than twelve months, and shall draw interest at the rate of six per cent. per annum.

Sales limited.

SEC. 941. (17.) The said county *courts* shall not dispose or sell any more of said lands than shall be absolutely necessary to complete the reclaiming, and draining of the same, and in all cases where there are any lands remaining unsold after the completing of said draining in any county, they shall be expended in the building of roads and bridges through or across said swamp lands, under the direction and superintendence of the drainage commissioner, and if said lands are not needed for this purpose, then to be disposed of in the construction of roads and bridges within the county.

Roads and bridges.

Embezzlement.

SEC. 942. (18.) If any drainage commissioner, or other person shall embezzle, or appropriate to their own use any money, bonds, bills, notes, or mortgages belonging to the drainage fund of any county in this state, he, she, or they shall be liable to indictment, and on conviction shall be imprisoned in the penitentiary of this state, for a period not less than one, nor more than five years, and such conviction shall work a forfeiture of office in all cases.

Private sale.

SEC. 943. (19.) All lands not sold at public sales as herein provided for, shall be subject to sale at any time thereafter at the valuation, and the clerk of the county *court* is authorized and required to sell all such lands at private sale upon the terms upon which they were offered at public sale, the money to be paid over to the drainage commissioner, and his receipt taken therefor.

Terms.

Accounts verified.

SEC. 944. (20.) The surveyor shall be required to file in the office of the clerk of the county *court* an affidavit setting forth the number of days he was actually, and necessarily employed, and the number of days that each person [naming such person] was actually, and necessarily employed by him, and when a team was employed, the number of days such team was actually, and necessarily employed in examining the swamp, and overflowed lands, and in making out plats, and descriptions of the same.

Payment.

SEC. 945. (21.) When accounts are proved, and filed in such manner as shall be satisfactory to the county *courts*, the clerk of said *court* is hereby authorized, and required to issue a county order for the amount thereof, in favor of the persons entitled thereto, or on their written order, the amounts authorized by this act to be paid, are hereby appropriated: *provided*, that the clerk of the county *court* shall charge the several amounts so paid to the drainage fund of the several counties, and the same shall be a debt due, and owing from such fund to the counties, and it is hereby made the duty of the drainage commissioners, to pay out of the first moneys received from the sale of lands, to the treasurers of the several counties the said amounts so charged by the clerk against such drainage fund as aforesaid.

Charged to drainage fund.

Pre-emption.

SEC. 946. (22.) Each and every person who on the twenty-eighth day of September, 1850, was the owner of any improvement, or who since that date has become the owner of any improvement on any of the said swamp, or overflowed lands, with a view to a residence, and occupation of said land for agricultural purposes, shall have the right to purchase at the appraised value thereof, a quantity of land including his said improvement, to be bounded by the legal subdivisions, not exceeding one quarter section, to consist of the quarter-quarter, half-quarter, or quarter section: *provided*, that any person claiming the right to pur-

Appraised value.

chase under this act, shall within three months after the taking effect of this act file in the clerk's office of the county *court* of the proper county, a notice of his, her, or their claims, describing the land by its numbers, and proving the facts in relation to such claim, to the satisfaction of such clerk: *and provided further*, that any person, claiming the right to purchase as aforesaid, shall within twelve months from the day set for selling the swamp lands in the neighborhood in which his improvement is situated, pay to the drainage commissioner the consideration money for the land claimed, or the person so claiming shall be allowed to pay the same in labor, according to the provisions of this act, which payment shall entitle him, her, or them to a deed conveying an estate in fee simple; but in case of failure to make such payment, or to pay in labor as aforesaid, the right to make the purchase shall cease.

Limitation.  
Time of payment.  
May pay in labor.  
Failure, to forfeit.

SEC. 947. (23.) All business in relation to the swamp and overflowed lands, shall be transacted at the regular term of the *courts* except on extraordinary occasions, when said county *courts* shall have power to appoint special terms for the transaction of such business. And the county *courts* shall have power to allow the drainage commissioners, surveyors, clerks and all others employed, such fees as they may deem just and right, to be paid out of the county treasury and charged to the drainage fund.

Business.  
Regular terms.  
Special terms.  
Fees.

SEC. 948. (24.) It shall be the duty of all constables, coroners, sheriffs, justices of the peace, county surveyors, and grand jurors to take notice of all trespasses committed on such lands, either by cutting timber, or otherwise, and to take all legal steps under the laws of this state, to bring such offenders to punishment.

Trespass.

SEC. 949. (25.)\* As soon as any of the unorganized counties of this state become organized, so much of this act as relates to the selecting of the swamp lands by surveyor, and returning the lists thereof to the proper departments, to obtain the necessary sanction thereto on the part of the United States, shall be in force and effect, and the time of appraising, selling, and draining of the said swamp lands, shall be at the discretion of the county *courts* respectively.

Unorganized counties

SEC. 950. (26.) All acts and parts of acts now in force in respect to the swamp lands of this state are hereby repealed.

Repeal.

ARTICLE 3.

An Act supplemental to an Act entitled "An act to dispose of the Swamp and overflowed Lands within this State, and to pay the expenses of selecting and surveying the same," approved January 13, 1853.

[Passed January 24, 1853, took effect July 1, 1858; Laws of Fourth General Assembly, Chapter 65, page 116.]

SECTION 951. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That, so soon as the examination and survey of the swamp and overflowed lands in any of the counties of this state, shall be completed by the county surveyor, (or other person appointed for that purpose,) a full and complete return of the same shall be forwarded to the secretary of state, whose duty it shall be to report the same to the surveyor general.

Returns made to secretary.  
His duty.

SEC. 952. (2.) *And be it further enacted*, That all expenses which may have accrued prior to the passage of this act, in any of the counties of this state for the examination and survey of said swamp and

Expenses how paid.

\* In archives, 26.

overflowed lands, shall be paid in accordance with the provisions of the act to which this is amendatory.

ARTICLE 4.

An Act providing for the collection of money due to the State of Iowa, from the Government of the United States, arising from the disposition of the Swamp Lands, and for selecting the Swamp Lands, and securing the title to the same.

[Passed January 25, 1855, took effect July 1, 1855; *Laws of the Fifth General Assembly, Chapter 138, page 261.*]

Governor to draw money.

SECTION 953. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the governor be, and he is hereby authorized and empowered, to draw from the treasury of the United States, all moneys which may now be due, or which may hereafter become due to the state of Iowa, arising from any disposition of the swamp lands of this state by the government of the United States: *provided,* that after said money shall have been transferred to the treasurer of this state, the governor, auditor, and secretary of state, shall constitute a board with power to ascertain what amount of said money is due to any of the counties of this state for swamp lands sold by the government of the United States, since said lands were granted to and became the property of said counties, and said board shall certify to the state treasurer the result of their investigation; and the moneys so ascertained to be due to the counties aforesaid, shall remain in the treasury subject to the draft of the treasurers of the said counties.

Board.

Deposit.

SEC. 954 (2.) That the governor is hereby required to cause said moneys to be deposited in the treasury of this state.

Selection of swamp lands.

SEC. 955. (3.) That the governor is hereby authorized to adopt such measures as to him may seem expedient, to provide for the selection of the swamp lands of this state, and to secure to the state the title to the same, and also for the selection in the name of the state, other lands, in lieu of such swamp lands as may have been or may hereafter be entered with warrants: *provided,* that the provisions of this act shall not be construed to apply to any swamp lands which have already been selected by any organized county of this state under the provisions of any previous law: *and provided further,* that this act shall not be construed to impair the rights of the counties of this state to any swamp lands within said counties under the provisions of any law in force in relation to the same, and that the selections made by the organized counties shall be reported by the governor to the authorities at Washington.

Proviso.

ARTICLE 5.

An Act to amend an Act entitled "An Act to dispose of the Swamp and Overflowed Lands within the State," approved January 13, 1853.

[Passed January 25, 1855, took effect February 21, 1855; *Laws of the Fifth General Assembly, Chapter 110, page 173.*]

Unorganized counties.

SECTION 956. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That no swamp or overflowed lands granted to the state, and situate in the present unorganized counties, shall be sold or disposed of till the title to said lands shall be perfected in the state, whereupon the titles to said lands shall be transferred to the said counties where they are situated: *provided,* that said counties shall refund to the state the expenses incurred in selecting said lands, under the provisions of an act of the present session of the general assembly, authorizing

Transfer.

the governor to cause said lands to be surveyed and selected, with ten per cent. interest thereon. Each county to refund its proportional amount of said expenses.

SEC. 957. (2.) *Be it further enacted*, That in all those counties which are now organized, when it may be impossible to reclaim said swamp land, said counties are hereby authorized to employ the proceeds of said lands, or any part thereof, in the erection of county buildings, or other work of improvement within their limits: *provided*, that in such case, the county *judge* shall first submit the question, including the proposed work of improvement, to the people of his county in the manner provided for in sections 114 and 115 of the code.\*

Organized counties.

Expend proceeds.

Submit to the people.

SEC. 958. (3.) In all cases contemplated in the foregoing sections, it shall be the duty of the drainage commissioner to pay over the proceeds of the sales of said lands, to the county treasurer.

Proceeds.

SEC. 959. (4.) No swamp or overflowed lands shall hereafter be sold at less than one dollar and twenty-five cents per acre.

Minimum.

SEC. 960. (5.) Such provisions of the act approved January 13th, 1853, in relation to swamp lands, and all other acts or parts of acts relating to the same, as conflict with the provisions of this act, are hereby repealed.

Repeal.

ARTICLE 6.

An Act to amend an act entitled, "An act to dispose of the Swamp and overflowed Lands within this State, and pay the expenses of selecting and surveying the same," approved Feb. 2, (January 13,) 1853.

[Passed July 15, 1856, took effect Fifth General Assembly, Extra Session, Chapter 36, page 83.]

SECTION 961. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That all moneys heretofore or hereafter to be realized from the sale of the swamp or overflowed lands, situated in any of the counties in this state, shall be deposited forthwith by the officers receiving the same, in the county treasury of their respective counties.

Deposit of money.

SEC. 962. (2.) It shall be the duty of the county treasurer receiving swamp land money, to pay the same out only on the joint order of the county *judge* and swamp land commissioner, or if there be no swamp land commissioner, then upon the order of the county *judge*.

How paid out.

SEC. 963. (3.) The county *judges* and treasurers shall have power jointly, and it is hereby rendered their duty, in all cases when the same can be done without detriment to the work of reclaiming said land, to loan any swamp land funds that may be in their several treasuries, at ten per cent. interest on approved real estate security, for such times as they may deem advisable, and the county *judges* and treasurers shall make semi-annual and separate public exhibits of the condition of the swamp land fund, showing the amounts received, the amounts expended, for what purpose and to whom paid, the amounts loaned and to whom, and the amounts on hand; which exhibit shall be filed with the county clerks, to be by them recorded in books kept for that purpose.

Loan.

Exhibits.

SEC. 964. (4.) Nothing in this act shall be so construed as to legalize the sale of swamp lands in cases where such sales were made without authority of law.

Not legalize.

\* Sections 250 and 251 of this Revision.

## ARTICLE 7.

A Bill to prevent Trespass or Waste on Swamp or other Lands in the State of Iowa, and for other purposes.

[Passed Jan. 25, 1855, took effect Jan. 31, 1855; Laws of Fifth General Assembly, Chapter 156, page 228]

- Trespass.** SECTION 965. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That whenever the county judge of any county shall become satisfied that trespass or waste, by cutting wood or carrying it away, or in any other manner, has been, within six months then past, or is then being committed on any swamp or overflowed lands, situate in, and belonging to, such county, and which have been properly selected according to law, and the returns thereof made to such county judge by the selecting officer, it shall be the duty of said county judge to issue a warrant to the sheriff of his county, or to some other officer directing said sheriff, or officer, to arrest and bring before him, forthwith, the person or persons charged in said warrant with having committed trespass or waste, as aforesaid, or any person then committing the same: *provided,* that this section shall not be construed as authorizing a warrant for trespass to be issued against any person for cutting or carrying away wood on swamp or overflowed lands, which such person shall have entered at any United States land office, or against any person who has acquired a *bona fide* pre-emption right to any of said lands, under the subsequent provisions of this act.
- Warrant.**
- Arrest.**
- Proviso.**
- Subpœna.** SEC. 966. (2.) It shall be the duty of the county judge, at the time of issuing said warrant, to issue a subpœna to any person or persons, who may be cognizant of trespass or waste committed in violation of this act, requiring such person or persons to appear before him forthwith, to testify in relation to the matter; which subpœna shall be served by the sheriff of the county, or some other officer, deputed by the county judge.
- Trial.** SEC. 967. (3.) On the appearance of the person or persons arrested under said warrant the county judge shall proceed to hear testimony in the case, and if the person or persons so arrested shall be found guilty of committing trespass or waste contrary to the provisions of this act he or each of them, if more than one is arrested, shall be adjudged to pay a fine not exceeding one hundred dollars or to be imprisoned in the county jail for a period not exceeding thirty days at the discretion of said judge: *provided,* that any person so arrested shall be entitled to be tried by a jury of six disinterested residents of the county, if he or they require it, and the county judge shall have authority to commit such person to the county jail until the fine and costs adjudged against him shall be paid.\*
- Fine and imprisonment.**
- Jury.**
- Fines, how disposed of.** SEC. 968. (4.) All fines so inflicted shall inure to the use of the school fund, and be paid to the person having charge of that fund in the county, after deducting from the same the amount of costs which may have been paid by the county, in cases of failure, to sustain any previous action commenced under this act; and the costs in prosecutions under this act, shall be the same as the costs in similar prosecutions before a justice of the peace.
- Mandate to prevent removal of timber.** SEC. 969. (5.) It shall be the further duty of the county judge of each county, whenever he may suspect that trespass or waste has been

\* Section (3) was thus amended April 2, 1860; laws of eighth general assembly, chapter 120.

committed, as mentioned in the first section of this act, to issue his mandate to the sheriff of his county, or to some other officer therein, to restrain and prevent all persons from carrying away wood or timber, that may have been cut on any of the swamp or overflowed lands above specified; and to take possession of such wood or timber, and dispose of the same by public or private sale, at the discretion of the sheriff, or officer serving the writ, and return the proceeds thereof to the county treasurer.

SEC. 970. (6.) It is further made the duty of the county *judge* of Suit for damages. the several counties, to sue for damages, in the name, and for the use of, their respective counties, in the proper district court, any person who shall have committed *trespass or waste*, in violation of the provisions of Trespass or waste. this act: *provided*, that it shall be discretionary with said judges to proceed against such person either by criminal prosecution, or civil suit, as above provided, or both.

SEC. 971. (7.) Any person convicted of trespass or waste, before Appeal. the county judge, as above specified, may take an appeal to the proper district court, by giving bond and security to the satisfaction of the county judge, in the usual penalty and condition, with the further condition that he will not, in the meantime, and until the decision of said district court in the matter, commit further waste or trespass as above specified.

SEC. 972. (8.) The foregoing provisions are extended to all school,\* All state lands. university, or other lands belonging to the state, so far as the same may be applicable.

SEC. 973. (9.) Any person who shall have a *bona fide* claim, by Pre-emption. actual settlement or improvement upon any of the swamp or overflowed lands in this state, which shall have been selected, and the returns thereof made to the county judge, as specified in the first section of this act; and any *bona fide* assignee of such person shall be allowed to enter the same by paying into the county treasury of the proper county the sum of one dollar and a quarter per acre therefor, as hereinafter provided: *provided*, that such person, or his assignee, shall first prove such claim, before the proper county judge, within ninety days after the first day of March, 1855: *provided further*, that in any county in which the proper returns shall not have been made to the county judge thereof, by the selecting officer, such person shall have ninety days after the time at which said returns shall be made, wherein to prove his said claim.

SEC. 974. (10.) Any person desirous of perfecting his said claim, Perfecting right of pre-emption. and of receiving the benefit of a pre-emption right to any swamp or overflowed lands above specified, shall be entitled to the same, by proving his claim, within the time specified in the eighth† section of this act to the satisfaction of the proper county judge, by any testimony which shall be satisfactory to said judge; and in case the claimant's right is contested by another, said judge shall appoint a day, when he will hear the evidence on both sides, and he shall make such decision in the case as he may deem right, and award costs in his discretion; and he shall give to the successful claimant a certificate of pre-emption: *provided*, Amount that no person shall receive a certificate for more than one hundred and sixty acres of land, which may be situate in two distinct tracts, one to consist of prairie, and one of timber: *provided*, that the timber tract shall not exceed eighty acres. The provisions of this, and the preceding section, are hereby extended to any person who shall hereafter

\* As to school lands, see section 1978.

† Though the ninth is meant, the *eighth* is used in the original.

acquire a *bona fide* claim, as above specified: *provided*, he shall prove the same according to the provisions of this act, within sixty days after acquiring the same.

Certificates. SEC. 975. (11.) The said certificate shall entitle the holder thereof to perfect his title to the land mentioned therein, whenever the proper returns of the Iowa swamp lands are made, so as to complete the title of the several counties thereto; and the several county judges shall give public notice thereof, and require the several claimants holding certificates, to pay the entrance money into the treasury of the proper county; whereupon said claimant shall be entitled to receive a patent for the land mentioned in their respective certificates.

Appeal SEC. 976. (12.) Any person feeling aggrieved by the decision of the county judge, under the ninth section of this act, may appeal therefrom to the district court of the proper county, *which shall have final jurisdiction over the matter*,\* and shall make such decision in the premises as justice and equity may require.

[Section (13) is repealed by section 473.]

Repeal SEC. 977. (14.) All acts and parts of acts, in relation to swamp lands, inconsistent herewith, are repealed.

#### ARTICLE 8.

An Act in relation to the Swamp Lands of this State.

[Passed Jan. 24, 1857, took effect July 1, 1857; Laws of the Sixth General Assembly, Chapter 115, page 127.]

Repeal SECTION 978. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That all acts and parts of acts now in force allowing the right of *pre-emption* on the swamp lands of this state, be, and the same are, hereby repealed: *provided*, this act shall not apply to the actual settlers on said lands at the time of the passage of this act.

#### ARTICLE 9.

An Act for the relief of Swamp Land Pre-emptors.

[Passed March 22, 1858, took effect April 7, 1858; Laws of the Seventh General Assembly, Chapter 100, page 198.]

Pre-emption prior to 1857 not forfeited. SECTION 979. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That in all cases where any person had acquired a bona fide pre-emption claim to any swamp land of this state, under the laws heretofore in force, and who was, in good faith residing on the same on the fifth day of September, 1857, such person shall not be held to have forfeited the same in consequence of not having proved up such pre-emption in accordance with such law: *provided*, he shall produce his evidence and prove up the same in accordance with the laws in force prior to the fifth day of September, 1857, and within six months from the day this act goes into force: *and provided further*, that no certificate of pre-emption has been granted for the land so claimed to any other person.

Must prove up within 6 months.

County judge hear and determine.

SEC. 980. (2.) It shall be the duty of the county judge when application is made for a pre-emption under this act, to hear and determine upon the same within thirty days from the date of the application, and

\* The matter italicized in this section was repealed by act of March 18, 1858, which took effect March 24, 1853; laws of seventh general assembly, chapter 76, page 111. If "which" had been left after county, and "and" taken away before "shall," the sense would have been probably better preserved.



shall notify the applicant at the time of his making his application, of the day upon which he will hear the testimony in the case. If the proof shall be deemed sufficient, the county judge shall issue a certificate of pre-emption in favor of the claimant to lands claimed, or to such portion of them as he shall have sustained his claim for a pre-emption to.

Issue certificate.

SEC. 981. (3.) The several county judges, in all cases where any person now holds, or may hereafter fairly acquire certificates of pre-emption to swamp lands in accordance with the laws heretofore in force, or in accordance with this act, shall be required to quit-claim the county interest to the persons holding said certificates of pre-emption, or the lawful assignees under the same, on payment or tender of payment of the said county judge, the price per acre named in such certificate, at any time within six months from the passage of this act; or if said certificate is granted after the passage of this act, six months from the date thereof.

County judge quit-claims the interest of the county.

ARTICLE 10.

An Act making an Appropriation for Swamp Land purposes.

[Passed Jan. 27, 1858, took effect Feb. 13, 1858; Laws of Seventh General Assembly, Chapter 3, page 3.]

SECTION 982. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the governor is hereby authorized to appoint an agent to proceed to Washington to effect an adjustment and settlement for the different counties in the state, of their swamp land business, and also one or more to have the swamp and overflowed lands selected in the new and unorganized counties of the state; and for defraying the expenses of the same there be, and hereby is appropriated from the treasury of the state, the sum of two thousand dollars.

Governor appoint agent.

Appropriates \$2000.

SEC. 983. (2.) That when the general government shall issue the scrip, and refund the money to the state, contemplated by the act of congress of 2d March, 1855, and patent to the state the lands accruing by virtue of the act of congress of 28th September, 1850, the governor, register of state land office, and the agent of the county, if any, shall constitute a board to ascertain what amount of said land, money and scrip, is due the different counties in the state, and when so ascertained the same shall be subject to the order of the county judges, or other proper authorities in the county.

Apportion scrip.

SEC. 984. (3.) That the two thousand dollars hereby appropriated be refunded the state with ten per cent. interest from date of same, each county paying an amount proportionate to its share of the lands, scrip and money received, to be ascertained and withheld by said board and paid over to the state treasury.

Counties refund to the state.

SEC. 985. (4.) Any laws inconsistent with, or contrary to this act, are hereby repealed.

Repeal.

ARTICLE 11.

An Act to authorize the Counties to use the Swamp Lands to and in the construction of Railroads and Seminary Buildings.

[Passed March 22, 1858, took effect April 21, 1858; Laws of Seventh General Assembly, Chapter 132, page 256.\*]

SECTION 986. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That it shall be competent and lawful for the counties

Swamp lands diverted to railroads, &c.

\* The power to give this act force by newspaper publication is derived from laws of seventh general assembly, chapter 119, page 237.

- owning swamp and overflowed lands, to devote the same or the proceeds thereof, either in whole or in part to the erection of public buildings for the purpose of education, the building of bridges, roads and highways, for building institutions of learning or for making railroads through the county or counties to whom such lands belong: *provided*, that before any of said land or the proceeds thereof shall be so devoted to any of the purposes aforesaid the question whether the same shall be so done shall be submitted at some general or special election to the people of the county.
- Submitted to the people. SEC. 987. (2.) The proper officer or officers of any county may contract with any person or company for the transfer and conveyance of said swamp or overflowed lands, or the proceeds thereof or otherwise appropriate the same to such person or company or to their use, for the purpose of aiding or carrying out any of the objects mentioned in the first section of this act, which said contract shall be reduced to writing and signed by the respective parties or their lawful authorized agents.
- Officer may make conveyance. SEC. 988. (3.) Before such contract shall be of any force or validity the same shall be published for four weeks immediately preceding some general or special election in some newspaper published in the county and if there be none published therein, then three copies of the same shall be posted in three of the most public places in each township in the county for the length of time aforesaid together with a proclamation of the proper officer and directing how and where the vote thereon shall be taken, and returns made and canvassed and in what manner or form the people shall vote thereon and if it shall appear that a majority of the people in any county voting thereon are in favor of the contract or proposition submitted to them, then and in that case such contract or proposition shall be binding upon the parties thereto, but if a majority of the people voting on such proposition are against the same then it shall be null and void: *provided*, that no sale, contract or other disposition of said swamp or overflowed lands shall be valid, unless the person or company to whom the same are sold, contracted or otherwise disposed of to, shall take the same subject to all the provisions of the acts of congress of September the 28th, 1850, and shall expressly release the state of Iowa and the county in which the lands are situate, from all liability for reclaiming said land.
- Notice of submitting the question to the people. SEC. 989. (4.) It is further provided that this act shall be so construed as not to interfere with any pre-emption claim under the act of 1855, chapter 156: *provided*, said claimant was an actual and bona fide settler upon such land as provided in section nine of said act and has not assigned his said pre-emption.
- Contract made binding. SEC. 990. (5.) Nothing in this act shall be so construed as to authorize or allow the people of any county or officer thereof in any manner to contract or otherwise dispose of the swamp or overflowed lands belonging to any county attached thereto for election, judicial or other purposes.
- Company assumes the liability of county.
- Pre-emptions secured.
- Lands exempted.

DECISIONS. Right of pre-emption under chapter 156, of 5th sess., *Givens v. Decatur Co.*, Dec., 1859; see *Kinnear v. same Co.*, same term; certificate for swamp lands may be set aside, 6 Iowa, 405; what a bill therefor must contain, *Calvin v. McClasky*, Dec., 1859; right of appeal, 1 Iowa, 556; right to appropriate proceeds of sale to the erection of county buildings, 6 Iowa, 425; need the question of such appropriation be submitted to the popular vote, 7 Iowa, 433.

## TITLE VIII.

### OF THE STATE CENSUS AND THE MILITIA.

#### CHAPTER 48.

##### THE CENSUS.

[Code—Chapter 39.]

[This chapter was superseded by the following act, after having been amended by laws of fourth general assembly, chapter 69, p. 122.]

An Act to provide for taking the State Census.

[Passed March 23, 1858, took effect July 4, 1858: *Laws of Seventh General Assembly, Chapter 136, page 261.\**]

SECTION 991. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the township assessor of each township in this state shall, at the time of assessing property in the years eighteen hundred and fifty-nine, eighteen hundred and sixty-three, eighteen hundred and sixty-five, eighteen hundred and sixty-seven, eighteen hundred and sixty-nine, and eighteen hundred and seventy-five, and every ten years thereafter, take an enumeration of the inhabitants in his township. Assessor shall take census.

SEC. 992. (2.) Said assessor shall make return on or before the first day of June, of such enumeration, to the clerk of the district court of the county, who shall make and forward to the secretary of state on or before the first day of September in the current year, an abstract of said census return, showing the total number of males. Return.  
Abstract.

The total number of females. Statistics.

The number of persons entitled to vote.

The number of the militia.

The number of foreigners not naturalized.

The total number of children between five and twenty-one years of age.

The number of families and the number of dwelling houses.

The number of acres of improved and unimproved lands.

An enumeration of agricultural, mining and manufacturing statistics, including the value of the products of the farm, herd, orchard and dairy each, and the value of manufactured articles, and of mineral sold the year preceding the census.

The number of miles of railroad finished and unfinished.

The number of colleges and universities, with the number of pupils therein.

SEC. 993. (3.) The governor and secretary, auditor and treasurer of state, or any three of them, constitute a census board for the state. Census board.

\* The act was required by article 3d, section 33, of new constitution.

- Other facts.** SEC. 994. (4.) The census board must require such other facts, in addition to those hereinbefore stated, to be ascertained and returned as they may deem expedient.
- Blanks prepared and furnished.** SEC. 995. (5.) The census board must prepare and cause to be printed suitable blank forms for this purpose, which together with such printed directions as will be calculated to secure uniformity in the returns, must be furnished to the respective clerks of the district court of the county, and by them to the township assessors on or before the first Monday in January of the year in which the census is to be taken.
- Abstracts filed and recorded.** SEC. 996. (6.) The secretary of state shall file and preserve in his office the abstracts received from the clerks of the district court, and cause an abstract thereof to be recorded in a book to be by him prepared for that purpose, and published in such manner as the census board may direct.
- Failure to return remedied.** SEC. 997. (7.) When any township assessor fails to make an accurate return of the census, as herein provided, the county court may, upon the request of the clerk of the district court, appoint some suitable person to take the census according to the provisions of this act, and at as early a day as practicable, which shall be done at the expense of the county in which the service is performed.
- Returns made.** SEC. 998. (8.) The census board shall require any clerk failing to make returns as herein provided, to send up the return as soon as practicable, at the expense of the delinquent county.
- Journal.** SEC. 999. (9.) The secretary of state shall keep a journal of the acts of the census board.
- SEC. 1000. (10.) All acts and parts of acts conflicting with this act are hereby repealed.
- Take effect.** SEC. 1001. (11.) This act to take effect from and after its publication.

PRIOR LAWS. 1. An act for taking census, passed, Dec. 30, 1837, Wis., 2d sess., No. 53, page 97; repealed, Aug. 30, 1840.

2. An act for taking census, passed, Jan. 20, 1847? 1st sess., chap. 8, page 23.

## CHAPTER 49.

### MILITIA.

[Code—Chapter 40.]

#### ARTICLE 1.

- Who constitute.** SECTION 1002. (621.) All the able-bodied white male citizens of the state between the ages of eighteen and forty-five years who are not exempt from military duty agreeably to the laws of the United States constitute the effective military force of this state.
- Secretary's report.** SEC. 1003. (622.) The secretary of state on or before the first Monday in January after the taking of each state census must report to the president of the United States the aggregate number of such military force.
- Calling out.** SEC. 1004. (623.) Whenever the governor deems it expedient to

call into service any portion of the said military force he must prescribe the number, and the manner in which they are to be called out.

SEC. 1005. (624.) He may make temporary appointments of such officers as he thinks proper for calling the troops into service and may appoint the time and place of rendezvous.

SEC. 1006. (625.) No troops can be called into service in any other manner than as volunteers except in cases of insurrection or invasion, and the governor may prescribe the number to be received from the counties respectively, and may fix the amount of their compensation which must not exceed that allowed to soldiers in the army of the United States.

SEC. 1007. (626.) At the time and place of rendezvous each company may proceed to elect the number of commissioned and non-commissioned officers that has been previously prescribed by the governor.

SEC. 1008. (627.) In like manner each regiment, brigade, or division shall at the same time and place elect the number of its officers which has been previously designated by the governor, except that each chief of brigade or division has power to appoint his own staff.

SEC. 1009. (628.) The particular place and hour for opening the polls at any such election, as well as the judges and clerks thereof, shall be fixed and appointed by the officer in temporary command at such place of rendezvous.

SEC. 1010. (629.) The governor may cause any arms owned by the state to be distributed to the troops thus called into service and may direct all necessary supplies to be procured and furnished at the expense of the state.

SEC. 1011. (630.) He may, if he think proper, take command in person of any troops thus called into actual service.

SEC. 1012. (631.) Subject to the foregoing provisions he may make all farther rules and regulations necessary to carry out the general spirit and intent of this chapter.

An Act to enable the Governor to distribute State Arms.

*Passed July 12, 1856, took effect Oct. 1, 1856, Laws of Fifth General Assembly, Extra, Chapter 45, page 89.]*

#### ARTICLE 2.

SECTION 1013. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That whenever the governor shall be satisfied that the applicant has a company of not less than thirty men enrolled, uniformed, it shall be lawful for him to supply such company with necessary arms, taking the bond of the captain of the company for their safe keeping and return thereof.

SEC. 1014. (2.) The said captain, on distributing the arms so received to the members of the company, shall take the bond of each in such sum as the governor may direct for the like purpose as that given by the said captain.

SEC. 1015. (3.) So many of the arms of the state as are or may be required at the state penitentiary, shall be delivered to the warden of the same, to be so used.

"An Act authorizing the Governor to raise, arm, and equip a Company of Mounted Men for the defense and protection of our Frontier."

*[Passed Feb. 9, 1858, took effect Feb. 15, 1858; Laws of the Seventh General Assembly, Chapter 10, page 10.]*

An Act to authorize the Governor of the State of Iowa to provide for the protection of certain citizens thereof, to guard against Indian depredations, and making appropriation therefor.

[Passed March 9, 1860, took effect March 13, 1860; *Laws of Eighth General Assembly, Chapter 29.*]

[The first of these acts, if not obsolete is, as well as the second, of a temporary nature, and so both are here omitted.]

**PRIOR LAWS.** 1. "An act to organize the militia," passed April 23, 1833; M. D., 1833, p. 47.

2. "An act in addition to the act to organize the militia," passed April 23, 1833; M. D., 1833, p. 73.

3. An act relating to the militia and public defense of Wisconsin territory, passed Jan. 17, 1838; Wis. 2d sess., No 57, p. 117; all the above repealed Aug. 30, 1840.

4. An act same, passed Jan. 4, 1835; I. T., 1st sess., p. 329; revived, I. T., 7th sess., chap. 15, p. 33; also, reprint 1843, p. 387.

5. An act same subject, passed July 31, 1840, I. T., 2d sess., extra, chap. 32, p. 23; revived, I. T., 7th sess., chap. 15, p. 33; also, reprint 1843.

6. An act to amend militia law, passed Feb. 17, took effect March 17, 1842; I. T., 4th sess., chap. 114, p. 95; revived, I. T., 7th sess., chap. 15, p. 33; also reprint 1843, p. 429.

7. An act amending the act of July 31, 1840, passed Feb. 15, took effect March 15, 1844; I. T., 6th sess., chap. 31, p. 54; repealed, I. T., 7th sess., chap. 15, p. 33.

8. An act to amend the militia law so as to form a fourth division, passed Feb. 15, 1844; I. T., 6th sess., chap. 34, p. 56.

9. An act to organize and discipline the militia of the territory, passed June 7, 1845; I. T., 7th sess., chap. 15, p. 33; reviving the above which were not wholly repealed.

10. An act repealing all laws of compensation to militia officers, passed Jan. 3, 1846; I. T., 8th sess., chap. 7, p. 5.

12. An act requiring assessors to take lists of persons liable to militia duty, passed Jan. 25, took effect Feb. 23, 1848; I. T., 1st sess., extra, chap. 69, p. 78.

## TITLE IX.

### OF TOWNS AND VILLAGES.

#### CHAPTER 50.

##### VILLAGE PLATS.

[Code—Chapter 41.]

##### ARTICLE 1.

**SECTION 1016. (632.)** The proprietor of a tract of land may lay out a village plat thereon in the manner herein prescribed.

Manner.

**SEC. 1017. (633.)** He must cause a survey to be made marking the lots by a stake placed in at least one corner of each which corner shall be uniform throughout the plat so far as practicable, and fixing a

stone of not less than one fourth of a cubic foot in dimension in a permanent manner at some point in every street.

SEC. 1018. (634.) An accurate map shall then be made of such plat designating the corners where the stakes are placed and the points where the stones are fixed and marking and describing the length and breadth of the lots as well as the breadth and courses of the streets and alleys, and the breadth shall be designated by feet and inches when practicable. Map.

SEC. 1019. (635.) All the owners of the land shall then acknowledge, before some officer authorized to take the acknowledgment of deeds, that the disposition of the land as shown by the map is with their free consent and in accordance with their desire, and such acknowledgment shall be certified upon the map. Acknowledged.

SEC. 1020. (636.) The plat and acknowledgment shall then be presented to the county judge, who if satisfied that the above requirements have been fully complied with shall enter thereon an order that the whole be recorded. Recorded.

SEC. 1021. (637.) The acknowledgment and recording of such plat is equivalent to a deed in fee simple of such portion of the land as is therein set apart for public use or is dedicated to charitable, religious, or educational purposes.\* Dedication to public.

ARTICLE 2.

An Act authorizing the Subdivision of Lands in this State.

[Passed Jan. 21, 1857, took effect July 1, 1857, Laws of Sixth General Assembly, Chapter 73, page 78.]

SECTION 1022. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That in case any person owning land in this state shall desire to subdivide the same into lots or parcels, other than the legal subdivisions thereof, he may have the same surveyed by the county surveyor of the county in which the land lies: the said surveyor, when required thereto, shall survey the same into lots of such size as the owner may desire and make a plat thereof, designating appropriately the number of each lot and its contents, and the length and course of its lines, and certify that the same was so surveyed by him in conformity to law, and at the request of the owner, naming him. Subdivision.

SEC. 1023. (2.) The proprietor of lands so surveyed, may have the said plat and certificate recorded in the recorder's office in the county where the land lies, for which service said recorder shall demand and receive fees, at the same ratio that he does for other services. Record.

SEC. 1024. (3.) It shall be the duty of the proper assessor to enter for taxation in his books all lands so platted and recorded by the numbers of the respective lots, designating the value and number of acres in each. Assessor's duty.

SEC. 1025. (4.) In conveying any of the lots so subdivided and recorded, it shall be a sufficient description to designate the same by numbers and the original United States survey. Description.

SEC. 1026. (5.) Provided that the provisions of this act shall not Proviso as to town lots.

\* Section (638) was modified by an act to amend section 638, chapter 41, of the code of Iowa, passed January 25, 1855, laws of fifth general assembly, chapter 101, page 162, which seems to have been itself repealed with all the rest of this chapter as in the code, by an act for the incorporation of cities and towns; laws of seventh general assembly, chapter 157, page 343, being chapter 51 hereof.

interfere with or repeal any laws now in force relating to the laying out of town lots.

## ARTICLE 3.

An Act requiring the Proprietors of Town Plats to record the same.

[Passed January 27, 1857, took effect July 1, 1857; *Laws of Sixth General Assembly, Chapter 181, page 169.*]

Town plats to be recorded.

SECTION 1027. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That any person or persons who shall dispose of, or offer for sale or lease, for any time, any out or in lots in any town or addition to any town or city, or any part thereof, which has been or shall hereafter be laid out, until the plat thereof has been duly acknowledged and recorded, as provided for in chapter forty-one (41) of the code of Iowa, shall forfeit and pay fifty dollars for each and every lot or part of lot sold or disposed of, leased or offered for sale.

Forfeiture.

Unrecorded plats to be recorded.

SEC. 1028. (2.) That every person who has heretofore thus laid out any town or addition to any town, and sold lots within the same, without having the plat of the same recorded according to law, shall have the said plat so recorded within three months from the taking effect of this act, and in case of failure so to do, shall be subject to the penalty in this act provided.

## ARTICLE 4.

An Act entitled an act to provide for the alteration and vacation of Streets and Alleys in unincorporated villages.

[Passed March 26, 1860, took effect July 4, 1860; *Laws of Eighth General Assembly, Chapter 56.*]

Alteration and vacation of streets and alleys.

SECTION 1029. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That streets and alleys in unincorporated villages, which have been, or may hereafter be laid out and dedicated to the public under the provisions of chapter forty-one of the code, shall be subject to be altered or vacated in the same manner provided in chapter thirty-eight of the code, for the alteration or discontinuance of county roads.

PRIOR LAWS. An act to provide for the recording of town plats, &c., passed April 12, 1827, M. D., 1833, p. 531.

2. An act to provide for establishing seats of justice, passed July 31, 1830, M. D., 1833, p. 533.

3. Amended, March 4, 1830? M. D., 1833, p. 533.

4. An act for recording town plats, Jan. 18, 1838, Wis., 2d sess., No. 70, p. 241. All the above repealed Aug. 30, 1840.

5. An act to provide for recording town plats, passed Jan. 25, took effect Feb. 25, 1839, I. T., 1st sess., p. 453; also reprint of 1843, p. 607.

6. An act to authorize the board of county commissioners to vacate town plats, passed Feb. 15, 1844, I. T., 6th sess., chap. 38, p. 59.

DECISIONS. Land dedicated as street may be used as wharf, 4 Iowa, 199-215; 2 Iowa, 30; as to power of railroads to put down track on streets, see *Milburne v. C. I. & N. R. Road Co.*, Dec., 1859; dedication, 2 Iowa, 27; 4 *ibid.*, 215; fee of the streets of Dubuque in the adjoining owners, *City of Dubuque v. Maloney*, Dec., 1859; selling according to a plat is a dedication of the streets thereof, *ibid.*; as to river line and city rights, and individual riparian rights, see *Sayer et al. v. Lyons City*, Dec., 1859; relative rights of city and lot owners in streets and wharf of Keokuk, 4 Iowa, 200.



CHAPTER 51.

THE INCORPORATION OF VILLAGES AND TOWNS.

[Code—Chap. 42.]

[This chapter of the code seems repealed by the next art.]

ARTICLE I.

An Act for the incorporation of Cities and Towns.

[Passed March 23, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 157, page 343.]

SECTION 1030. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That no town or city shall hereinafter be incorporated in the state of Iowa, in any other manner than as herein provided. None of the provisions of this act shall apply to cities or towns already incorporated in this state, otherwise than as herein provided, save and except section sixty one of this act.

Corporation limited.  
Application of law.

SEC. 1031. (2.) When the inhabitants of a part of any county not embraced within the limits of any city, or incorporated town, shall desire to be organized into an incorporated town, they may apply by petition in writing signed by not less than thirty of the qualified voters, residents of the territory to be embraced in the proposed incorporated town, to the county court of the proper county, which petition shall describe the territory proposed to be embraced in such incorporated town, and have annexed thereto an accurate map or plat thereof, shall state the name proposed for such incorporated town, and shall also name the person or persons authorized to act in behalf of the petitioners in prosecuting said petition.

Petition presented.

Contents.

SEC. 1032. (3.) Where any such petition shall be presented to the county court, the same shall be filed in the office of the county judge, to be there kept subject to the inspection of any person or persons interested, until the time appointed for the hearing thereof; the said judge shall at or before the time of such filing, fix and communicate to such petitioners, or their agents, a time and place for the hearing of such petition, which time shall not be less than fifty days after the time of such filing, and thereupon the petitioners or their agents shall cause a notice to be published in some newspaper of general circulation in the county, (if one is published in the county) not less than four consecutive weeks, and a copy of said notice to be posted at some public places within the limits of the said proposed incorporated town, not less than four weeks previous to the time of such hearing, which notice shall contain the substance of said petition, and state the time and place for hearing thereof.

Petition filed.

Day of hearing.

Notice of hearing.

SEC. 1033. (4.) Every such hearing shall be public, and may be adjourned from time to time, and any person interested may appear and contest the granting of said petition, and upon demand shall have the right to a jury of six men to hear and decide the case, and affidavits or other testimony in support of or against said petition, which may be prepared and submitted, shall be examined and heard by said court or jury, and the court may permit the agent or agents named in the original petition, to change or amend the same, but no amendment shall be permitted whereby territory not before embraced shall be added, or the

Hearing public.

Mode of conducting.

	character or extent of said proposed incorporated town materially changed, without appointing another time for hearing, and requiring new notice to be given as above provided.
Facts proved.	SEC. 1034. (5.) If the court or jury, after hearing such petition, shall be satisfied that at least fifty qualified voters actually reside within the limits described in the petition, and that said petition has been signed by a majority of the voters within said limits, that said limits have been accurately described and an accurate plat or map thereof made and filed, that the name proposed for said town is proper and sufficient to distinguish it from others in the state, and it shall moreover be deemed right and proper in the judgment of the court or jury, that said petition should be granted, the court shall make and indorse on said petition an order to the effect that the incorporated town as named and described in the petition, may be organized, which order the court shall sign and deliver, together with the plat or map, to the recorder of the county, whose duty it shall be to record the same as soon as practicable in the proper book of records, and to file and preserve in his office the original papers, having certified thereon that the same have been properly recorded, and it shall also be the duty of said recorder to make out and certify two transcripts of said record, one of which he shall forward to the secretary of state, and the other he shall deliver to the agent or agents of said petitioners, with a certificate thereon, that a similar transcript has been forwarded to the secretary of state as above provided.
Organization ordered.	
Petition filed and recorded.	
Beginning of incorporation.	SEC. 1035. (6.) So soon as said record shall be made and said transcripts certified and forwarded and delivered, the inhabitants within the limits described in the petition, shall be deemed an incorporated town, to be organized and governed under the provisions of this act, in like manner as if specially named therein, and so soon as said incorporated town shall be actually organized, by an election of its officers as herein-after provided, notice of its existence as such shall be taken in all judicial proceedings in the state.
Delay in organization.	SEC. 1036. (7.) Two months shall elapse from the time such transcripts are forwarded and delivered, before notice shall be given for an election of officers in any such town, and any person interested may at any time within said two months, make complaint in writing, in the nature of an application for an injunction, to the district court of the county, or to the judge thereof in vacation, having given at least five days' notice thereof, and furnished a copy of the complaint to the agent or agents of the petitioners, for the purpose of having the organization of such proposed town prevented. It shall be the duty of such judge or court to hear such complaint in a summary manner, receiving such answers, affidavits and proofs as may be deemed pertinent, and if it shall appear that the proposed town does not contain the requisite number of inhabitants, or that a majority of them have not signed the petition, or that the limits of said town are unreasonably large, or small, or are not properly and sufficiently described, then the said court or judge shall order that the record of said town shall be annulled, and it shall be the duty of the county recorder to indorse on the record the order so made, and to certify and transmit to the secretary of state a copy thereof, but such proceeding shall in no manner bar a subsequent petition to the county court.
Injunction may be issued.	
Complaint heard.	
Records annulled.	
Provisions for first election.	SEC. 1037. (8.) Unless the agent or agents of the petitioners shall, within two months after the transcript shall be delivered as above provided, be notified of a complaint having been made to the district court, or judge thereof, then at the end of said two months, or after the dis-

mission of said complaint, the said agent or agents shall give public notice by posting the same at three or more of the most public places within the limits of said town, of the time and place of holding the first election for officers of said town, which election shall be conducted and the officers elected and qualified in the manner prescribed by law in like cases, the clerk and other officers of the township in which said proposed town is situated presiding at said election in the same manner as at township elections, and making the same returns: *provided*, the officers so elected shall continue in office only until the time of the regular election of said officers, and until their successors are elected and qualified.

Township officers conduct.

SEC. 1038. (9.) When the inhabitants of a part of any county contiguous and adjoining to any city or town, shall desire to be annexed to such city or town, they may apply by petition in writing to the county court of the proper county, signed by the inhabitants so applying, to be in number not less than a majority of the electors, which petition shall describe the territory proposed to be annexed, and be accompanied by an accurate map or plat thereof, and shall name the person or persons in prosecuting said petition.

Contiguous territory annexed.

SEC. 1039. (10.) When any such petition shall be presented to the county court, the same shall be filed, and like proceedings shall be had for a hearing thereon as is prescribed by the third, fourth, and fifth sections of this act, and should the said petition be granted, the judge shall indorse on said petition an order to the effect that the territory described in the petition may be annexed to, and become a part of the city or town named in said petition, and the petition, together with the map or plat, shall be delivered to the clerk or recorder of such city or town.

Proceedings to secure annexation.

SEC. 1040. (11.) No further action shall be taken on such order for the space of two months, and within that time any person interested, may in like manner as provided in the seventh section of this act, institute a proceeding to have the proposed annexation prevented, and if it shall appear to the court or judge hearing such proceeding, that a majority of the electors aforesaid actually residing within the limits described in such petition, have not signed the same, or that the territory proposed to be annexed is unreasonably large, or that said territory is not properly described, he shall make an order to restrain any further action under the order of the county court, and annulling the same, but such proceeding shall not bar any subsequent petition to the county court.

Proceedings in opposition to annexation.

SEC. 1041. (12.) When any complaint shall be made as before provided, to prevent an annexation of territory, notice thereof shall be given as well to the proper authorities of such city or town as to the agent or agents of the petitioners, and if no such notice shall be given within two months after the delivery of the order to the clerk or recorder of said city or town, then at the end of said two months and within one year, and in case of any such complaint, and after the dismissal of said complaints, and within one year thereafter, the proper authority of such city or town shall provide by ordinance or resolution for the submission to the electors at the next annual election of municipal officers, of the question whether such annexation shall be made, and if a majority of the electors of such city or town voting at such election, shall vote in favor of such annexation, then on the return of such vote to the proper authority of such city or town, a resolution or ordinance shall be adopted or passed declaring that the territory described in the petition has been annexed to, and is a part of such city or town, and it shall be the duty of the clerk or recorder of the said city or town to make out two copies of the petition, plat, order of the county court, abstract of

After decision of court.

The question submitted to the people.

Petition and plat recorded and filed.	votes and resolutions or ordinances in relation to such annexation, with a certificate that the same are correct, attested by the seal of such city or town, and he shall deliver one of said copies to the recorder of the county, whose duty it shall be, having first made a record thereof in the proper books of record, to file and preserve the same, and the other of said copies shall be forwarded by the clerk or recorder of said city or town, to the secretary of state.
Annexation completed.	SEC. 1042. (13.) So soon as said resolution or ordinance declaring such annexation has been adopted, and the said copies transmitted, delivered and recorded, the said territory shall be deemed and taken to be a part and parcel of the said city or town, and the inhabitants residing therein, shall have and enjoy all the rights and privileges of the inhabitants within the original limits of such city or town.
Corporation desiring to annex territory.	SEC. 1043. (14.) When any municipal corporation shall desire to annex any contiguous territory thereto, not embraced within the limits of any city or town, it shall be lawful for the trustees or council of the corporation, by an ordinance passed for that purpose, at least one month before the regular annual election to submit the question of said annexation to the qualified voters of such corporation, and if a majority of the electors of the corporation voting on the question, shall vote in favor of such annexation, the officers of said corporation shall present to the county court, a petition praying for such annexation, which petition shall describe the territory proposed to be annexed to such municipal corporation, and have attached thereto an accurate map or plat thereof, and like proceedings shall be had upon said petition, as are provided in the third, fourth, fifth, sixth and seventh sections of this act, so far as the same may be applicable, but it shall be lawful for the voters residents upon the territory thus proposed to be annexed, or any of them to appear at said hearing, and show cause why such annexation should not be made, and if it appear by remonstrance or otherwise that a majority of the legal voters in said district so proposed to be annexed are opposed to such annexation, said annexation shall not be allowed, and if within two months as above provided, no notice of a complaint against such annexation shall be given, according to the provisions of this act, then at the end of said two months, and in case such complaints then at the end of said two months, and after the dismissal of said complaint, the said contiguous territory proposed to be annexed shall be in law deemed and taken to be included in and shall be a part of said municipal corporation and the inhabitants thereof shall, in all respects, be citizens thereafter of the said municipal corporation.
Submitted to people of city	
Submitted to people of territory.	
Time of annexing.	
Corporations joining	SEC. 1044. (15.) When any municipal corporation, the territory of which shall be contiguous to and adjoining that of another municipal corporation, shall desire to be annexed thereto, it shall be lawful for the trustees or council of the corporation proposing such annexation, to submit the question to the electors of the corporation, by an ordinance passed for the purpose, at least one month before the annual election the trustees or council of the municipal corporation to which the annexation is proposed to be made, may in like manner submit the question to its electors, if a majority of the electors of each of the two corporations voting on the question at the same general election, shall vote in favor of such annexation, the trustees or council of each corporation may appoint three commissioners who shall arrange the terms and conditions of the annexation, and submit the same to the trustees or council of the respective corporations, and the same being duly approved, by an ordinance passed for the purpose by each corporation, certified copies thereof
Question submitted.	
Commissionersto arrange terms.	

signed by the presiding officer of the trustees or council of each corporation, and the clerk or recorder, and attested by its corporate seal, shall be filed in the office of the clerk of the corporation to which such annexation shall be proposed to be made, and it shall be the duty of such clerk or recorder, under the direction of such corporation to make out and certify two transcripts of all ordinances, abstracts of the returns of the votes, and other papers relating to such annexation, one of which shall be filed in the office of the county recorder, who having made a record thereof, shall file and preserve the same, and the other of said copies shall be forwarded by said clerk or recorder, to the secretary of state.

Agreement filed.

Transcripts of proceedings filed.

SEC. 1045. (16.) So soon as said transcripts shall be certified and delivered, and forwarded, the said annexation shall be deemed complete, and it shall be lawful for the corporation to which the annexation has been made, to pass such ordinances as will carry into effect the terms of such annexation, so far as the same shall not be inconsistent with this act, and with the regular and proper government of such corporation under the provisions thereof, and any part of such terms so inconsistent shall be deemed void, but their nullity shall in no manner affect such annexation, and the two former corporations shall thereafter be governed as one, embracing the territory, shall have equal rights and privileges: *provided*, such annexation shall not affect or impair any rights or liabilities existing at the time of such annexation either in favor of or against said corporations, and suits founded upon such rights and liabilities may be commenced, and pending suits prosecuted and carried to final judgment and execution, the same as though such annexation had not taken place.

Annexation completed by ordinance.

Existing rights not impaired.

SEC. 1046. (17.) It shall be the duty of the secretary of state, to receive and preserve in his office, all papers transmitted to him in relation to the incorporation of cities or towns, or the annexation of territory to the same or the consolidation of municipal corporations, and shall keep an alphabetical list of said cities and towns, in a book provided for that purpose, in which shall be entered the name of the town or city, the character of the same, whether town or city, and if a city, whether of first or second class, the county in which situated and the date of organization under this act.

Complete record by secretary of state

SEC. 1047. (18.) Cities and towns, organized or to be organized under this act, are hereby declared to be bodies politic and corporate under the name and style of the city of \_\_\_\_\_ or town of \_\_\_\_\_, as the case may be, capable to sue and be sued, to contract and be contracted with, to acquire and hold property real and personal, to have a common seal, and to change and alter the same at pleasure, and to have such other privileges as are incident to municipal corporations of like character or degree not inconsistent with this act, or the laws of this state.

Powers of corporation enumerated.

SEC. 1048. (19.) When the inhabitants of a part of any city or town, shall desire to have the part of the territory of such city or town in which they reside, severed from or stricken out of the limits of such city or town, they may apply by petition in writing, signed by a majority of the resident property holders of such part of the territory of such city or town as they desire to have so severed from or stricken out of the limits of such city or town, to the district court of the county, which petition shall describe the territory proposed to be thus severed or stricken out of the limits of such city or town, and have attached thereto, an accurate map or plat thereof, and shall also name the person or per-

Territory taken from a corporation.

Petition court.

	sons authorized to act in behalf of the petitioners in the prosecution of said petition.
Petition filed and notice given.	SEC. 1049. (20.) When any such petition shall be presented to the clerk of the district court, he shall file the same and docket the case in its proper place, said petition shall be subject to the inspection of any person interested in the subject matter thereof, and notice of the filing of the same shall be given by publication in a newspaper published in said city or town, or by posting a notice of the same in five public places in said city or town, four weeks previous to the succeeding term of said court, which notice shall contain the substance of said petition, and state the term of court at which the hearing thereof will be had.
Petition heard	SEC. 1050. (21.) The hearing of such petition may be had by the court, or either party may demand a jury, and the proper authorities of such city or town, or any person interested in the subject matter of said petition may appear and contest the granting of the same, and affidavits in support of or against said petition which may be prepared and submitted, shall be examined by the court or jury, and the court may in its discretion permit the agent or agents named in the petition to amend or change the same, except that no amendment shall be permitted whereby the territory embraced in said petition shall increase or diminish, without continuing the case to the next term and requiring new motion to be given as above provided.
Amended.	
Evidence examined.	SEC. 1051. (22.) If the court or jury, after hearing the petition and evidence bearing upon the subject matter thereof, shall be satisfied that said petition has been signed by a majority of the property holders residing within the limits of the part of the city or town described in the petition and plat, and that the limits have been accurately described and a correct map or plat thereof made and filed, and if the court or jury shall be further satisfied that justice and equity require that the prayer of the petitioners should be granted, the court shall appoint three disinterested persons commissioners to settle and adjust the terms upon which such part shall be so stricken out as to any debts or liabilities of such city or town that have accrued during the connection of such part with such corporation.
Terms adjusted by commissioners.	
Commissioners qualify, hear and report.	SEC. 1052. (23.) The commissioners so appointed shall take and subscribe an oath or affirmation that they will faithfully and impartially perform their duties as such, and shall at a time ascertained by them fixed, hear the agent or agents named in said petition, and also the proper authorities of the city or town, in regard to the subject matter to them submitted, and report to the next succeeding term of said court their doings and judgment in the premises, and upon the filing of said report the court shall order, adjudge and decree in accordance therewith and with the prayer of said petition: <i>provided</i> , that for good and sufficient cause and upon a proper showing, the court may reject or set aside said report, and appoint new commissioners, and continue the cause for further action to be had thereon.
Judgment rendered.	
Decree filed and recorded.	SEC. 1053. (24.) The clerk of said court, as soon as practicable, shall file a certified transcript of such decree, together with the petition and map or plat, in the office of the recorder of the county, and the same disposition shall be made thereof as is provided by section five of this act, in the organization of a corporation under this act.
Completion of separation.	SEC. 1054. (25.) So soon as said record shall be made, and said transcript certified and forwarded and delivered as provided in said section five, the inhabitants residing within the limits described in said petition

and plat or map, shall be deemed and taken to be no part of such corporation, and the territory described in such petition and map shall be deemed no part of such city or town, the costs shall be paid by the petitioners, but when witnesses are called in such cases, each party shall pay their own witness fee.

Costs

SEC. 1055. (26.) In no case shall territory which is not laid out into town or city lots or blocks, be annexed to, or retained as a part of a city or town without the consent of the majority of the resident owners thereof.

Town lots only annexed.

SEC. 1056. (27.) All municipal corporations organized or to be organized under this act, shall have the general powers and privileges, and be subject to the rules and restrictions granted and prescribed in the succeeding section of this act.

Powers and privileges of corporations.

SEC. 1057. (28.) They shall have power to prevent injury or annoyance within the limits of the corporation, from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated, to regulate the transportation and keeping of gunpowder or other combustibles, and to provide or license magazines for the same, to prevent and punish fast or immoderate riding or driving of horses through the streets, to establish and regulate markets, to provide for the measuring or weighing of hay, coal, or any other article of sale, to prevent any riots, noise, disturbance or disorderly assemblages, to suppress and restrain disorderly houses, houses of ill fame, billiard tables, nine or ten pin alleys, or tables and ball alleys, and to authorize the destruction of all instruments or devices used for purposes of gaming, and to protect the property of the municipal corporation and its inhabitants, and preserve peace and order therein.

Enumeration of powers.

SEC. 1058. (29.) They shall have power to make regulations for the purpose of guarding against danger from accidents by fire, and on petition of the owners of two-thirds of the grounds included in any square or block, to prohibit the erection thereon of any building, or any addition to any building, unless the outer walls thereof be made of brick and mortar or of iron, or stone and mortar, and provides for the removal of any building or additions erected contrary to such prohibition.

Regulations against fires.

SEC. 1059. (30.) They shall have power to provide a supply of water by the construction and regulation of wells, pumps, cisterns, reservoirs, or water works, to prevent the unnecessary waste or the pollution of water and injuries to the water works, and for the purpose of establishing or supplying water works, any municipal corporation may go beyond its territorial limits and its jurisdiction to prevent or punish any pollution or injury to the stream or source of water, or to the water works, shall extend five miles beyond its corporate limits, and they shall have power to assess and collect, from time to time in such manner as they shall deem equitable upon each and every tenement supplied with water, a water rent of sufficient amount to defray the expenses of conducting and repairing the water works, and for the creation of a sinking fund for the liquidation of the debts incurred by said corporation in the erection of the same, and the amount so collected shall be applied to the above named purpose and none other.

Power to erect water works.

SEC. 1060. (31.) They shall have power to regulate the burial of the dead, to provide without the limits of the corporation, places for the interment of the dead, and to prevent any sub-interments within such limits, and to carry into effect any prohibition of interments within the limits of the corporation, may not only impose proper fines and penalties, but shall have power to cause any body interred contrary to such

Power to regulate cemeteries.

- prohibition to be taken up and buried without the limit of the corporation.
- Power to impound animals.** SEC. 1061. (31.) They shall have power to restrain and regulate the running at large of cattle, horses, swine, sheep and other animals within the limits of the corporation, and to authorize the distraining, impounding and sale of the same, for the penalty incurred and costs of proceeding to prevent the running at large of dogs and injuries therefrom, and to authorize the destruction of the same when at large contrary to any prohibition to that effect.
- Power to regulate shows.** SEC. 1062. (32.) They shall have power to regulate or prohibit all theatrical exhibitions of whatever name or nature for which money or any other reward is in any manner demanded or received: *provided*, that lectures on scientific, historical or literary subjects shall not come within the provisions of this section.
- Power to regulate auctions, taverns and liquors.** SEC. 1063. (33.) They shall have power to regulate or prohibit the sale of horses or other domestic animals at public auction, in the streets, alleys or highways, to regulate all carts, wagons, drays, coaches, omnibuses, and every description of carriages which may be kept for hire, to regulate taverns, and houses for the public entertainment, and to regulate or prohibit sale of intoxicating liquors subject to the provisions of the law relating thereto.
- Power to regulate and light streets.** SEC. 1064. (34.) They shall have power to lay off, open, widen, straighten or to narrow or vacate, or to extend and establish, to improve, keep in order and repair, and to light streets, alleys, public grounds, wharves, landing places, and market places, to open and construct, keep in order and repair sewers and drains, to enter upon and take for such of the above purposes as may require it, land or material, and to assess and collect, or on the lots or lands through or by which a street, alley, or public highway may pass for the purpose of defraying the expenses of constructing, improving, repairing or lighting such street, alley or public highway in such proportion as to them shall seem just and equitable.
- Private property taken for public purposes.** SEC. 1065. (35.) When it shall be deemed necessary by any municipal corporation to enter upon or take private property as above provided, an application in writing shall be made to the county judge, which application shall describe as correctly as may be the property to be taken, the object proposed, and the owners of the property, and of each lot or parcel thereof, known notice of the time and place of such application shall be given, either personally in the ordinary manner of serving legal process or by publishing a copy of the application with a statement of the time and place at which it is to be made, for three weeks next preceding the time of the application in some newspaper of general circulation in the county, if it shall appear to the county judge, that such notice has been served five days before the application, or has been published as above provided, the time may be set for the inquiry into, and assessment of compensation, and the county judge shall appoint three disinterested persons who shall act as a jury to assess the compensation, which assessment shall be made at the time set as above provided; the said jurors having first examined the premises or property so proposed to be appropriated, unless for good cause continued to another day to be specified, if at the time of such application it shall appear that any of the owners of property are infants or insane, a guardian *ad litem* shall be appointed, and the municipal corporation may be required to file a more accurate description of the property to be taken, and the object proposed, and maps, plats and surveys if necessary or proper. The assessment shall be made so that the amount payable to each owner
- Application published.**
- Jury to assess damages.**
- Guardian.**



may be ascertained either by allotting it to each owner by name, or on each lot or parcel of land, and the inquiry and assessment, shall in other respects be made by the jurors under such instruction as shall be given by the court. The jurors shall be sworn or affirmed to make the whole inquiry and assessment, but may be allowed to return a verdict as to part, and be discharged as to the rest in the discretion of the court, and in case they shall be discharged from rendering a verdict in whole or in part, another jury shall be empaneled, at the earliest convenient time, who shall make the whole inquiry and assessment on the part not made as the case may be. But in making said assessment the jury shall not take into consideration any advantages that may result to said owner or owners on account of the improvement for which the property is taken.

Jurors sworn.

Return.

Second jury.

SEC. 1066. (36.) So soon as the amount of compensation which may be due to the owners of the property to be taken, or any of them, shall be ascertained, the court shall make such order as to its payment, or its deposit as shall be deemed right and proper, and the proportion payable to each, and may require adverse claimants to any part of the money or property to interplead, so as fully to settle their rights and interests according to equity and justice, the court may direct the time and manner in which the possession of the property, shall be taken or delivered, and may if necessary enforce any order giving possession. But none of the property shall be actually taken or occupied until the compensation thus ascertained shall have been paid or secured to be paid. The costs occasioned by the inquiry and assessment shall be paid by the corporation and as to the other costs, which may arise, they shall be charged or taxed as the court in its discretion may direct, no delay in making an assessment of compensation or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners, but in such cases the court shall require the deposit of the money allowed as compensation for the whole of the property, or the part in dispute and in all cases as soon as the corporation shall have paid the compensation assessed or secured its payment by a deposit of money under the order of the court, possession of the property may be taken, and the public work or improvement progress.

Damages paid.

Possession.

Costs paid.

Money deposited.

SEC. 1067. (37.) Any party interested in any such inquiry and assessment, who shall feel aggrieved by the finding of the jury or the order of the court may have the part thereof in which such party may be interested and feel aggrieved, reviewed in the district court, by filing a petition for that purpose within ten days after the finding or decision complained of shall have been made, and it shall be the duty of the court to report in the nature of a bill of exceptions, the facts necessary to show the ground of the finding, or decision, and said petition and report shall be filed in the district court, on or before the first day of the next term thereof, and the matter shall be heard and determined by said court, and if the court shall find that right and justice has not been done, a new assessment may be ordered by a jury in said court or the judgment of the court below affirmed. When such petition shall be filed, the court may suspend the execution of any order which may have been made, on such terms as may be deemed proper, and may require a bond with security for the payment of any damages or costs which may be thereby occasioned, but in all cases when the municipal corporation shall pay or secure by deposit of money the compensation assessed, and shall give such surety as shall be deemed adequate to pay any further compensation and all damages and costs which may be adjudged in

Right of appeal.

Proceedings in district court.

Security for damages.

the district court the right to take and hold the property condemned shall not be affected by such review.

The assessment  
of lots.

SEC. 1068. (38.) Each municipal corporation may by a general by-law or ordinance, prescribe the mode in which the charge on the respective owners of lots or lands, and on the lots or lands shall be assessed and determined, for the purposes authorized by this act, such charge when assessed shall be payable by the owner or owners at the time of the assessment personally, and shall also be a lien upon the respective lots or parcels of land in the possession of any owner from the time of the assessment, such charge may be collected, and such lien enforced by a proceeding in law, or in equity, either in the name of the municipal corporation, or of any person to whom the municipal corporation shall have directed payment to be made, in any such proceeding at law where pleadings are required, it shall be sufficient to declare generally for work and labor done, and materials furnished on the particular street, alley or highway, and in proceedings in equity, when the owner of any lot shall be a non-resident of the county, or unknown notice shall be given by publication in the manner prescribed by law for notices upon absent defendants returned not found, but a publication for one-half the usual time, shall be deemed sufficient, proceedings at law or equity may be instituted against all the owners, or against each or any member of them, as to enforce the lien against all the lots or land, or each lot or parcel or any number of them embraced in any one assessment, but the judgment or decree shall be rendered separately for the amount properly chargeable, any proceeding may be served, in the discretion of the court for the purpose of trial, review or appeal.

Tax collected.

Pleadings.

Non-residents  
notified.

Proceed against.

Tax enforced by  
court.

SEC. 1069. (39.) In any such proceeding where the justice of the peace or the court trying the same, shall be satisfied that work has been done or materials furnished, which according to the true intent of the act would be properly chargeable upon the lot or land through or by which the street, or alley highway improved or repaired or lighted may pass, a recovery shall be permitted, or a charge enforced, to the extent of the proper proportion of the value of the work or materials which would be chargeable on such lot or land notwithstanding any informality, irregularity or defect in any assessment on the part of such municipal corporation, or any of its officers, but in such case the justice or court may adjudge as to costs as may be deemed proper, and in cases where an assessment shall have been regularly made and payment shall have been neglected or refused at the time when the same was required, any municipal corporation shall be entitled to demand, and recover in addition to the amount assessed and interest thereon at ten per cent., from the time of the assessment, five per cent. to defray the expenses of collection which shall be included in any judgment or decree which may be rendered.

Costs paid.

Interest on de-  
linquent taxes

Lots raised and  
nuisances abat-  
ed.

SEC. 1070. (40.) Municipal corporations shall have the power to cause any lot or lots of land within their limits on which or part of which, water at any time become stagnant, to be raised and filled up or drained, and to cause all putrid substances whether animal or vegetable to be removed from such lot or lots and may for such purposes from time to time direct that such lot or lots be raised, filled up or drained or that such putrid substances be removed from such lot or lots by the owner or owners thereof respectively in such manner as may be directed by a resolution of the proper authority of any municipal corporation, and it shall be the duty of such owner or owners his, her or their agent or attorney, after service of a copy of the same resolution or after a

Owner to have it  
done.

publication of the same in some newspaper of general circulation in such municipal corporations for two successive weeks, to comply with the directions of such resolution within the time therein specified, and in case of a failure or refusal to do so, it may be done at the expense of said municipal corporation, and the amount of money so expended shall be a debt due to said municipal corporation from the owner or owners of said lot or lots according to the amount expended by him, her or them respectively, to be recovered before a justice of the peace or any other court of competent jurisdiction, and shall moreover from the time of the adoption of such resolution be a lien on such lot or lots, which may be enforced if need be, either after or without a previous proceeding at law, by a suit in equity in the district court of the proper county and like proceedings may be had as hereinbefore directed in relation to the improvement of streets, or as in other cases at law or in equity.

Lien on the lots.

Expense recovered.

SEC. 1071. (41.) Municipal corporations shall have power to make and publish from time to time by-laws, or ordinances, not inconsistent with the law of the state for carrying into effect, or discharging the powers and duties conferred by this act, and it is hereby made the duty of municipal corporations to make and publish such ordinances or by-laws as shall be necessary to secure such corporation from injuries by fire, thieves, robbers, burglars, and all other persons violating the public peace for the suppression of riots and gambling and indecent and disorderly conduct for the punishment of all lewd and lascivious behavior in the streets and other public places, and they shall have power to make and publish such by-laws and ordinances as to them shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof.

Power to make ordinances.

Ordinances published.

SEC. 1072. (42.) By-laws and ordinances of municipal corporations may be enforced by the imposition of fines, forfeitures and penalties, and any person or persons offending against or violating such by-laws or ordinances or any of them, and the fines, penalties or forfeiture may be prescribed in each particular by-law or ordinance or by a general by-law or ordinance made for that purpose, and municipal corporations shall have power to provide in like manner for the prosecution, recovery and collection of such fines, penalties and forfeitures.

Ordinances enforced by penalties.

SEC. 1073. (43.) Fines, penalties and forfeitures which shall not exceed the sum of twenty dollars, for any one specified offense or violation of the by-law or ordinance, or double that sum for each repetition of each offense a violation of which shall not exceed the sum of ten dollars for each day, where a thing prohibited or rendered are lawful and in its return continuous in respect to time shall be deemed reasonable and proper. But where in any by-law or ordinance a greater fine, penalty or forfeiture is imposed than as above specified it shall and may be lawful in any suit or recovery thereof, to reduce the same to such amount as shall be deemed reasonable and proper and to permit a recovery or render judgment accordingly.

Fines regulated.

Heavy fines not limited.

SEC. 1074. (44.) Fines, penalties and forfeitures may in all cases, and in addition to any other mode provided be recovered by suit or action before a justice of the peace, or other court of competent jurisdiction in the name of the proper municipal corporation and for its use, and in any such suit or action. Where pleading is necessary it shall be sufficient to declare generally for the amount claimed to be due in respect to the violation of the by-law, or ordinance referring to its title,

Fines may be enforced.

and the duties of its adoption or passage, and showing as near as may be the transaction of the alleged violation.

Time of commencing suits or fines.

SEC. 1075. (45.) All suits or prosecutions for the recovery of any such fines, penalties or forfeitures or for the commission of any offense made punishable by any by-law or ordinance, of any municipal corporation as hereinafter provided shall be commenced within one year after the violation of the ordinance or commission of the offense and not afterwards.

Copies of ordinances made evidence.

SEC. 1076. (46.) The printed copies of the by-laws or ordinances of any municipal corporation, published by its authority and transcripts of any by-laws or ordinances, or of any act or proceeding of municipal corporation, recorded in any book, or entry, on any minutes or journals kept under the direction of such municipal corporation and certified by its clerk shall be received in evidence for any purpose for which the original ordinances, books, minutes or journals would be received, and with as much effect. It should be the duty of the clerk, to furnish such transcripts, and he should be entitled to charge therefor, at the rate that the clerk of the district court is entitled to charge for transcripts of records from that court.

Transcripts by the clerk.

#### *Of the classes of Municipal Corporations.*

Cities classified.

SEC. 1077. (47.) In respect to the exercise of certain corporate powers, and duties of certain officers, municipal corporations are and shall be divided into the classes following: cities of the first and cities of the second class, and incorporated towns.

First and second classes defined by population.

SEC. 1078. (48.) All cities which at the last federal census, had or now have a population of fifteen thousand inhabitants, shall be deemed cities of the first class, and all other cities shall be deemed cities of the second class; all cities which at any future federal census, or at any census which may be taken in pursuance of the laws of this state shall have a population exceeding fifteen thousand inhabitants, shall also be deemed cities of the first class, and any incorporated town, which at any future federal census, or at any census taken under the authority of the state, as aforesaid, shall have a population exceeding two thousand and less than fifteen thousand, shall be deemed a city of the second class.

Cities change from second to first class.

SEC. 1079. (49.) It shall be the duty of the governor, auditor and secretary of state, or any two of them, within six months after the census contemplated by this act, has been filed in the office of the secretary of state, to ascertain what cities of the second class are entitled to become cities of the first class, and what incorporated towns are entitled to become cities of their proper class. And the governor shall cause a statement thereof to be prepared by the secretary of state, which statement he shall cause to be published in some newspaper published in the city of Des Moines, and also in some newspaper printed in each of the cities and incorporated towns, the grade of which shall have been so advanced, and a copy of said statement shall also be transmitted by the secretary of state, to the next general assembly, and any such city or incorporated town, shall at the next regular annual period for the election of municipal officers, proceed to organize, according to its new grade, by the election of officers properly belonging thereto, and on their election and qualification the term of service of any former officer shall expire.

Statement of cities published.

Election of officers.

Pro per ordinances made and published.

SEC. 1080. (50.) So soon as the statement shall be published as above provided, showing that any city or incorporated town, will be entitled at the next regular annual period for the election of municipal officers, to be organized into a city of the first or second class as the case

may be, it shall and may be lawful for the proper corporate authority of such city or incorporated town, to make and publish such by-laws or ordinances as may be necessary to perfect such organization, in respect to the election, duties and compensation of officers or otherwise.

*Of Incorporated Towns.*

SEC. 1081. (51.) The corporate authority of incorporated towns, Officers of incorporated towns organized or to be organized for general purposes shall be vested in one mayor, one recorder, and five trustees, who shall be qualified electors, residing within the limits of the corporation, and shall hold their offices for one year, and until their successors are elected and qualified, and such mayor, recorder and trustees, shall constitute the council of the Council incorporated town, any five of whom shall be a quorum for the transaction of business.

SEC. 1082. (52.) The mayor, or in case of his absence, the recorder Duties of the recorder. shall preside at all meetings of the council; the recorder shall also be and act as clerk of the corporation, and shall attend all meetings of the council, and make a fair and accurate record of all their proceedings, laws, rules and ordinances made and passed by the council, and the same shall at all times be open for the inspection of the electors of the corporation.

SEC. 1083. (53.) The council shall have power to order special Vacancies filled elections to fill vacancies which may happen in the board, from the qualified electors of the corporation, who shall hold their offices until the next annual election, and until their successors are elected and qualified, and in the absence of the mayor and recorder, from any meeting of the council, the council shall have power to appoint any two of their number to perform the duties of mayor and recorder for the time being.

SEC. 1084. (54.) The council of any incorporated town shall have Subordinate officers provided power to provide, by any by-law or ordinance, for the election of a treasurer, marshal and such subordinate officers as they may think necessary for the good government of the corporation, to prescribe their duties and compensation, or the fees they shall be entitled to receive for their services, or to require of them an oath of office, and a bond with surety for the faithful discharge of its duties. The period for the election of any such officer, shall be fixed at the time of the regular annual election, and no appointment of any officer shall endure beyond the period of the Terms of office term of office of the council making the appointment, and one week after the qualification of the members of the succeeding council.

SEC. 1085. (55.) The mayor of the corporation shall be a conservator of the peace throughout its limits, and shall have within the same all the power and jurisdiction of a justice of the peace, in all matters civil and criminal arising under the laws of this state, to all intents and purposes whatever, and for crimes and offenses committed within the limits of the corporation, his jurisdiction shall be co-extensive with the county, and the said mayor shall perform all the duties required of him by the laws and ordinances of the corporation, and appeals may be taken in the same manner as from decisions of justices of the peace, he shall keep a docket, and shall be allowed and receive the same fees that justices of the peace are, or may be allowed for similar services.

SEC. 1086. (56.) The marshal shall be the principal ministerial Marshal and his duties. officer of the corporation, and shall have the same power that constables have by law, and his jurisdiction shall be co-extensive with the county, for offenses committed within the limits of the corporation, he shall exe-

cute the process of the mayor, and receive the same fees for his services that constables are allowed in similar cases.

Removal from office.

SEC. 1087. (57.) By the concurrent vote of five members of the council, the mayor, recorder or any member of the council, or any officer of the corporation may be removed from office, but no such removal shall be made without a charge in writing being made, and an opportunity of hearing being given, unless the officer against whom the charge is made, shall have removed out of the limits of the corporation, and when any officer shall cease to reside within the limits of the corporation, it shall be deemed a good ground for a removal from office.

Arrests for violation of ordinances.

SEC. 1088. (58.) It shall be lawful for any council to provide for the immediate arrest, by the proper officer of the corporation, of any person found violating the ordinances made to preserve the peace and good order of the corporation, and any person so arrested shall be taken forthwith before the mayor or some justice of the peace of the county, for trial, the council may also provide, that when any fine is imposed for the violation of any ordinance, the offender may be committed until the fine and costs of prosecution be paid or until there shall be a discharge in due course of law.

SEC. 1089. (59.) The corporation shall be allowed the use of the jail of the county for the confinement of such persons as may be liable to imprisonment under the laws and ordinances of the corporation; and all persons so imprisoned shall be under the charge of the jailor as in other cases.

#### *Of Cities.*

Corporate authorities defined.

SEC. 1090. (60.) The corporate authorities of cities organized or to be organized under this act, shall be vested in one principal officer, to be styled the mayor, in one board of trustees to be denominated the city council, together with such officers as are within this act mentioned, or as may be created under its authority.

Election of mayor.

SEC. 1091. (61.) The mayor, shall be elected biennially in cities of the first class, and annually in cities of the second class, on the first Monday of April by the qualified voters of the city, he shall be a qualified voter and reside within the limits of the city, and shall hold his office for the term for which he shall have been elected and qualified, he shall keep an office at some convenient place in the city, to be provided by the city council, and shall keep the corporate seal of the city in his charge, he shall sign all commissions, licenses and permits, granted by the authority of the city council, and such other acts as by the law or ordinances may require his certificate.

Qualification and duties.

Vacancy

In case of the death, disability, resignation or other vacation of his office, the city council shall order a special election as soon as practicable to fill the vacancy for the remainder of the time of office, and may appoint some qualified voter to act as mayor until such special election.

Powers of mayor enumerated.

The mayor of the city shall be its chief executive officer and conservator of the peace, and it shall be his special duty to cause the ordinances and regulations of the city to be faithfully and constantly obeyed; he shall supervise the conduct of all the officers of the city, examine the grounds of all reasonable complaints made against any of them, and cause all the violations of their duty, or their neglects, to be promptly punished, or reported to the proper tribunal for correction; he shall have and exercise within the city limits the powers conferred upon the sheriffs of counties, to suppress disorders and keep the peace; he shall also perform such other duties compatible with the nature of his office, as the

council may from time to time require; he shall receive such salary payable quarterly out of the city treasury, as may be provided by ordinance, but the amount of such salary shall neither be increased nor diminished during any incumbent's term of office. Salary.

SEC. 1092. (62.) That until otherwise provided for by the city council constituted by this act, the numbers, divisions and boundaries of the several wards of the cities heretofore incorporated shall remain as fixed by ordinance, on the first Monday of March, A. D. one thousand eight hundred and fifty-eight: *provided*, that the city council created by this act may at any time create new wards, and the boundaries thereof, and those now established, alter in such manner as may be deemed expedient: *and provided further*, that in each city classified in this act as a city of the second class, the city council shall within three months after the taking effect of this act, divide such city into not less than four, nor more than seven wards; the number of wards shall not at any time be decreased nor shall the number ever be increased beyond seven. Wards defined.  
New wards may be created.

SEC. 1093. (63.) That the qualified voters of each ward within the several cities shall on the first Monday of March in each year, elect by a plurality of votes, two trustees who shall be residents of the wards in which they shall be elected, and who shall at the time be qualified voters therein, and when the city council elected under this act shall have been organized as hereinafter provided, they shall proceed and determine by lot the term of service, of each trustee so elected, so that one of the trustees from each ward shall serve for two years, and the other for the term of one year, and at every succeeding annual city election, one trustee shall be elected by the qualified electors of each ward, who shall possess the qualifications hereinbefore required and whose term of service shall be two years, so that the terms of service of the two trustees from each ward shall always expire on different years, and the persons thus chosen shall hold their offices until their successors shall be elected and qualified. The trustees elected for each city shall on the next Election of ward trustees  
after their election assemble together and organize the city council, a majority of the whole number of trustees shall be necessary to constitute a quorum for the transaction of business, they shall be judges of the election returns, and qualification of their own members, they shall determine the rules of their own proceedings and keep a journal thereof, which shall be open to the inspection and examination of any citizen, and may compel the attendance of absent members, in such Terms of office  
manner and under such penalties, as they shall think fit to prescribe; they shall elect from their own body a president *pro tempore*, they shall also appoint from the qualified voters of the city, a city clerk, who shall have the custody of all the laws and ordinances of the city, and shall keep a regular and correct journal of the proceedings of the council, and shall perform such other duties as may be required by the ordinances of the city. The clerk in office at the expiration of the term of service of any council, shall continue in office until his successor shall be appointed and qualified. Organization of council

SEC. 1094. (64.) Each city council shall cause to be provided for the clerk's office, a seal, in the center of which shall be the name of the city, and around the margin the words "city clerk," which shall be affixed to all transcripts, orders or certificates which it may be necessary or proper to authenticate under the provisions of this act, or of any ordinance of the city. For all attested certificates and transcripts other than those ordered by the city council, the same fees shall be paid to the clerk, as are allowed to county officers for the same services. Duties of council.  
City clerk.  
City seal.  
Clerk's fees.

Powers of the council.	<p>SEC. 1095. (65.) The city council shall possess all the legislative powers granted in this act, and other corporate powers of the city, not herein, or by some ordinance of the city council, made in pursuance to this act, conferred on some officer of the city, and they shall have the management and control of the finances, and all the property, real and personal, belonging to the corporation, they shall provide the times and places of holding their meetings, which shall at all times be open to the public, and the mayor or any three trustees may call special meetings, by notice to each of the members of the council, personally served or left at his usual place of abode, they shall appoint, or provide by ordinance that the qualified voters of the city, or of the wards or districts, as the case may require, shall elect, all such city officers as may be necessary for the good government of the city, and for the due exercise of its corporate powers, and which shall have been provided for by ordinance, as to whose election or appointment provision has not herein been made, and all city officers whose term of service is not prescribed, and whose powers and duties are not defined by this act, shall perform such duties, exercise such powers and continue in office such term of time, not exceeding one year, as shall be prescribed by ordinance; but all officers to be elected, shall be elected at the regular annual election for municipal corporations. The officers of all municipal corporations shall receive such compensation and fees, for their services as the trustees shall by ordinance prescribe: <i>provided</i>, that the compensation of the council or trustees shall not exceed one dollar to each member for every regular or special meeting of the board, and not to exceed to each, fifty dollars in any one year.</p> <p>SEC. 1096. (66.) The city council shall have power to establish a board of health, to invest it with powers, and impose upon it such duties, as shall be necessary to secure the city and the inhabitants thereof, from the evils, distresses and calamities, of contagious, malignant and infectious diseases, provide for the proper organization and the election or appointment of the necessary officers thereof and make such by-laws, rules and regulations for its government and support, as shall be required for the enforcing of the most prompt and efficient performance of its duties, and the lawful exercise of its powers, they shall have power to establish a city watch or police, to organize the same under the general supervision of the mayor, marshal or other officer of the police, prescribe its duties and define its powers in such manner as will most effectually preserve the peace of the city, secure the inhabitants thereof from personal violence, and their property from fire and unlawful depredations, they shall establish and organize all such fire companies, and provide them with proper engines and such other instruments as may be necessary to extinguish fire and preserve the inhabitants of the city from conflagration, and provide such by-laws and regulations, for the government of the same as they shall see fit and expedient, and each and every person, who may belong to such fire company, shall in the time of peace, be exempt from the performance of military duty, under the laws of the state; they may erect, establish and regulate the markets and market places, for the sale of provisions, vegetables and other articles necessary for the sustenance, comfort and convenience of the city and the inhabitants thereof; no charge or assessment of any kind shall be made or levied on any wagon or other vehicle, or the horses thereto attached or belonging, bringing produce or provisions to any of the markets in any city, for standing in or occupying a place in any of the market spaces of the city, or in the streets contiguous</p>
Finances.	
Meetings.	
Officers elected.	
Duties and term.	
Pay of city officers.	
Board of health.	
Police.	
Fire companies.	
Markets.	
Farmers not charge d	
Marketing regulated.	



thereto, on market day and evenings previous thereto, and no charge, assessment or prohibition, shall be imposed or made on or against the owners of such wagons or vehicles, or the person using the same, in respect of the use of market spaces and streets, in the manner and for the purpose aforesaid, but the city council shall have full power to prevent forestalling, to prohibit or regulate huxtering in the markets, to prescribe the kind and description of articles which may be sold, and the stands or places to be occupied by the venders and may authorize the immediate seizure, and arrest or removal from the market, of any person violating its regulations as established by ordinance, together with any article of produce in their possession, and the immediate seizure and destruction of tainted or un-sound meat or other provisions.

SEC. 1097. (67.) The city council shall have the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons, within the city, and shall cause the same to be kept open and in repair, and free from nuisances; no street or alley which shall hereafter be dedicated to public use, by the proprietor of ground in any city, shall be deemed a public street or alley, or to be under the use or control of the city council unless the dedication shall be accepted and confirmed by an ordinance especially passed for such purpose; they shall have the power in cities of the first class, to prescribe by ordinance the width of the tires of all wagons, carts, drays and other vehicles habitually used in the transportation of persons or articles from one part of the city to another, or in the transportation of coal, wood, stone or lumber, into the city to establish stands for hackney coaches, cabs and omnibuses, and enforce the observance and use thereof, and to fix the rates and prices for the transportation of persons and property in such coaches, cabs, and omnibuses, from one part of the city to another.

Control and repair of highways  
Public squares.

Wagons and omnibuses.

SEC. 1098. (68.) The city council shall have power to establish and construct and regulate, landing places, wharves, docks, piers and basins, and to fix the rates of landing, wharfage and dockage, and to use for the purpose aforesaid any public building or any property, belonging to, or under the control of the city, and the city council shall have the use and control for the above purpose, of the shore or bank of any lake or river, not the property of individuals, to the extent and in any manner that the state can grant such use or control, the city council shall have power to appoint, or to provide that the qualified voters shall elect harbor masters, wharf masters, port wardens, and other officers usual and proper for the regulation of the navigation, trade or commerce of such city, to define their duties and powers, and fix their fees or compensation, copies of examination and surveys, and of the proceedings of any port warden in the usual discharge of the duties of such officers, certified under his hand and seal, shall be prima facie evidence of the facts therein duly stated.

Wharves and dockage.

Harbor masters.

Papers used as evidence.

SEC. 1099. (69.) The city council of any city shall have the exclusive power to establish and to regulate and license ferries, from such city or any landing therein, to the opposite shore, or from one part of said city to another, and in granting such license, to impose such reasonable terms and restrictions, in relation to the keeping of such ferries, and the time, manner, and rates of the carriage and transportation of persons and property, as the city council may prescribe, and the city council shall have power to provide for the revocation of any such license, and for the punishment by proper fines and penalties, of the violation of any ordinance prohibiting unlicensed ferries, or regulating those established and licensed.

The regulations of ferries.

- Fines collected.**      **SEC. 1100. (70.)** The city council shall have power to provide that when a fine shall be imposed for the violation of the ordinances of the city, or any of them, and the same is not paid, the party convicted, shall by order of the mayor, or the proper authority, or on process issued for the purpose, be committed until such fine or the costs of the prosecution shall be paid, or the party discharged by due course of law; they shall also have power to provide that any person convicted of a repeated and willful violation of any ordinance, who shall refuse or neglect to pay the fine imposed, and the costs of prosecution, shall by like order of process, be imprisoned and kept in confinement for any term not exceeding thirty days; they shall have power to provide that all vagrants, common street beggars, common prostitutes, and persons disturbing the peace of the city, shall on conviction thereof be punished by imprisonment, not exceeding thirty days, and any city shall be allowed for the purpose of imprisonment, authorized under this act, the use of the jail of the proper county, and all persons so imprisoned shall be under the charge of the sheriff of the county, who shall receive and discharge such persons in such manner as shall be prescribed by the ordinances of the city, or otherwise by due course of law.
- Imprisonment for non-payment.**
- Bad characters punished.**
- Removal from office.**      **SEC. 1101. (71.)** Any member of the city council may be expelled or removed from office by a concurrent vote of two-thirds of all the trustees elected to the city council, but not a second time for the same cause; any officer appointed by the city council may be removed from office by a concurrent vote of two-thirds of all the trustees elected to the city council, and provision be made by ordinance, as to the mode in which charges shall be preferred, and a hearing be had; in all cases of vacancies in the city council, they shall be filled by special election, and in case of any office of an elective officer, except trustees of the wards, shall become vacant before the regular expiration of the term thereof, the vacancy shall be filled by the city council, until a successor is elected and qualified, and such successor shall be elected for the unexpired term, at the first annual election that occurs after the vacancy shall have happened.
- Vacancies filled.**

*Of Cities of the Second Class.*

- Mayor act as justice.**      **SEC. 1102. (72.)** The mayor of cities of the second class shall have within the limits of the same, all the jurisdiction and powers of a justice of the peace, in all matters civil or criminal arising under the laws of this state, to all intents and purposes whatever, and for the crimes and offenses, his jurisdiction shall be co-extensive with the county; he shall give bond and security as is required of justices of the peace, to be approved by the city council; he shall have exclusive jurisdiction of all the prosecutions for violations of the ordinances of the city, he may award and issue any process or writs that may be necessary to enforce the administration of right and justice throughout the city, and for the lawful exercise of his jurisdiction according to the usages and principles of law, and he shall in the discharge of his duties as justice of the peace, receive the fees and compensation allowed by law in such cases.
- Jurisdiction.**
- Fees.**      **SEC. 1103. (73.)** The qualified voters of each city of the second class, shall elect a city marshal, who shall hold his office for one year, a city treasurer who shall hold his office for one year, and a city solicitor, who shall hold his office for two years, each of said officers shall continue in office until his successor is elected and qualified and shall have such powers and perform such duties as are prescribed in this act, or may be by any ordinance of the city council, not inconsistent therewith.
- Election of city officers and terms.**

SEC. 1104. (74.) The marshal of the cities of the second class shall execute and return all writs and process to him directed by the mayor, and in criminal cases, or of cases in violation of city ordinances, he may serve the same in any part of the county, it shall be his duty to suppress all riots, disturbances and breaches of the peace, to apprehend all disorderly persons in the city, and to pursue and arrest any person fleeing from justice in any part of the state, to apprehend any person in the act of committing any offense against the laws of the state or ordinances of the city, and forthwith to bring such person before the mayor, or other competent authority, for examination or trial; he shall have power to appoint one or more deputies for whose official acts he shall be responsible; he shall have in the discharge of his proper duties, like power, shall be subject to like responsibilities, and shall receive the same fees as sheriffs and constables in similar cases.

The marshal's duties and jurisdiction

*Of Cities of the First Class.*

SEC. 1105. (75.) The mayor of the cities of the first class, shall at the first regular meeting of the city council in the month of April of every year, and at such other times as he may deem expedient, report to the city council concerning the municipal affairs of the city, and recommend such measures as to him may seem advisable; the mayor shall appoint one chief of police and as many subordinate officers and watchmen as the city council may deem necessary, the watchmen to be selected in equal numbers from each ward, who shall hold their appointments during the pleasure of the mayor; he shall have power in cases of emergency, to appoint as many special watchmen as he may think proper, but such appointments shall be reported to and subject to the action of the city council at its next meeting; he shall have within the county in which such city is situated, in all criminal cases, all the powers of a justice of the peace, but in cases of emergency or necessity, the mayor shall not be required to sit on the examination or hearing of any criminal charge or case, and warrants issued by him shall be made returnable before some judge of the police court.

Message from the mayor.

Appointment of police.

Act as justice

SEC. 1106. (76.) The qualified voters shall elect a city marshal, a city civil engineer, a city treasurer, a city auditor, a city solicitor, police judge, and a superintendent of the market, who shall hold their offices for two years; each of said officers shall continue in office until his successor is elected and qualified, and shall have such powers and perform such duties as are prescribed in this act, or as may be prescribed in any ordinance of the city, not inconsistent with this act, and which may not be incompatible with the nature of their respective offices.

Election of city officers.

SEC. 1107. (77.) The city marshal shall execute and return all process to him directed by the mayor or judge of the police court, and shall attend on the sittings of said court, he shall have power to execute any such process by himself or deputy, in any part of the county, it shall be his duty to suppress all riots and disturbances, and breaches of the peace, to apprehend all persons committing any offense against the laws of this state or the ordinances of the city, and then forthwith bring before the proper authority for examination or trial; he shall have power to pursue and arrest any person fleeing from justice in any part of the state, and to receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or states, to appoint one or more deputies, for whose official acts he shall be responsible; he shall have, in the discharge of his proper duties like powers,

City marshal's duties, powers and jurisdiction

	be subject to like responsibilities, and shall receive the same fees as sheriffs and constables in similar cases.
Appointment of police.	SEC. 1108. (78.) The city council shall by a general ordinance direct the number of officers of the police and watchmen to be appointed, they shall also provide, in addition to the regular watch, for the appointment of a reserved watch to consist of a suitable number of persons in each ward, to be called into duty in whole or in part,
Reserve.	in such manner and on such occasions as the council may prescribe, and by the mayor, or officers of the police under his direction, in special cases or cases of emergency, the duty of the chief and other officers of the police, and of the watchmen shall be under the direction of the mayor, and in conformity with the ordinances of the city, to suppress all riots and disturbances and breaches of the peace, to pursue and arrest any person fleeing from justice in any part of the state, to apprehend any and all persons in the act of committing any offense against the laws of the state, or the ordinances of the city, and forthwith to bring such person or persons before the police court, or other competent authority, for examination, and at all times to diligently and faithfully enforce all such laws, ordinances and regulations, for the preservation of good order and the public welfare, as the city council may ordain, and for such purposes they shall have all the power of constables; the mayor, marshal and watchmen of the city may, upon view arrest any person or persons who may be guilty of a breach of the ordinances of the city, or of any crime against the laws of the state, and may upon reasonable information, supported by affidavits, procure process for the arrest of any person or persons, who may be charged with a breach of any of the ordinances of the city.
Duties, powers, and jurisdiction of the police.	
Trustees of water works.	SEC. 1109. (79.) The city council of any city of which water works are or may be constructed, shall establish a board of three trustees to be known as the trustees of the water works, who shall be elected by the qualified electors of the city, and hold their offices for the term of three years, but it shall be so provided that one of said trustees shall be elected annually; the trustees of water works shall manage, conduct and control the city water works, furnish supplies of water, collect water rents, and appoint all necessary officers and agents under such rules and regulations as the city council shall prescribe, when any city shall have contracted a debt, in respect of water works, the rents and income which may accrue therefrom, shall be kept a separate and distinct fund, to be applied to the payment of the expense of constructing and repairing the works, the payment of such debts, or the creation of a sinking fund for its redemption.
Terms of office.	
Duties.	
Water debt.	
Street commissioners and terms of office.	SEC. 1110. (80.) That on the first Monday in March there shall be elected three commissioners, the person having the highest number of votes cast to hold his office for the term of three years, the person having the next highest number to hold his office for the term of two years, and the person having the next highest number to hold his office for the term of one year, and thereafter one shall be elected annually, who shall continue in office for the term of three years, and until his successor is elected and qualified; it shall be the duty of the city commissioners to enforce the ordinances of the city, to superintend the cleaning and improvement and the lighting of the streets, lanes and alleys, market spaces, commons, bridges, sewers and landings of the city, and perform such other duties as the council by ordinance may provide; they shall, with the mayor of the said city, and the city civil engineer, constitute the board of city improvements, and receive such compensation for their services as the council may determine; the board of city improvements,
Streets cleaned.	
Construction of public works.	

shall exercise such powers and perform such duties in the superintendence and construction of public works, constructed by authority of the city council, or owned by the city, as the said council may from time to time prescribe.

SEC. 1111. (81.) The city council shall have power to erect and establish, to maintain and regulate an infirmary for the accommodation of the poor of the city, either within the limits of the city, or within the county, within which it may be situate, and for such purpose may purchase or hold any real estate that may be deemed necessary; the management and government of any such infirmary, and the granting of out door relief to the poor, under such rules and regulations as the council may prescribe shall be vested in a board of three directors to be elected by the qualified voters of the city, and hold their offices for the term of three years, but it shall be so provided that one of said directors shall be elected annually; the city council may provide that the qualified electors of each ward of the city shall elect, or that the said directors shall appoint an overseer in each ward, who shall perform such duties in respect of the care of the poor, and their removal to said infirmary, as the city council may provide.

Infirmary for the poor.

Directors elected.

Overseers of poor.

SEC. 1112. (82.) The city council shall have power to erect and establish and to maintain and regulate either within its limits, or within the county in which it is situate, a house of refuge, or a house of correction, and a work house, or either of them, and place the same under the management and control of such directors, superintendents and other officers as the council may by ordinance provide; all children under the age of sixteen years, who shall be convicted of any offense made punishable by imprisonment under any ordinance of the city, or who shall be liable to be committed to prison under any such ordinance, may be confined in such house of refuge, and may be there kept or apprenticed out under such rules and regulations as the directors of the house of refuge may prescribe, until they arrive at the age of eighteen years, and it shall and may be lawful for the directors of any such house of refuge to receive and take charge of any children who may be committed to their custody by the county court, or any judge, justice of the peace, or other officers, under any law of the state, any person over the age of sixteen years, convicted of the violation of any ordinance, and liable to be punished therefor by imprisonment, may, in lieu thereof, be committed to the house of correction, or to the work house as may be provided by ordinance.

House of refuge.

Convict children confined.

Bad children committed.

SEC. 1113. (83.) That the board of directors of any house of refuge heretofore established by any city, be and they are hereby authorized to appoint a committee of one or more of their own number with power to execute and deliver, on behalf of said board indentures of apprenticeship for any inmate of said institution whom they may deem a proper person for an apprenticeship to a trade or occupation, to such person as said committee or the board may select and agree with, and the said indentures shall have the like force and effect as other indentures of apprenticeship, under the laws of Iowa, and that said indentures shall be filed and kept in said institution by the superintendent thereof, and it shall not be necessary to file or record the same in any other place or office.

Children may be bound to apprenticeship.

SEC. 1114. (84.) That when any boy or girl shall be convicted of any offense against the laws of this state, punishment with imprisonment in the penitentiary, or in the jail of the county where such house of refuge may be situate, and shall under existing laws be sent to the house of refuge, instead of the penitentiary or jail; and if said boy or girl shall refuse to submit to the rules of said institution, and prove to be

Youth may be changed from house of refuge to the prison.

Statement of causes made.	stubborn and irreclaimable, in the opinion of a majority of said board, he or she may, by their order, be delivered into the custody of the sheriff of said county, with a written statement of the cause of his or her commitment, and of the conduct and character of such boy or girl as exhibited in said institution, which statement shall be prepared and signed by the superintendent of said institution; and it shall be the duty of the sheriff to receive such boy or girl into custody, and to file such statement in the office of the clerk of the district court, or in the office of the court in which he or she shall have been tried, and to notify the prosecuting attorney of the district thereof, and thereupon the district attorney shall cause such boy or girl to be brought before the district
Sentenced in district court.	court, or before the court in which he or she may have been tried, to receive the sentence which the court shall deem just according to the law for the offense for which he or she may have been convicted.
Recommitment to house of refuge.	SEC. 1115. (85.) That when any inmate of said institution shall have been apprenticed, and prove untrustworthy and unreformed, he or she shall be recommitted to the said institution, to be held in the same manner as before said apprenticeship.
City prison.	SEC. 1116. (86.) The city council shall have power to erect, establish and maintain, a city prison, which shall be in the keeping of the city marshal, under such rules and regulations as the city council shall provide.
Watch house.	The city council of such city shall provide one or more watch or station-houses; they shall also provide suitable rooms for holding the police court; they shall provide by ordinance for the election by the qualified voters of the city, or for the appointment by the police judge, of a clerk for such police court, and for the selection, summoning and empanneling its juries, and for all such matters touching said court as may tend to its efficiency and the despatch of business. No clerk of said court shall be in any way concerned as counsel or agent in the prosecution or defense of any person before such court. It shall be the duty of the city marshal, by himself or deputy, to attend the sittings of the police court, to execute its orders and process, and preserve order.
Clerk of police.	SEC. 1117. (87.) The police judge shall have in all criminal cases the powers and jurisdiction that are or may by law be vested in justices of the peace of the county, in all respects whatsoever; he shall also have the powers to take acknowledgments of deeds and other writings; he shall have jurisdiction of all ordinances of the city, and of all cases of petit larceny and other inferior offenses which do not require an indictment or presentment by the grand jury, with power to hear and determine the same, where a jury is not demanded in cases where it may be properly claimed. The police judge of any such city shall have power to hold court, to be styled the "police court." Every such police court shall be deemed a court of record, shall have a seal to be provided by the city council, with the name of the state in the center, and the style of the court around the margin, and shall have like jurisdiction as a court as is or may be invested in the judge holding the same; and shall also have jurisdiction and power to hear and determine all cases of violation of the ordinances of the city which shall be prosecuted in the name or in the behalf of the city; and all cases of petit larceny, or other inferior offenses of any description committed within the limits of the city, or within one mile thereof, and which the constitution or some law of the state does not require to be prosecuted by indictment or presentment of a grand jury; and prosecutions for such offenses shall be brought and conducted in the name of the state. And for the proper exercise of such jurisdiction, such police court shall have in respect of
Police judge's powers.	
Police court.	
Seal.	
The powers and jurisdiction of police judge determined.	

the issuing of process, the preserving order and punishing contempts, the administering oaths, the summoning and empanelling juries, or otherwise all the persons incident to the district courts in the hearing and determining like cases.

SEC. 1118. (88.) The police judge holding the police court shall be entitled to receive in all criminal cases prosecuted in behalf of the state, the same fees, to be collected in the same manner as is or may be provided by law, as the justice of the peace in like cases, and in cases prosecuted in behalf of the city, such fees not exceeding fees for the services of the like nature in state prosecutions, as the council may by ordinance prescribe, and shall also receive such future salary or compensation as the city council in like manner may prescribe.

Fees and salary of police judge.

SEC. 1119. (89.) The police court shall always be open for the dispatch of business but may adjourn from day to day or from time to time, and the mode in which cases shall be brought before the court shall be regulated by the ordinance of the city council or rule of the court; the jurors in said court, shall have the qualifications of jurors in the district court, the police judge shall adopt such rules of practice and proceedings as will give to all the parties a proper statement of any charge against them, full opportunity of being heard, but at the dispatch the business of the court with convenient speed.

Sessions of police court.

Jurors.

Rules of court.

SEC. 1120. (90.) Any final conviction or sentence of the police court may be examined into by the district court on certiorari, which may be allowed by such court or judge thereof, for sufficient cause and proceedings may be stayed on such terms as may be deemed reasonable; such police judge or court shall on such certiorari, all matters of record on file touching the proceedings, or a transcript thereof and any facts which may have been noted by the judge, or certified in the nature of a bill of exceptions at the time of trial, which it shall be the duty of the judge on the request of the party to do and on such return the district court shall make such order as right and justice may require and may either discharge the party or set aside the conviction, and order another trial, or dismiss the certiorari and order a procedendo, but no conviction or sentence of any such judge shall be set aside or disregarded for want of any technical averment that any matter or thing is within their jurisdiction and in like manner as is above provided, may a conviction for the violation of any ordinance before the mayor of any corporation, be examined and revised.

Appeal to district court.

Transcript of case made out.

Cese decided.

Appeal from Mayor.

SEC. 1121. (91.) That until a police judge shall be elected and qualified the mayor of any such city shall have all the powers and jurisdiction which are by this act vested in the police judge, and shall hold the police court in like manner, and with like jurisdiction and powers as required of the police judge, and shall be entitled to demand and receive the same fees and compensation as in this act or as may be provided by the city council for the police judge or police court.

Mayor act till Judge is elected.

SEC. 1122. (92.) All by-laws or ordinances and all resolutions or orders of the appropriation or payment of money, shall require for their passage or adoption the concurrence of a majority of all the trustees of any municipal corporation, all by-laws, and ordinances of a general or permanent nature, shall be fully and distinctly read on three different days, unless three-fourths of the council of the municipal corporation in which the same may be pending, shall dispense with the rule, no by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title and no by-law or ordinance or section thereof shall be reviewed or amended unless the new by-law or ordinance contain

Majority of all the council pass laws.

Three readings of bills.

Mode of amendment.

the entire by-law or ordinance, or section reviewed or amended, and the by-law or ordinance, section or sections so amended, shall be repealed.

Councilmen not eligible to office. No trustee or member of any council, shall during the term for which he has been elected or for one year thereafter, be appointed to any municipal office, which shall be created or the emoluments of which shall have been increased, during the term for which he shall have been elected, no such trustee or member shall be appointed to any municipal office except in the cases provided in this act during the time for which he may have been elected, nor shall any such trustee or member be interested directly or indirectly in the profits of any contract or job for work or service to be performed for the corporation. The emoluments of no officer whose election or appointment is required by this act shall be increased or diminished for the term for which he shall have been elected or appointed, nor shall any charge of compensation effect any officer whose office shall be created under the authority of this act during his existing term, unless the office, be abolished, and no person who shall have resigned or vacated any office shall be eligible to the same during the time for which he was elected or appointed to serve where during the same time the emoluments have been increased.

No interest in contracts.

Salary not increased during term of office.

*Revenue and Debts of Municipal Corporations.*

Tax certified to county clerk. SEC. 1123. (93.) That the council of any municipal corporation, is hereby authorized and required to cause to be certified to the clerk of the county, on or before the first of August annually, the percentage by them levied on the real and personal property in said corporation, appraised and returned on the grand levy aforesaid, and county clerk is hereby authorized and directed to place the same on the duplicate of taxes for said county, in the same manner as county taxes are now placed on said duplicates, which said taxes of said municipal corporation, shall be collected by the county treasurer of the county, and paid into the treasury of such corporation, with the same power and restrictions, and under the same regulations, and in all things as to the sale of real or personal property, he shall be authorized, and he is hereby required to act according to the provisions and requisitions of the law for the collection of taxes for the state and county purposes.

County treasurer collects taxes.

The per cent of tax defined. SEC. 1124. (94.) The amount which may be so certified, assessed and collected for a special road district, to defray the general and incidental expenses thereof, shall not exceed three-fourths ( $\frac{3}{4}$ ) of one mill on the dollar of the amount subject to taxation for an incorporated town, to defray its general and incidental expenses, ten mills on the dollar, for a city of the second class, to defray its general and incidental expenses ten mills on the dollar.

Tax levied for sinking fund. SEC. 1125. (95.) That for the purpose of creating a sinking fund for the gradual extinguishment of the bonds and funded debt of any municipal corporation, the council thereof may in their discretion annually levy and collect, in addition to the other taxes of said corporation a tax of not more than one mill upon the assessed value of said property appraised and returned as aforesaid, which shall be paid into said treasury and be applied by orders of the city council towards an extinguishment of the said bonds and funded debt and to no other purpose whatever.

County treasurer pays over to city treasurer. SEC. 1126. (96.) That it shall be the duty of the treasurer of the county to pay over to the treasurer of any municipal corporation, all moneys received by him arising from taxes levied belonging to such municipal corporation, on or before the ——— day of ——— in each



year, and such moneys as said county treasury may receive after that time for delinquent taxes belonging to such corporation, he shall pay over to the treasurer thereof when demanded.

SEC. 1127. (97.) In any municipal corporation where the power exists to impose taxes on lots when platted and recorded, the corporation shall also have power to impose taxes upon parcels of land laid off into lots and sold or leased by metes and bounds, or other description, though the same shall not have been platted or recorded. Unrecorded lots taxed.

SEC. 1128. (98.) That the council of any municipal corporation shall have power, whenever in their opinion the interests of the corporation require it, to lay and collect a tax on dogs and other domestic animals, not included in the list of taxable property for the state and county purposes, which said tax shall be collected by the collector of such corporation and paid into the treasury thereof. City may tax dogs.

SEC. 1129. (99.) Loans may be made by any municipal corporations in anticipation of the revenues thereof, but the aggregate amounts of such loans shall not exceed the sum of four per cent. upon the taxable property of any city or town. Loans made and limited.

*Of Elections and Qualifications of Officers.*

SEC. 1130. (100.) The first Monday of March shall be the regular annual period for the election of municipal officers, and all officers whose election is provided for in this act, or may be provided for by any by-law or ordinance, shall be elected on that day. Special election of members of the city council of any city shall be held at such time as the mayor may direct, so that ten days' notice thereof be given. The trustees or council of every municipal corporation shall direct the place or places for holding elections for municipal officers. In all cities there shall be a place appointed in each ward for holding all elections; any person who at the time of any election of municipal officers would be a qualified voter under the laws of the state for county officers, and shall actually reside in the corporation or ward in which he offers to vote, shall be deemed a qualified voter, and all elections shall in all respects be held and conducted in the manner prescribed by law in case of township elections. Annual election. Special election. Places of election. Qualifications of voters.

SEC. 1131. (101.) The returns of all municipal elections in cities and incorporated towns which are divided into election districts or wards shall be made to the clerk or recorder of the corporation, and shall be opened by him within the time prescribed by law in the county elections. He shall call to his assistance the mayor of the corporation, or if there be no mayor, or the mayor shall have been a candidate at such election, then any of the justices of the peace of the county, and shall in his presence make out an abstract, and ascertain the candidates elected in all respects as required by law for the canvass of returns of the county elections, and shall in like manner make out a certificate as to each candidate so elected, and cause the same to be delivered to him or to be left at his place of abode. At all elections in cities and incorporated towns, which are not divided into election districts or wards, the mayor and trustees, any three of them whom shall be a quorum, shall serve as judges, and the recorder shall serve as clerk, and after canvassing the votes which may be given at such election shall declare the result, and the recorder shall make out and deliver to each person elected to any office in such city or incorporate town, a certificate of such election. Returns made to city clerk. Canvass. Certificate of election. Canvass by council.

SEC. 1132. (102.) All officers elected or appointed in any municipal Oath of office.

corporation, shall take an oath or affirmation to support the constitution of the United States, and the constitution of the state of Iowa, and the trustees or council of any municipal corporation may require from such officers as they may think proper, a bond with proper penalty and surety, for the faithful discharge of the duties of their office, and such trustees or council shall have the power to declare the office of any person appointed or elected to any office, who shall fail to take the oath of office, or give bond when required, for ten days after he shall have been notified of appointment or election, vacant, and proceed to appoint as in other cases of vacancy.

*Further General Provisions.*

**Record and publication of ordinances.** SEC. 1133. (103.) All by-laws or ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose, and be authenticated by the signature of the presiding officer of the council, and the clerk; and all by-laws of a general or permanent nature, and those imposing any fine, penalty or forfeiture, shall be published in some newspaper of general circulation in the municipal corporation, and it shall be deemed a sufficient defense to any suit or prosecution for such fine, penalty or forfeiture to show that no such publication was made.

**Yeas and nays called on passage of bills.** SEC. 1134. (104.) On the passage or adoption of every by-law or ordinance, and every resolution or order to enter into a contract by any council of any municipal corporation, the yeas and nays shall be called and recorded; and to pass or adopt any by-laws or ordinance or any such resolution or order, a concurrence of a majority of the whole number of the members elected to the council shall be required; all appointments of officers by any council shall be made *viva voce*, and the concurrence of like majority shall be required and the names of those, and whom they voted, on the vote resulting in an appointment shall be recorded. No money shall be appropriated by the council except by ordinance.

**Appointments.**

**Repairing of streets.** SEC. 1135. (105.) No street or highway shall be opened, straightened or widened, nor shall any other improvement be made which will require proceedings to condemn private property, without the concurrence in the by-laws or ordinance or resolution directing the same of two-thirds of the whole number of the members elected to the council, and the concurrence of a like majority shall be required to direct any improvement or repair of a street or highway, the cost of which is to be assessed upon the owners of the property, unless two-thirds of the owners to be charged therefor, shall petition in writing for the same.

**Two thirds' vote.**

**Improvements recommended by board.** SEC. 1136. (106.) In all cities of the first class, where there shall be a board of city improvements, no improvement, or repair in relation to streets, sewers or bridges shall be ordered or directed by the city council, except on the report and recommendation of said board; all petitions from the owners of property in relation to such improvements, shall be presented to such board who shall report from time to time to the city council, when any such improvement is necessary or proper, and when assessment is required, and the proper amount to be assessed, and the city council shall take such action thereon as may be deemed proper.

**Petitions presented.**

**Rights of old corporation secured.** SEC. 1137. (107.) All rights and property of every kind and description, which were vested in any municipal corporation under its former organization, shall be deemed and held to be vested in the same municipal corporation under the organization made by this act, and no right or liabilities either in favor or against such corporation existing at the time of taking effect of this act, and no suit or prosecution of any

kind shall in any manner be affected by such change, but the same shall stand or progress as if no such change had been made: *provided*, that where a different remedy is given by this act, which can properly be made applicable to any right existing at the time of its passage, the same shall be deemed cumulative to the remedies before provided, and may be used accordingly.

SEC. 1138. (108.) Any municipal corporation which under its former organization, held or exercised any power or duty in ordering or directing the election of justices of the peace, constables or other township officers, shall continue to hold and exercise such power and duty until otherwise provided by law. Additional justices elected.

SEC. 1139. (109.) Any municipal corporation in which under its former organization any law or charter regulating any literary, charitable or benevolent institution, vested any power appointing officers of supervision or control, shall continue to hold, possess the like power and authority in every respect. Powers continued.

SEC. 1140. (110.) That the mayor, trustees, marshal, treasurer, and all officers heretofore elected by the people or appointed by any municipal corporation now in office, shall remain and continue in their respective offices and perform the several duties thereof under the provisions of this act, until the term shall expire for which they have been elected or appointed, and until their successors shall be chosen or appointed and qualified, unless the council of such corporation shall otherwise provide; but all such officers shall notwithstanding any instruction in this act, be subject to such rules and regulations touching their duties or compensation, as the proper authority of any municipal corporation may provide; and all laws, ordinances, and resolutions heretofore lawfully passed and adopted by the city council, shall be, remain and continue in force until altered or repealed by the city council, established by this act, and all special acts in relation to any municipal corporation, repealed by the first section of this act, shall notwithstanding, so far as the same affects the particular police regulations or local affairs of any municipal corporation, in matters not inconsistent with this act, be and remain in full force as by-laws and ordinances of the particular municipal corporations, until altered or repealed by the proper authority thereof. Officers continued in office.  
Laws and ordinances continued in force.

SEC. 1141. (111.) The charter or act of incorporation of any city or town in this state may be amended in manner following, to wit: Process of amending charters.

When one-fourth qualified voters of said city or town as shown by the vote at the charter election immediately previous, petition the legislative body of said city or town for the amendment of the charter or act of incorporation, the said legislative body shall immediately propose sections amendatory of said charter or act of incorporation as petitioned for, and submit them to the qualified voters of said city or town at the first ensuing charter election, at least ten days before said election; the mayor or chief officer of said city or town shall issue his proclamation setting forth the nature and character of such amendment, and the said proclamation shall be immediately published in some newspaper published in said town, and be posted up in some conspicuous place in the office of said mayor or chief officer, or if there is no such paper, then by posting copies of said proclamation in five conspicuous places in said city or town; one of which shall be the door of the office of said mayor or chief officer. On the day specified the said amendment shall be submitted to the qualified voters of the corporation for adoption or rejection, and the form of the ballot shall be, "for the amendment," or "against the amendment." Submitted to the people.  
Notice published.  
Form.

- An amendment in force. SEC. 1142. (112.) If the majority of the votes cast is in favor of said amendment, the mayor or chief officer shall forthwith issue his proclamation accordingly; and the said amendment shall thereafter constitute a part of said charter and be operative on the people.
- Amendment at special election. SEC. 1143. (113.) The legislative body of said city or town may submit any amendment to the vote of the people as aforesaid at any special election: *provided*, one-half the voters determine as aforesaid, petition for that purpose, and the proceeding shall be the same as at the general election.

## ARTICLE 2.

## An Act concerning Taxes levied by Municipal Authorities.

[Passed March 22, 1858; took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 105, page 207.]

- Inequalities stated. WHEREAS, By the charters and other acts granting to municipal corporations, the right to levy and collect taxes on real estate, the mode of said collection, the rate of interest, and the effect of the collector's deed are various, unequal, and in some cases unjust; and, whereas it is desirable to remedy such defects, and establish a uniform principle on the subject, therefore,
- Deed from city of same force as deed from county. SECTION 1144. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That from and after the publication of this law, in all cases of the sale of real estate made by virtue of the laws and ordinances of any municipal corporation in this state, the purchaser shall receive a deed which shall have the same effect as the county treasurer's deeds under sales made by him, as provided in the code, and that the mode there provided for the purposes of making sales effective, and foreclosing the redemption, shall be purchased by the holder of said corporation deed; and that no greater rate of interest than twenty-five per cent. per annum, shall hereafter be charged on any such deed or sale.
- Rate of interest.

## ARTICLE 3.

## An Act to change the names of Towns and Villages not Incorporated.

[Passed March 22, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 108, page 210.]

- Petition for change. SECTION 1145. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That any town or village desirous of changing its name shall petition the county court of the county where such town or village is situated, and if it shall appear to said court that a majority of the actual resident voters of such town or village are in favor of such change,
- Notice given. he shall cause three notices to be posted up in three of the most public places of the town for at least thirty days previous to the next sitting of said court, which notice shall state the fact that a petition has been presented to said court by the citizens of said town or village, praying for a change of name of said town or village, also the name prayed for by said petitioners, and that unless those interested in the change of said name will appear at the next regular term of said court and show cause why said name shall not be changed there will be a decree rendered granting such change, which notice shall be signed by said court and attested by the seal thereof.
- Decree. SEC. 1146. (2.) If at the time fixed for the trial the court is satisfied there are still a majority in favor of such change of name, said court shall render a decree granting such change, attesting the same by
- Decree rendered and recorded.

his official name, together with the seal of his court, which decree shall be recorded in the office of the recorder of the county where such town or village is situated. The cost of such change and recording shall be paid by the petitioners of such town or village. But should it appear to said court that a majority of the citizens of such town or village are not in favor of such change, he shall dismiss the case and tax the cost of the proceedings against the petitioners. Majority gov  
erns.

## ARTICLE 4.

An Act relating to the publication of Ordinances and other Acts of City Governments.

[Passed April 2, 1860, took effect April 25, 1860; Laws of Eighth General Assembly, Chapter 111.]

SECTION 1147. (1.) *Be it enacted by the General Assembly of the State of Iowa,* In all cases where the act of incorporation of any city in this state provided for the publication of ordinances, proclamations and notices in one or more newspapers published in said city, before said ordinances, proclamations and notices should go into effect, that in case no newspaper is published in said city, said ordinances, proclamations and notices shall go into effect and be in full force after they have been posted up in three public places in said city for the term of ten days. Publicatio  
posting.

SEC. 1148. (2.) All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. Repeal.

SEC. 1149. (3.) Two of the public places required by section first of this act for posting notices, shall be the post office of said city and the mayor's office. Public places.

PRIOR LAWS. 1. An act to incorporate the inhabitants of such towns as wish to be incorporated, passed Dec. 6, 1837, Wis., 1st sess. No. 17, p. 43; repealed Aug. 30, 1840.

2. An act for incorporating towns, passed Feb. 24, 1847? 1st sess., chapter 117, page 174.

DECISIONS. A municipal corporation may be subjected to garnishment and held; the objection of exemption from garnishment is the privilege of garnishee, 4 Iowa, 302; city ordinances have force only within city, but affect all persons therein; as to power of ordinance making under sec. 663, of code, 4 Iowa, 296; city powers as to nuisances, 4 Iowa, 296; legislative power over charter, 8 Iowa, 82; to authorize taxing without consent of the inhabitants, *ibid.*; the liabilities of cities for injuries through bad streets, 7 Iowa, 488; 6 Iowa, 443; where the burden of proof in such case lies, 6 Iowa, 443; 7 Iowa, 488; ordinary care defined, 7 Iowa, 488; city liable for diverting water upon the premises of others and causing damage, 4 G., 373; and *Cotes and Patchin v. City of Davenport*, Dec., 1859; liability for non feissance or negligence of its agents, *ibid.*; or want of skill, *ibid.*; rights of reversioner to action for permanent injury to real estate, *ibid.*; as to right of compensation for damage from grade, or change thereof, *ibid.*, and 4 G., 47; fee of soil in the adjacent owner, *City of Dubuque v. Maloney*, Dec., 1859; *Milburne v. C. I. and N. R. R. Co.*, same term; power of city council over markets and to control place of sale of meat, &c., 7 Iowa, 102; can not delegate such power, *ibid.*; ordinances have no extra territorial force, 4 Iowa, 296; nor are they judicially noticed by the courts, 8 Iowa, 286; the legislative power of extension of limits can not be used to include agricultural lands, 8 Iowa, 82; laying out streets—assessing and awarding damages—right to enforce the report of commissioners of assessment—and mandamus to compel to collect, *State of Iowa v. City of Keokuk*, Dec., 1859; presumption as to qualification of commissioners, *ibid.*; power of justice to try causes when such power depends upon a condition precedent—the record should show its existence, 7 Iowa, 505; liability of the city of Davenport for bad streets and bridges, 6 Iowa, 443; its existence as a road district commensurate with such existence as a city, *ibid.*; amended charter of Davenport unconstitutional, *ex parte*, *Pritz*, June, 1859; see a case of no appeal under the Dubuque charter, 4 Iowa, 343; right of injunction until compensation for lot taken

by city for street be made, *ibid.*; description of the tribunal created by the charter of Dubuque, 1 Iowa, 444; two ordinances applicable to a case, *ibid.*; power of Keokuk to grade and establish streets, 4 G., 47; mayor of Iowa city to notice ordinances *ex officio*, 2 Iowa, 90; as to signature of mayor to the recorded copy of ordinance, *ibid.*; the city of Mount Pleasant can license and tax pedlers, 6 Iowa, 546; power of corporation to employ an attorney in a given case, 4 G., 336; all acts of incorporation public, and as such may be given in evidence, by reprint, chap. 137, sec. 2, 2 G., 518; *see also* 4 G., 42; 2 G., 482; and as to road district, *see White v. Road District*, June, 1859.

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## TITLE X.

### OF CORPORATIONS.

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#### CHAPTER 52.

##### CORPORATIONS FOR PECUNIARY PROFIT.

[Code—Chapter 43.]

##### ARTICLE 1.

Who incorporated.

SECTION 1150. (673.) Any number of persons may associate themselves and become incorporated for the transaction of any lawful business including the establishment of ferries, the construction of canals, railways, bridges, or other works of internal improvement; but such incorporation confers no power or privilege not possessed by natural persons except as hereinafter provided.

Powers assumed.

SEC. 1151. (674.) Among the powers of such body corporate are the following:

1. To have perpetual succession;
2. To sue and be sued by its corporate name;
3. To have a common seal which it may alter at pleasure;
4. To render the interests of the stockholders transferable;
5. To exempt the private property of its members from liability for corporate debts except as herein otherwise declared;
6. To make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy;
7. To establish by-laws and make all rules and regulations deemed expedient for the management of their affairs, in accordance with law and not incompatible with an honest purpose.

Pre-requisites.

SEC. 1152. (675.) Previous to commencing any business except that of their own organization they must adopt articles of incorporation which must be recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor.

Same.

SEC. 1153. (676.) Corporations for the construction of any work of internal improvement must, in addition, also file a copy of such arti-

cles in the office of secretary of state and have the same recorded by him in a book kept for such purposes. Such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case except in that of the risks of insurance companies exceed two-thirds of its capital stock.

SEC. 1154. (677.) A notice must also be published for four weeks <sup>Notices.</sup> in succession in some newspaper as convenient as practicable to the principal place of business.

SEC. 1155. (678.) Such notice must contain:

<sup>What to contain.</sup>

1. The name of the corporation and its principal place of transacting business;
2. The general nature of the business to be transacted;
3. The amount of capital and stock authorized, and the times and conditions on which it is to be paid in;
4. The time of the commencement and termination of the corporation;
5. By what officers or persons the affairs of the company are to be conducted and the times at which they will be elected;
6. The highest amount of indebtedness or liability to which the corporation is at any time to subject itself;
7. Whether private property is to be exempt from the corporate debts.

SEC. 1156. (679.) The corporation may commence business as soon <sup>When may com-  
mence.</sup> as the articles are filed in the office of the recorder of deeds, and their doings shall be valid if the publication in a newspaper is made and the copy filed in the office of secretary of state, when such filing is necessary, within three months from such filing in the recorder's office.

SEC. 1157. (680.) No change in any of the above matters shall be <sup>Change.</sup> valid unless recorded and published as the original articles are required to be.

SEC. 1158. (681.) Corporations for the construction of any work <sup>Duration.</sup> of internal improvement may be formed to endure fifty years; those formed for other purposes can not exceed twenty years in duration; but in either case they may be renewed from time to time for periods not greater respectively than was at first permissible, provided three-fourths of the votes cast at any regular election for that purpose be in favor of such renewal, and provided also that those thus wishing a renewal will purchase the stock of those opposed to the renewal at its fair current value.\*

SEC. 1159. (682.) The corporation can not be dissolved prior to <sup>Dissolution.</sup> the period fixed upon in the articles of incorporation except by unanimous consent, unless a different rule has been adopted in their articles.

SEC. 1160. (683.) The same period of newspaper publication must <sup>Notice of.</sup> precede any such premature dissolution of a corporation as is required at its creation.

SEC. 1161. (684.) A copy of the by-laws of the corporation with <sup>By-laws posted.</sup> the names of all its officers appended thereto must be posted in the principal place of business and be subject to public inspection.

SEC. 1162. (685.) A statement of the amount of the capital stock <sup>Statement  
posted.</sup> subscribed, the amount of capital actually paid in, and the amount of indebtedness of the company in a general way, must also be kept posted up in like manner, which statement must be corrected as often as any

\* See section 1185.

- material change takes place in relation to any part of the subject matter of such statement.
- Fraud.** SEC. 1163. (686.) Intentional fraud in failing to comply substantially with the articles of incorporation or in deceiving the public or individuals in relation to their means or their liabilities shall subject those guilty thereof to fine and imprisonment or both at the discretion of the court. Any person who has sustained injury from such fraud may also recover damages therefor against those guilty of participating in such fraud.
- What constitutes.** SEC. 1164. (687.) The diversion of the funds of the corporation to other objects than those mentioned in their articles and in the notices published as aforesaid (provided any person be thereby injured,) and the payment of dividends which leave insufficient funds to meet the liabilities of the corporation, shall be deemed such frauds as will subject those therein concerned to the penalties of the preceding section, and such dividends or their equivalent in the hands of individual stockholders shall be subject to said liabilities.
- Insurance companies.** SEC. 1165. (688.) Dividends by insurance companies, made in good faith before their knowledge of the happening of actual losses, are not intended to be prevented or punished by the provisions of the preceding section.
- Individual liability.** SEC. 1166. (689.) A failure to comply substantially with the foregoing requisitions in relation to organization and publicity renders the individual property of all the stockholders liable for the corporate debts.\*
- Forfeiture.** SEC. 1167. (690.) Either such failure or the practice of fraud in the manner hereinbefore mentioned shall cause a forfeiture of all the privileges hereby conferred, and the courts may proceed to wind up the business of the corporation by an information in the manner prescribed by law.
- False books.** SEC. 1168. (691.) The intentional keeping of false books or accounts by any corporation whereby any one is injured is a misdemeanor on the part of those concerned therein, and any person shall be presumed to be concerned therein whose duty it was to see that the books and accounts were correctly kept.
- Transfers; liability.** SEC. 1169. (692.) The transfer of shares is not valid except as between the parties thereto until it is regularly entered on the books of the company so far as to show the name of the persons by and to whom transferred, the numbers or other designation of the shares, and the date of the transfer; but such transfer shall not in any way exempt the person or persons making such transfer from any liability or liabilities of said corporation which were created prior to such transfer. The books of the company must be so kept as to show intelligibly the original stockholders, their respective interests, the amount which has been paid in on their shares, and all transfers thereof; and such books, or a correct copy thereof so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same.
- Non-user.** SEC. 1170. (693.) Any corporation organized or attempted to be organized in accordance with the provisions of this chapter shall cease to exist by the non-user of its franchises for two years at any one time, but such body shall not forfeit its franchises by reason of its omission to elect officers or to hold meetings at any time prescribed by the by-laws,

\* Section (689) is modified so as not to apply to railroad corporations. See section 1338.



provided such act be done within two years of the time appointed therefor.

SEC. 1171. (694.) Corporations whose charters expire by their own limitation or by the voluntary act of the stockholders may nevertheless continue to act for the purpose of winding up their concerns, but for no other purpose. Powers continued.

SEC. 1172. (695.) Nothing herein contained exempts the stockholders of any corporation from individual liability to the amount of the unpaid installments on the stock owned by them or transferred by them for the purpose of defrauding creditors, and an execution against the company may to that extent be levied upon such private property of any individual. Individual liability.

SEC. 1173. (696.) In none of the cases contemplated in this chapter can the private property of the stockholders be levied upon for the payment of corporate debts while corporate property can be found with which to satisfy the same, but it will be sufficient proof that no property can be found if an execution has issued on a judgment against the corporation and a demand thereon made of some one of the last acting officers of the body for property on which to levy, and if he neglects to point out any such property. Individual liability.

SEC. 1174. (697.) The defendant in any stage of a cause may point out corporate property subject to levy, and upon his satisfying the court of the existence of such property by affidavit or otherwise the cause may be continued or execution against the defendant stayed until the property can be levied upon and sold, and the court may subsequently render judgment and order execution for any balance which there may be after disposing of the corporate property, according to the stage of the cause; but if a demand of property has been made as contemplated in the preceding section the costs of such proceedings shall in any event be paid by the company or by the defendant. Same.

SEC. 1175. (698.) When the private property of a stockholder is taken for a corporate debt he may maintain an action against the corporation for indemnity and against any of the other stockholders for contribution. Indemnity.

SEC. 1176. (699.) For the purpose of repairs, rebuilding, or enlarging, or to meet contingencies, or for the purpose of a sinking fund, the corporation may establish a fund which they may loan and in relation to which they may take the proper securities. Sinking fund.

SEC. 1177. (700.) When the franchise of a corporation has been levied upon under an execution and sold the corporators shall not have power to dissolve the corporation so as to destroy the franchise, and if they neglect to keep up an organization sufficient to enable the business to proceed the purchaser thereupon becomes vested with all the powers of the corporation requisite therefor; and when it becomes impracticable for an individual so to conduct them and in cases where doubts or difficulties not herein provided for arise, the purchaser may apply by petition to the district court which is hereby vested with authority to make any orders requisite for carrying into effect the intent of this chapter in this respect. Judgment sale of franchise.

SEC. 1178. (701.) In any proceedings by or against a corporation or against a stockholder to charge his private property or the dividends received by him the court is invested with power to compel the officers to produce the books of the corporation on the motion of either party upon a proper cause being shown for that purpose. Production of books.

SEC. 1179. (702.) A single individual may entitle himself to all Individuals.

the advantages of this chapter provided he complies substantially with all its requirements, omitting those which from the nature of the case are inapplicable.

Presumption in favor of.

SEC. 1180. (703.) Persons acting as a corporation under the provisions of this chapter will be presumed to be legally incorporated until the contrary is shown; and no such franchise shall be declared actually null or forfeited except in a regular proceeding brought for that purpose.

Want of legal organization.

SEC. 1181. (704.) No body of men acting as a corporation under the provisions of this chapter shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with such a corporation or sued for an injury to its property or a wrong done to its interests be permitted to set up a want of such legal organization in his defense.

Existing corporations.

SEC. 1182. (705.) Corporations regularly organized under the general law heretofore in force, by adapting their articles of association to the provisions of this chapter and by making the required publication of the change as well as of their intention to act under the foregoing provisions, will be entitled to all the advantages and subjected to all the liabilities above provided for, but the change in their articles of association must be made in accordance with those articles or by the unanimous consent of the stockholders.

Mutual insurance companies.

SEC. 1183. (706.) Mutual insurance companies organized under the provisions of this chapter may render their premium notes a lien upon the whole or any part of the real estate upon which the property insured is situate, whether such real estate is or is not exempt from other liabilities as a homestead, but such lien will not attach until the premium note stating the property on which it is a lien is filed for record and treated in the same manner as though it were a mortgage from the maker thereof to the company except that it need not be acknowledged.

Existing corporations.

SEC. 1184. (707.) Nothing herein contained is intended to affect the interests of companies already organized farther than is above expressed.

#### ARTICLE 2.

An Act to amend Chapter Forty-three of the Code of Iowa of 1851.

[Passed April 2, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 124.]

Corporations favored as to term of duration.

SECTION 1185. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That corporations for agricultural and horticultural purposes, and cemetery associations may be formed to endure any length of time that may be provided by the articles of incorporation thereof: *provided,* such corporation shall not own, to exceed nine sections of land, and the improvements and necessary personal property for the management thereof: *and provided further,* that the articles of incorporation shall provide a mode, by which any member thereof may, at any time withdraw from such incorporation, and also the mode of determining the amount to be received by such member upon withdrawal; and also for the payment thereof to such member, subject only to the rights of creditors of such incorporation; *and provided further,* that nothing in this act shall be so construed as to prohibit the general assembly at its present or any subsequent session, from fixing a time when any or all corporations formed under the provisions of this act shall be dissolved.

SEC. 1186. (2.) This act shall take effect and be in force from and after the publication thereof according to law.

PRIOR LAWS. 1. An act to authorize general incorporation, passed Feb. 22, 1847? 1st sess., chap. 81, p. 104.

2. An act amending same, passed Jan. 15, 1849, 2d sess., chap. 89, p. 120.

DECISIONS. A decision on the liability of private property of incorporators, &c., 5 Iowa, 300; a repeal of the law of incorporations of 1847, was only a repeal of it as a rule of subsequent organizations, 5 Iowa, 305; on a judgment against a corporation, a judgment, that execution issue against the private property of members is one which may be appealed from, and such judgment can not be questioned in a proceeding to enjoin the issuance of execution thereon, 4 Iowa, 13; if a corporation out of this state has lost its identity and existence by becoming merged into a new organization, then it may be here treated as at an end. But if it has suffered no act which *per se* works a forfeiture or dissolution, our courts can not determine a forfeiture. That must be done by the state, conferring the corporate powers, 5 Iowa, 367; a corporation can not extinguish its debts by merger in another organization, 5 Iowa, 367; by such merger it may be estopped from claiming that it is not dissolved, 5 Iowa, 367; one who becomes a member of a corporation whose articles contemplate a mode of change, is bound by such change, when duly made, 5 Iowa, 412; construction of grants and franchises, 1 G., 553; question of its existence, 5 Iowa, 357; liability to garnishment, 4 Iowa, 302; dissolution of, and its effects, 5 Iowa, 357, 15; mode of bringing suits against, 5 Iowa, 518; 4 G., 152; power of directors to change manner of calling in instalments, 5 Iowa, 509; teacher suing school district, 2 G., 482; liability of residents of school district who remove therefrom after tax levied, *Toothaker v. Moore*; proceedings to render private property of stockholders liable under chap. 81, of 1st sess., 5 Iowa, 300; effect of repeal of incorporation law, 5 Iowa, 300; powers of municipal corporations, 4 Iowa, 296; 8 *ibid.*, 82; subjection to state legislation, *ibid.*; their responsibility and duty, 7 Iowa, 488; 6 *ibid.*, 443; 4 G., 373; *Cotes & Patchin v. City of Davenport*, Dec., 1859; 4 G., 47; jurisdiction of the city courts of Iowa city, 2 Iowa, 90; charter of Iowa city, 2 Iowa, 90; charter of Mount Pleasant, 6 Iowa, 546; Marion Lyceum, 2 G., 518; road district can not sue or be sued, *White v. Road District, &c.*, June, 1859; notice to stockholders, 4 G., 42.

## CHAPTER 53.

### CORPORATIONS OTHER THAN THOSE FOR PECUNIARY PROFIT.

[Code—Chapter 44.]

#### ARTICLE 1.

SECTION 1187. (708.) Corporations for the establishment of semi- How created. naries of learning, churches, lyceums, libraries, agricultural societies, and for other lawful purposes unconnected with motives of pecuniary profit, may be formed in the manner directed in the preceding chapter so far as applicable, and the provisions of that chapter are extended to them except as herein modified.

SEC. 1188. (709.) Their articles of incorporation shall be recorded, Recording. but a newspaper publication is not requisite.

(710.) No dividend nor distribution of property among Dividend. the stockholders shall be made until the dissolution of the corporation.

SEC. 1189. (711.) Corporations of an academical character are Degrees. invested with authority to confer the degrees usually conferred by such institutions.

## ARTICLE 2.

An Act to amend Chapter 44 of the Code.

[Passed January, 24, 1855, took effect July 1, 1855; Laws of Fifth General Assembly, Chapter 93, page 154.]

- Incorporation of.** SECTION 1190. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That chapter 44, of the code, is hereby amended, and the provisions thereof so extended, that lodges of odd fellows, masonic lodges, and other institutions of a benevolent or charitable character, within this state, may become incorporated in the manner in said chapter provided.
- Powers and privileges.** SEC. 1191. (2.) By complying with the provisions of said chapter, said lodges, or associations, shall become vested with all the powers and privileges, and subject to all the liabilities therein conferred upon, and incurred by, the other incorporation, in said chapter mentioned.
- Take effect.** SEC 1192. (3.) This act to be in force from and after its passage.

## ARTICLE 3.

An Act for the incorporation of Benevolent, Charitable, Scientific, or Missionary Societies.

[Passed March 22, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 131, page 253.]

- Society formed by certificate.** SECTION 1193. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That any three or more persons of full age, citizens of the United States, a majority of whom shall be citizens of this State, who shall desire to associate themselves for benevolent, charitable, scientific, religious or missionary purposes, may make, sign and acknowledge before any officer authorized to take the acknowledgments of deeds in this state and file in the office of the secretary of state, and also in the office of the recorder of the county in which the business of such society is to be conducted, a certificate in writing, in which shall be stated the name or title by which such society shall be known in law, the particular business and objects of such society, the number of trustees, directors or managers to manage the same, and the names of the trustees, directors or managers of such society, for the first year of its existence.
- Acknowledged and filed.**
- Incorporated.** SEC. 1194. (2.) Upon filing a certificate as aforesaid, the persons who shall have signed and acknowledged such certificate, and their associates and successors shall thereupon, by virtue of this act be a body politic and corporate by the name stated in such certificate and by that name they and their successors shall and may have succession and shall be persons in law capable of suing and being sued, and they and their successors may have and use a common seal and the same may alter or change at pleasure; and they and their successors, by their corporate name shall in law be capable of taking, receiving, purchasing and holding real and personal estate, to make by-laws for the management of its affairs, not inconsistent with the constitution and laws of this state or of the United States, to elect and appoint the officers and agents of such society for the management of its business.
- Powers of incorporation.**
- Trustees elected.** SEC. 1195. (3.) The society so incorporated may annually or oftener elect from its members its trustees, directors or managers at such time and place in such manner as may be specified in its by-laws, who shall have the control and management of the affairs and funds of said

society, a majority of whom shall be a quorum for the transaction of business, and whenever any vacancy shall happen among such trustees, directors or managers, by death, resignation or neglect to serve, such vacancy shall be filled in such manner as shall be provided by the by-laws of such society. Vacancy.

SEC. 1196. (4.) In case it shall at any time happen that an election of trustees, directors or managers shall not be made on the day designated by the by-laws, said society for that cause shall not be dissolved, but it shall and may be lawful on any other day to hold an election for trustees, directors or managers, in such manner as may be directed by the by-laws of such society. Failure to elect not dissolve corporation.

SEC. 1197. (5.) The provisions of this act shall not extend or apply to any association or individual who shall in the certificate filed with the secretary of state or with the recorder, use or specify a name or style the same as that of any previously existing incorporated society in this state. Name and style.

SEC. 1198. (6.) Any corporation formed under this act shall be capable of taking, holding or receiving any property real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever: *provided*, no person leaving a wife or child or parent shall devise or bequest to such institution or corporation more than one-fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth. Corporation may hold property.  
No person bequeaths more than one-fourth of property.

SEC. 1199. (7.) The trustees, directors or stockholders of any existing benevolent, charitable, scientific or missionary or religious corporations may, by conforming to the requirements of the first section of this act, re-incorporate themselves or continue their existing corporate powers, and all the property and effects of such existing corporation shall vest in and belong to the corporation so re-incorporated or continued. Societies re-incorporated.

PRIOR LAWS. 1. An act to provide for the incorporation of religious societies, passed July 31, 1830; M. D. 1833, p. 544.

2. An act concerning religious societies, passed June 29, 1832; M. D. 1833, p. 549.

3. An act to protect mission schools in territory, passed April 12, 1827; M. D. 1833, p. 549.

4. An act to incorporate medical societies, passed April 12, 1827; M. D. 1833; p. 552.

5. An act to establish social libraries, passed Feb. 1, 1831; M. D. 1833, p. 560. All the above repealed, August 30, 1840.

6. An act for the incorporation of agricultural societies, passed Dec. 19, 1838; I. T., 1st sess. p. 227.

7. An act for the incorporation of public libraries, passed Jan. 23, took effect Feb. 23, 1839; I. T., 1st sess., p. 252.

8. An act relative to incorporated religious societies; I. T., 3d sess., chap. 12, p. 9; passed Dec. 22, took effect Jan. 22, 1841; also reprint, 1843, p. 538; repealed, I. T., 6th sess., chap. 5, p. 4, No. 10, hereof.

9. An act supplemental to the same, passed Feb. 17, 1842; I. T., 4 sess., chap. 99, p. 88; reprint 1843, p. 539; repealed I. T., 6th sess., chap. 5, p. 4, No. 10 hereof.

10. An act relative to religious societies, passed Feb. 7, 1844; I. T., 6th sess., chap. 5, p. 4.

11. An act to authorize general incorporation for other than pecuniary profit, passed Feb. 24, took effect, March 18, 1847, 1st sess., chap. 86, p. 118.

DECISIONS. How wills are to be constructed, 5 Iowa, 124; 4 Iowa, 180; takes effect only at death, 5 Iowa, 196; parol, when admissible, 5 Iowa, 196; revocation, 4 Iowa, 520; charitable devise, 5 Iowa, 124; 4 Iowa, 180; no *cy pres* here, 2 Iowa, 315; 4 *ibid.*, 252; donee not incorporated, 4 Iowa, 180; our courts have only judicial powers, 5 Iowa, 124; an act relative to religious societies only restricts purposes, not quantity or value, 2 Iowa, 315.

## TITLE XI.

## OF WORKS OF INTERNAL IMPROVEMENT.

## CHAPTER 54.

## "LICENSES FOR WORKS OF INTERNAL IMPROVEMENT."

[Code—Chapter 45.]\*

## ARTICLE 1.

## FERRY.

- County court. SECTION 1200. (712.) The several county *courts*\* have power to grant such *ferry* licenses as may be needed within their respective counties, for a period not less than three nor more than ten years.
- Rates of ferriage. SEC. 1201. (713.) The *court* may prescribe the rates of ferriage as well as the hours of the day or night during which the ferry must be attended, both of which may from time to time be changed at the discretion of the *court*.
- Exclusive. SEC. 1202. (714.) In granting a ferry license the *court* has power to make the privilege granted exclusive for a distance not exceeding one mile in either direction from said ferry, in which case no person shall keep a public ferry within the prescribed distance unless after twenty days notice to the person who has obtained such privilege it is made to appear to the *court* that the public good requires both ferries and a new license is issued for the second ferry accordingly. The notice herein required must be served personally on the owner or on the person in charge of the ferry boat.
- Preference. SEC. 1203. (715.) In granting a ferry license preference must be given to the keeper of a previous ferry at the same point, and if it be a new ferry preference shall be given to the owner of the land, but if there is none such, or if after giving the same notice as is required by the last section he fails to make application for such license, or if in the opinion of the *court* he is an improper person to receive the same, it may be conferred on any other proper applicant.
- What court. SEC. 1204. (716.) Where the opposite shores of the stream are in different counties a license from either is sufficient, and the *court* which first exercises jurisdiction by granting a license retains that jurisdiction during the life-time of such license.
- Notice. SEC. 1205. (717.) Where but one side of a river is within this state the county *court* possesses the same powers so far as the shore of this state is concerned as though the river lay wholly within the jurisdiction of this state.

\* For the word "court" or "judge" throughout this chapter when the same is italicized read "board of supervisors." See section 312, and chapter 22, article 13.

SEC. 1206. (718.) Before a license can be granted notice of the intended application therefor must be posted up in at least three public places on each side of the river (if both sides of the river are within this state) in the township and neighborhood in which the ferry is proposed to be kept, at least twenty days next prior to the making of such application. Over common waters.

SEC. 1207. (719.) The *court* upon being satisfied that the above requirements have been complied with, that a ferry is needed at such place, and that the applicant is a suitable person to keep it, must grant the license, which however shall not issue until the applicant files a bond with sureties to be approved by the *court* in a penalty not less than one hundred dollars with a condition that he will keep the ferry in proper condition for ferrying and attend the same at all times fixed by the *court* for running the same, that he will neither demand nor take any illegal tolls and that he will perform all other duties which are or may be enjoined on him by law, which bond shall be filed in the county office. Order and conditions

SEC. 1208. (720.) The license together with the rates of toll established must be entered upon the records of the county *court*, and the certificate of license shall contain the rates of toll allowed. Record.

SEC. 1209. (721.) Every ferryman must transport the public expresses of the United States and of this state and also the United States mail at any hour of the day or night. Duty.

SEC. 1210. (722.) He must keep a list of the rates of toll allowed him posted up on his boat, or on the door of his ferry house, or at some other conspicuous place near the ferry. Same.

SEC. 1211. (723.) The failure to have such list posted up as aforesaid justifies any person in refusing the payment of tolls, and where such failure is habitual the proprietor of the ferry is liable to pay twenty-five dollars in a suit brought on his bond, and the proceeds shall be paid into the county treasury. Penalty.

SEC. 1212. (724.) When it is made to appear to the county *court* after ten days notice to the person licensed that such person fails substantially to perform his duties according to law the court may revoke his license. Revocation.

SEC. 1213. (725.) Existing licenses and charters are not to be affected by the provisions of this chapter. Existing licenses.

#### *Bridges.\**

SEC. 1214. (726.) The county *court* is also authorized to grant licenses for the erection of toll bridges across any stream or other obstruction which justifies the establishment of such bridge and which calls for an expenditure greater than can be met without serious inconvenience by the revenues of the county, but the navigation of no navigable river must be thereby materially obstructed. And in all cases of granting a license to build such bridge preference shall be given to the owner of the land on which said bridge is proposed to be located, provided he be in other respects a competent person to erect such bridge. Bridge licenses.

SEC. 1215. (727.) Subject to the provisions of the last section bridges may be thus authorized to be constructed across navigable streams provided they do not prove substantially a nuisance. Same.

SEC. 1216. (728.) Where the extremities of the bridge lie in different counties a license must be procured from each of such counties, and From what county.

\* These provisions as to bridges of any sort, are qualified as to those over navigable rivers by laws of seventh general assembly, chapter 93, page 183,—article 3 hercof.

if different rates of toll are fixed by the different county *courts* each has power to fix the rates of travel which is going from its own county. A similar principle shall be observed where only one of the extremities of the bridge is within this state.

**Duration.** SEC. 1217. (729.) Such licenses may be granted to continue for any period not exceeding fifty years, and the rate of toll may be fixed in the first instance in such a manner as to be unalterable within any stipulated period not exceeding ten years; after that time the rate of toll will be under the control of the county *court* in the same manner as is provided in the case of ferries.

**Exclusive.** SEC. 1218. (730.) The *court* is also authorized to stipulate in the license to the effect that no other toll bridge or ferry shall be permitted across the same obstruction within any distance not exceeding two miles of such bridge and for a period not exceeding ten years; any violation of the terms of such stipulation is a nuisance and he who causes it is guilty of a misdemeanor.

**Notice.** SEC. 1219. (731.) Before granting a license to build a toll bridge the *court* must be satisfied that the same general notice has been given as is required in the case of an application for a ferry.

**Rates of toll.** SEC. 1220. (732.) The rates of toll must be conspicuously posted up at each extremity of the bridge under the same penalty as is provided in the case of ferries.

**Regulations.** SEC. 1221. (733.) Any proprietor of a toll bridge established and kept up according to law may make and enforce a regulation prohibiting any person, under a penalty not exceeding two dollars, from traveling across such bridge faster than on a walk, but such regulation must be conspicuously posted up at each end of the bridge; and suit may be brought for the penalty before a justice of the peace in the name of the proprietor and for his benefit.

**Hours.** SEC. 1222. (734.) All toll bridges must be so regulated as to allow persons to pass at any hour of the night or day, but the county *court* may in its discretion in fixing the rates of toll permit a greater amount to be collected during certain hours of the night time.

#### *Other Licenses.*

**Road licenses.** SEC. 1223. (735.) The county *court* may also grant licenses for the construction of any canal or railroad or any macadamized or plank road, or any other improvement of a similar character or any telegraph line, to keep the same up for a period not exceeding fifty years and to use for this purpose any portion of the public highway or other property public or private if necessary: *provided*, such use shall not obstruct the highway; and where a road thus authorized is of such a character as to admit of its being used for the same purposes as an ordinary highway the *court* in its discretion may discontinue a highway thus rendered unnecessary.

**Rates of toll.** SEC. 1224. (736.) The *court* in its discretion may at the time of granting the license fix the maximum rates of toll to be charged on any such work and may render the same unalterable for a period not exceeding twenty years from the time tolls are begun to be charged thereon, after the expiration of which time the rate of tolls shall be under the direction of the county *court* in the same manner as those of ferries and bridges.

**Tolls.** SEC. 1225. (737.) The time for the commencement of taking tolls as contemplated in the preceding section must be notified to the *court* and entered on its records before any such tolls are collectable.



SEC. 1226. (738.) The rates of toll established as above contemplated must be conspicuously posted up at every gate or other place where tolls are required to be paid, under the same penalty as is hereinbefore fixed in the case of ferries. Posting rates.

SEC. 1227. (739.) From the decision of the county court in refusing or granting any of the licenses authorized in this chapter an appeal lies to the people of the county as hereinafter regulated at any time within thirty days after the making of such decision, which appeal may be taken by any white male citizen of the county. Appeal.

SEC. 1228. (740.) The county court may also in the first instance cause any question, growing out of an application for any of the licenses authorized herein, to be submitted at once to the popular vote of the county. Question put to vote.

SEC. 1229. (741.) Neither the appeal nor the vote contemplated by the preceding two sections shall be allowed until money is deposited or security given sufficient to indemnify the county against the payment of any of the expenses growing out of the taking of such vote or appeal. Deposit.

SEC. 1230. (742.) Where the license has been granted, and the appeal above authorized is for the purpose of setting aside such grant, the license as granted must be published in the ordinary manner provided for publishing questions thus to be submitted to vote. Publication.

SEC. 1231. (743.) If the appeal be from the order refusing the license the appellant shall draw up and cause to be thus published, a license such as he desires to have submitted. Same.

SEC. 1232. (744.) If, where a license has been granted, the appellant is dissatisfied with the terms thereof he must cause to be published both the license granted and that which he desires to obtain. Same.

SEC. 1233. (745.) The county court must make the necessary arrangements for carrying the above regulations in relation to taking a vote of the people into full effect, and it shall grant or withhold the license in accordance with the result of such vote. Power of court.

SEC. 1234. (746.) In none of the above cases shall the license issue until a bond be filed such as is required in the case of ferry licenses and in such increased penalty as the court directs. Bond.

SEC. 1235. (747.) The county court, as a consideration or bonus for any of the licenses herein contemplated, may require the licensee to pay money or do acts for the purpose of promoting the public convenience in connection with the subject of his license, but for no other purpose. Bonus.

SEC. 1236. (748.) The taking illegal toll by the grantees of any of the licenses herein contemplated subjects the offender to the penalty of twenty-five dollars for every such offense to be recovered by suit on the bond of such licensee by the person who paid the illegal toll and for his own benefit, or he may bring suit in the name of the county in which latter case he is a competent witness but the proceeds shall go into the county treasury. Unlawful toll.

SEC. 1237. (749.) A failure in other respects to comply substantially with the terms fixed by the court in accordance with the above provision works a forfeiture of any of the licenses herein authorized and also subjects the party guilty of such failure to damages for all the injury resulting therefrom, for which he is also liable on his bond. Forfeiture.

SEC. 1238. (750.) Any person who refuses to pay the regular tolls established and posted up in accordance with the provisions of this chapter or who shall run through or pass around their toll gates with a view of avoiding the payment of just tolls or dues forfeits the sum of five Evading toll.

dollars for every such offense, which together with costs of suit may be recovered by the person entitled to such toll by civil action before the proper justice of the peace; but nothing herein contained shall prevent a person from fording a stream across which a toll bridge has been constructed.

Regulation of  
travel.

SEC. 1239. (751.) The proprietor of any canal, road, bridge, or ferry authorized by this act may establish rules for the regulation of passengers, travelers, teams, and freight passing or traveling thereon and may enforce those rules by penalties not exceeding five dollars for any one offense; which penalties may be recovered by civil action before a justice of the peace in the name of the proprietor aforesaid, but such rules must be published by being conspicuously posted up before they can be thus enforced.

Sale of execu-  
tion.

SEC. 1240. (752.) Any of the franchises contemplated in this chapter is subject to execution, and shall be sold as real property and be subject to the same rights and consequences except that the purchaser may take immediate possession of the property.

Effect of

SEC. 1241. (753.) The sale of any such franchise carries with it all the material, implements, and works of whatever kind necessary for or ordinarily used in the exercise of such franchise.

Highest bidder.

SEC. 1242. (754.) In the sale of such franchise he who will satisfy the execution and costs thereon and take the franchise for the shortest period of time to receive during that time all the tolls to which the defendant in execution was entitled, keeping the same in ordinary reasonable repair, is the highest bidder.

Officer's deed.

SEC. 1243. (755.) The officer's deed transfers to the purchaser all the privileges and immunities of the corporation necessary for demanding and receiving tolls during the time therein specified, and the officer must immediately after the sale deliver to the purchaser possession of the toll houses and gates of the defendant, and the purchaser may thereupon demand and receive all tolls accruing during the time limited by the terms of the purchase in the same manner and under the same regulations as the defendant might.

Injury; liability  
for.

SEC. 1244. (756.) In case of destruction or extraordinary injury happening to the works thus temporarily in possession of the purchaser without any fault or negligence on his part he shall not be compelled to repair the injury, provided he will abandon his interest in the franchise so held by him and yield possession thereof to the owner without delay.

Free ferries.

SEC. 1245. (757.) Nothing in this chapter contained shall be so construed as to prevent any person, incorporated city, town, or village from establishing a free ferry at any point where a license to keep a ferry has been granted under the provisions of this chapter, provided that where said free ferry is established said person or company shall pay a reasonable compensation to the persons owning said ferry for all boats, ropes, and other material, if the same be fit for use, and when said free ferry is established at a point at or near where a license has been granted to an individual, such individual shall be exonerated from any farther obligation in relation to the ferry. Bond and security shall be given in like manner by the person or company establishing the free ferry as required in this chapter.

SEC. 1246. (758.) Nothing in this chapter shall be so construed as to prevent owners of mills from crossing themselves or customers free of charge, nor so as to prevent footmen from passing through toll gates on incorporated roads free of charge.

ARTICLE 2.

An Act granting the Right of Way for the construction of Bridges in Iowa.

[Passed January 24, 1855, took effect July 1, 1855; Laws of Fifth General Assembly, Chapter 99; page 160.]

SECTION 1247. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That there is hereby granted the right of way of sixty feet of road to any person or persons who are now building, or may hereafter build, any bridge or bridges across any of the streams in this state. Right of way.

SEC. 1248. (2.) The right of way to extend to the nearest accessible point of the road for which the said bridge or bridges were built to accommodate. Extend to road.

SEC. 1249. (3.) The damage shall be assessed in a reasonable time after the notice is served, by either party requiring the same, but in the case when the land so taken, belongs to minors, the notice shall be served by the person building the bridge. Damages.

SEC. 1250. (4.) The damage shall be assessed in accordance with section\* thirty-eight of the code of Iowa: *provided, always,* that the party building the bridge shall pay the costs of assessing the damage. Section 38. code.

SEC. 1251. (5.) That nothing herein shall be so construed as to prevent the parties from settling the damage by agreement. Agree.

ARTICLE 3.

An Act authorizing the construction of Bridges in the State of Iowa.

[Passed March 22, 1858, took effect March 31, 1858; Laws of Seventh General Assembly, Chapter 93, page 183.]

SECTION 1252. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That when any corporation, company, person or persons shall wish to construct a bridge across any navigable river in this state, said corporation, company, person or persons shall give notice of the same in some newspaper published in the county in which said bridge is to be constructed, for four consecutive weeks, or if there is no such paper published in said county, then by posting up notices in five conspicuous places in said county, one of which shall be on the door of the house where the last district court was held. Persons wishing to build bridge must give notice.

SEC. 1253. (2.) Said notice shall state where the said bridge is to be built, the name or names of the owner or owners of the land on both sides of said river, where the bridge is to be erected, the corporation, company, person or persons intending to erect the same, and the time necessary for the completion of the structure. What the notice must contain.

SEC. 1254. (3.) Said notice shall inform the public, that at the next term of the district court in and for the county in which said bridge is to be built, provided four weeks intervene from the first publication or posting, the said corporation, company, person or persons will petition the district court for authority to build said bridge. Company applies to district court.

SEC. 1255. (4.) Said petition shall be filed with the clerk of the district court at least ten days before the term at which it is to be heard, and shall contain the name or names of the owner or owners of the land as in the notice, the place where the bridge is to be built, the name of Petition filed. Particulars stated.

\* Chapter ?

	the corporation, company, person or persons designing to build the same, a description of said bridge and a prayer for authority to proceed.
Aggrieved party may defend.	SEC. 1256. (5.) Any person supposing himself about to be aggrieved, may become a party to the proceeding on application and make defense.
Toll fixed.	SEC. 1257. (6.) The court shall render such a decree as may seem proper under the circumstances, and the said court shall fix the rate of toll: <i>provided</i> , that no bridge shall be constructed without a suitable draw, or that shall in any way interfere with the navigation of the river, and <i>provided</i> , that no rate of toll shall be established higher than the highest rates allowed by law to corporations, companies, person or persons under legislative charters heretofore granted for the construction of bridges over the navigable waters of the state, and <i>provided</i> , that this section, so far as it provides for a draw, shall not be held to apply to* the Iowa river at a point two miles below the junction of the Cedar and Iowa rivers, nor to the Cedar river above said point, said rivers not being deemed navigable above said points, nor to the town of Wapello in Louisa county, said rivers not being deemed navigable above said points.
Rates of toll limited.	
Navigation of river defined.	
Decree authorizing construction.	SEC. 1258. (7.) Said decree shall fully authorize the construction of said bridge, the power being herein conferred on said court, and shall be equal in force and obligation to bridge charters heretofore granted by the legislature.
Bond for payment of damages.	SEC. 1259. (8.) Said court shall have full power and authority to require of the petitioner a bond to be executed to the county in which the proceeding is had, in such penalty as the court may fix, conditioned to the payment of any damage that any person may sustain by reason of the construction of said bridge, which bond shall be filed in the office of the recorder of the county, and any person damaged as aforesaid, shall be privileged to institute suit on the same unless such person shall have made himself a party to the original petition, and no damage shall have been decreed, or unless said damage was sustained before the notice was given as afore-said, and the person damaged failed to make himself a party to the original petition.
Bond filed	
Suits for damage.	
Notice in different counties.	SEC. 1260. (9.) Where the extremities of said bridge lie in different counties, the proceeding may be commenced in either county, but the same notice shall be given in both counties, stating where and when the proceeding will be heard.
County judge may build bridge.	SEC. 1261. (10.) The county <i>judge</i> may cause the erection of a bridge over any stream in the county of which he is <i>judge</i> , where said stream is not navigable: <i>provided</i> , the expense does not exceed five hundred dollars, and for that purpose may enter into contract with one or more persons which shall be binding on the county.
County judge may contract.	SEC. 1262. (11.) Where the expense of the erection of any bridge is greater than five hundred dollars, the county <i>judge</i> may enter into a contract with any person or persons for the construction of the same: <i>provided</i> , that one hundred of the qualified voters of the county petition the county <i>judge</i> for that purpose, said petition must state the place of building such bridge, and the stream, and shall be heard at the first regular term of the county <i>court</i> after the same is filed in the office of county <i>judge</i> : <i>provided</i> , ten days have intervened. Notice of the time when said petition shall be heard and the object shall be posted up in five conspicuous places in said county, one of which shall be on the door of the county <i>court</i> room.
Petition.	
Notice.	

\* Thus changed by law of eighth session, chapter 24, passed March 2, 1860. See page 142, special laws of eighth session.

SEC. 1263. (12.) All acts and parts of acts inconsistent with this Conflicting laws repealed.  
are hereby repealed.

ARTICLE 4.

An Act authorizing Mill Dams.

[Passed January 24, 1855, took effect July 1, 1855; Laws of Fifth General Assembly, Chapter 92, page 151.]

SECTION 1264. (1.) *Be it enacted by the General Assembly of the* Owner of one side.  
*State of Iowa,* That any person owning lands on one or both sides, of a stream or water course, and being desirous of building a mill, or erecting other machinery, to be propelled by water power, on said stream, and of erecting a dam thereon, may have a writ, *ad quod damnum*, to be issued May have a writ A. Q. D.  
by the district court of the proper county, to be proceeded on as hereafter provided.

SEC. 1265. (2.) An applicant for said writ shall file his petition in Petition.  
the office of the clerk of the district court of the proper county, which petition shall set forth the locality with sufficient certainty, and also the names of the owners of lands to be affected by said dam, and he shall give ten days' notice of his said petition, by serving a copy thereof on Notice.  
each of said persons, or on his or their agents, if to be found, and make proof of such service by affidavit, to be filed with his said petition.

SEC. 1266. (3.) The clerk of said court shall thereupon issue said Jury.  
writ, directed to the sheriff of said county, in which the lands proposed to be effected may lie, commanding him to summon twelve good and lawful men of his county, to meet on a day certain upon the lands in said writ named, and ten days' notice shall be given by the sheriff to the owners or agents as aforesaid, of the execution of said writ.

SEC. 1267. (4.) The jury so summoned shall be sworn by the sheriff Empaneled and sworn.  
impartially, and to the best of their skill and judgment, to view the lands in said writ described, and the lands both above and below said proposed dam, and ascertain and appraise the damages, as by said writ directed, to each of the proprietors of said land proposed to be affected by said dam, and also to ascertain whether the dwelling house, out house, Inquisition.  
orchard, or garden, of such proprietor shall be overflowed, or otherwise injuriously affected, which inquisition shall be signed by the jurors aforesaid, and returned with the writ aforesaid, to the court whence it issued.

SEC. 1268. (5.) When said inquest shall have been filed, the clerk Si. Fa.  
of the court issuing said writ shall issue a *scire facias* to the parties in said inquisition mentioned, to appear at the next term of the district District court.  
court, and show cause, if any they have, why leave should not be granted to build said dam, which notice shall be served and proved as before directed.

SEC. 1269. (6.) If on such inquest it shall appear to said district License.  
court that neither the dwelling house, out house, garden or orchard, of any proprietor, will be overflowed, or injuriously affected, and if said court shall judge it reasonable, and for the public benefit, license shall be granted to erect the same, on the applicants paying to the proper parties the damages decreed by said court, from the inquisition aforesaid; Damages.  
and if the applicant shall not within one year thereafter begin to build said dam, and finish and have in operation said mill or machinery within three years thereafter, and afterwards keep it in good repair, for the accom- Forfeiture.  
modation of the public, or in case said dam or mill or machinery be destroyed, he shall not begin to repair or rebuild it in one year, and finish it in three years, then the said license shall be forfeited.

Continuance..	SEC. 1270. (7.) <i>Provided</i> , that if the writ shall not be executed by the sheriff on the day therein mentioned, said sheriff may, from time to time, appoint a day, at least ten days' notice thereof being given to the parties interested, as hereinbefore provided; and if the inquest can not be completed in one day, the sheriff shall adjourn the jury, from day to day, until its completion; and if a portion of the lands to be affected
Another county.	be in another county, the sheriff may act notwithstanding; and if the owner of any of the lands to be affected by these proceedings be a
Minors.	minor, service on the guardian of his estate shall bind him.
Not to bar action.	SEC. 1271. (8.) <i>Provided</i> , also, that no inquest under this act, nor any judgment thereon, shall bar any action which could have been maintained if this act had not been enacted, unless the prosecution or action was actually foreseen, and estimated upon the inquest.
Person interested.	SEC. 1272. (9.) Any owner of land affected by any proceedings under this act, who may not have been made party thereto, by reason of want of notice, or from any other cause, may be made party thereto by <i>scire facias</i> , at any time thereafter.
Fees.	SEC. 1273. (10.) The fees of the sheriff, jurors and witnesses, under this act, shall be the same as in other cases in the district court, and shall in all cases be paid by the applicant.
Apply to dams now existing.	SEC. 1274. (11.) This act shall apply as well to dams already in existence, and to the heightening of the same, as to those hereafter to be erected.
Back water.	SEC. 1275. (12.) Where the water backed up by any mill dam belonging to any mill or machinery is about to break through or over the banks of the stream, or to wash a channel, so as to turn the water of such stream, or any part thereof, out of its ordinary channel, whereby such mill or machinery will be injured or affected, the owner or occupier of such mill or machinery, if he do not own such banks, or the lands lying contiguous thereto, may, if necessary, enter thereon, and erect and keep in repair such embankments and other works as shall be necessary to prevent such water from breaking through or over the bank or banks of such stream, or washing a channel, as aforesaid, such owner or occupier committing thereon no unnecessary waste or damage.
Repairs.	
Damages may be recovered	SEC. 1276. (13.) Nothing contained in the last section shall be so construed as to bar the owner of such bank or banks, or land lying contiguous thereto, from recovering the amount of any injury which he may actually sustain by the erection or repair of such embankments or other works.
Injuring.	SEC. 1277. (14.) If any person shall injure, destroy or remove any such embankment, fortification or other works, the owner or occupier of such mill or machinery may recover of such person all damages he may sustain by reason of such injury, destruction or removal.
Penalty.	

- PRIOR LAWS. 1. An act to regulate ferries, passed April 20, 1833; M. D., 1833, p. 522.
2. An act to regulate mills and mill ponds, passed April 23, 1833; M. D., 1833, p. 524.
3. An act fixing rate of toll for grinding, passed April 12, 1827; M. D., 1833, p. 527.
4. An act to regulate ferries, passed Jan. 18, 1838; Wis., 2d sess., No. 74, p. 256; all the above repealed Aug. 30, 1840.
5. An act to regulate ferries, passed Dec. 20, took effect March 1, 1839; I. T., 1st sess., p. 208.
6. An act regulating mills and millers, and for other purposes, passed Jan. 25, took effect May 1, 1839; I. T., 1st sess., p. 343; repealed with others, 1843.
7. An act to regulate ferries in certain cases, passed Jan. 8, took effect Feb. 8, 1840; I. T., 2d sess., chap. 32, p. 43, also reprint 1843, p. 263.

8. An act to regulate ferries, passed Feb. 16, took effect March 16, 1843; reprint, chap. 73, p. 264.

9. An act regulating mills and millers, and for other purposes, passed Feb. 3, 1843; reprint, chap. 102, p. 437; this act is all that of 1839, and more added.

10. An act to provide for the navigation of Skunk river, passed Feb. 15, 1847? 1st sess., chap. 45, p. 57; repealed 1st sess., extra, chap. 42, p. 40, No. 13, hereof.

11. An act as to powers of board of county commissioners in licensing ferries, passed Feb. 24, 1847? 1st sess., chap. 108, p. 152.

12. An act to amend the act passed Feb. 3, 1843, as to mills, passed Jan. 22, 1848? 1st sess., extra, chap. 9, p. 14.

13. An act to provide for the descending navigation of Skunk river, passed Jan. 24, took effect Feb. 16, 1848, 1st sess., extra, chap. 42, p. 40.

**DECISIONS.** Ferry-man is common carrier, his duties, 4 G., 148-151-516; extent of responsibility, 4 G., 151; right of making road includes ferry, M., 251, 2 Iowa, 256, 1 G., 520; power of legislation regarding, 1 G., 498, M., 348; interstate rights of ferry, 2 Iowa, 524; exclusive privilege to be expressed, 4 G., 532; obstruction of navigation, 4 G., 335, 1 G., 502, M., 348; forfeiture of license, 1 G., 498; construction of a freight receipt given by a railroad, *Angel & Co. v. M. & M. R. R. Co.*, Dec., 1859; explainable by usage, *ibid.*; termination of liability, *ibid.*; passengers and company rights, 7 Iowa, 204; under chap. 31 of 3d sess., owner retains fee, 2 Iowa, 288; measure of damages, 2 Iowa, 288, 1 Iowa, 386; *Miss. & Missouri Railroad Co. v. Russeau*, June, 1859; railroads need not fence, 2 Iowa, 288; *Bell v. M. & M. R. R. Co.*, and *Alger v. same*, Dec. 1859; liability for injuries to cattle, *ibid.*; right to erect a dam over a river, 1 G., 348; rights of tenants in common thereto, *ibid.*; one whose private rights are injured by a dam, may abate it, 1 G., 247; in the inquisition of damages the statute should be fully and fairly obeyed, 7 Iowa, 72, else the return should be vacated; a petition under art. 4, chap. 54, does not need to be sworn to, 2 Iowa, 562; notice of the application, *ibid.*; conclusiveness of the finding of the jury of inquest, 6 Iowa, 548; conditions upon which the applicant can have a license, *ibid.*; on the *scire facias* what can be answered, *ibid.*; and on an application to set aside the inquisition, and award a new one, what? *ibid.*; what can be objected in equity, 8 Iowa, 33; of what such license is a bar, *ibid.*

## CHAPTER 55.

### TAKING PRIVATE PROPERTY FOR WORKS OF INTERNAL IMPROVEMENT.

[Code—Chapter 46.]

#### ARTICLE 1.

**SECTION 1278. (759.)** When any corporation or other person Who may take. designs to construct a canal or a railroad, or a turnpike, graded, macadamized, or plank road, or a bridge, as a work of public utility although for private profit, it may take such reasonable amount of private real property as may be requisite for a right of way not exceeding one hundred feet in width upon paying therefor such sum as may be assessed, in the manner herein provided.

**SEC. 1279. (760.)** The company shall file its petition in the district Manner of proceeding. court in the county where the land lies setting forth in substance:

The name of the owner;

The parcel of land a portion of which is wanted;

The object for which it is wanted;

A prayer that a suitable portion of land may be decreed to the petitioner and may be set apart to them by metes and bounds.

**SEC. 1280. (761.)** The owners of distinct parcels of real estate Same. may be made defendants to one petition.

- Service, owner unknown.** SEC. 1281. (762.) A service upon the owner must be made as in civil actions except as herein qualified :  
 Service upon and notice to an agent entrusted with the supervision of a non-resident's land will be sufficient ; a service by publication in a newspaper may be made the prescribed length of time before the return term ; and when the owner of a tract of land is unknown the court, upon being satisfied that diligent and unsuccessful efforts have been made to ascertain the ownership, may either before or after a publication authorize proceedings against him by the description of the unknown owner of that tract of land, (describing it).
- Inquiry of damages.** SEC. 1282. (763.) When the requisite service has been made if no sufficient cause to the contrary is shown the court shall issue a writ of inquiry of damages to the sheriff commanding him to summon a jury to inquire into and assess the damages. The jurors are required to possess the ordinary qualifications of jurors and to be persons not interested in the same or a similar question.
- Jurors.** SEC. 1283. (764.) Twelve jurors shall be summoned unless the parties otherwise agree in writing, and each party will have the right of challenge both for cause and peremptorily as in the district court.
- Same** SEC. 1284. (765.) Or, if the parties assent, the jury may be thus constituted ; the sheriff may set down in writing the names of eighteen jurors and the parties shall alternately strike off one, beginning with the defendant, until but six remain who shall be competent to act and be summoned accordingly.
- Striking a jury.** SEC. 1285. (766.) If a juror summoned fail to attend his place may be supplied by one summoned to attend forthwith.
- Juror failing.** SEC. 1286. (767.) The jury shall be sworn to examine impartially and report truly upon the subject submitted to their consideration, and the sheriff is authorized to administer such oath.
- Oath.** SEC. 1287. (768.) The jury shall then proceed to examine the ground and may hear testimony, but no argument of counsel, and shall set apart by metes and bounds a quantity of land convenient and suitable for the purpose intended and assess the damage occasioned to the owner thereby.
- Inquest.** SEC. 1288. (769.) In estimating the damages no deduction shall be made for any benefit that may be supposed to result to the owner from the contemplated work.
- Same.** SEC. 1289. (770.) When the petitioning body desires earlier action than is contemplated in the preceding provisions and is proceeding against one person only it may file its petition in the office of the district court and cause a service as before provided, and seven days after service is effected the clerk may in vacation issue a writ of inquiry of damages to the sheriff as before directed and the sheriff shall then proceed as above provided and make his return as hereinafter directed.
- Inquiry before court.** SEC. 1290. (771.) Before proceeding with the jury the sheriff is directed to give the defendant if he is known and resides in the county, and if not then to his agent if he have one known or to his tenant, three days' notice of the time and place of the meeting of the jury.
- Notice to party.** SEC. 1291. (772.) The report of the jury shall be reduced to writing, signed by each of the jurors, and delivered to the sheriff and be by him returned together with the writ and his doings thereon to the district court without delay.
- Report of jury.** SEC. 1292. (773.) Upon the return of the inquest and writ the owner of the land may file objections to the proceedings and show cause why they should be set aside, and the court may direct issues other than those upon the facts found by the jury to be made up and tried as in



other civil actions, and if good cause be shown may set aside the proceedings.

SEC. 1293. (774.) The damages assessed by the jury shall be paid Damages.  
into court for the defendant or to the defendant before a decree for the conveyance of the land can be made, unless the parties otherwise agree.

SEC. 1294. (775.) If no sufficient objection is made and the Decree.  
damages are paid the court shall decree a conveyance to the plaintiff of the land reported by the jury, and such decree shall have the same effect and be enforced in the same manner as an ordinary decree for the conveyance of land.

SEC. 1295. (776.) If the contemplated work be not commenced Non-user.  
within one year after obtaining land under these provisions, or if after being commenced it cease for two years to be prosecuted, or if after being completed it ceases for two years to be used for its original purpose, the former owner may file his petition in the district court to have the land restored to him upon his refunding the purchase money without interest.

SEC. 1296. (777.) The costs of the foregoing proceedings shall be Costs  
paid by the petitioner, except that costs occasioned by litigation by the defendant shall be governed by the common rule in relation thereto.

SEC. 1297. (778.) A company or person actually intending to make Entering on land and suit.  
application for the privileges herein contemplated and entering upon the land of another for the purpose of making the requisite examination and surveys and doing no unnecessary injury, shall be liable only for the actual damage done, and if sued in such case the plaintiff shall recover only as much cost as damage.

SEC. 1298. (779.) The provisions of this chapter do not apply to Limitation  
any corporation or person who has not obtained a license from the proper county court in accordance with the provisions of the chapter relating to granting licenses for works of internal improvement.

ARTICLE 2.

An Act to accept of the grant and carry into execution the trust conferred upon the State of Iowa, by an act of Congress entitled an Act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of Railroads in said State, approved May 15th, 1856.

[Passed July 14, 1856, took effect July 16, 1856: Laws of Fifth General Assembly, Extra, Chapter 1, page 1.]

SECTION 1299. (1.) *Be it enacted by the General Assembly of the* Grant accepted.  
*State of Iowa,* That the lands, rights, powers and privileges, granted to, and conferred upon, the state of Iowa, by the act of congress entitled "an act making a grant of lands to the state of Iowa, in alternate sections, to aid in the construction of railroads, in said state, approved May 15th, 1856," be and the same are hereby accepted upon the terms, conditions and restrictions, contained in said act of congress.

SEC. 1300. (2.) That so much of the lands, interest, rights, powers Lands granted to Burlington and Missouri R. R. Co.  
and privileges, as are or may be granted and conferred, in pursuance of the act of congress aforesaid, to aid in the construction of a railroad from Burlington on the Mississippi river to a point on Missouri, near the mouth of Platte river, are hereby disposed of, granted and conferred upon the Burlington and Missouri river railroad company, a body corporate, created and existing under the laws of the state of Iowa.

SEC. 1301. (3.) That so much of the lands, interest, rights, powers To Mississippi and Missouri R. R. Co.  
and privileges as are or may be granted and conferred, in pursuance of the act of congress aforesaid, to aid in the construction of a railroad from Davenport via Iowa city and Ft. Des Moines to Council Bluffs,

are hereby disposed of, granted and conferred to and upon the Mississippi and Missouri railroad company, a body corporate, created and existing under the laws of the state of Iowa.

SEC. (4.) [Repealed by chapter 39 of the 8th session, see special laws of 8th session.]

To Dubuque and  
Pacific R. R. Co.

SEC. 1302. (5.) That so much of the lands, interest, rights, powers and privileges as are or may be granted and conferred, in pursuance of the act of congress aforesaid, to aid in the construction of a railroad from the city of Dubuque to a point on the Missouri river at or near Sioux city, with a branch from the mouth of the Tete Des Morts to the nearest point on said road, to be completed as soon as the main line is completed to that point, are hereby disposed of, granted and conferred to and upon the Dubuque and Pacific railroad company, a body corporate, created and existing under the laws of the state of Iowa.

Location of  
roads.

SEC. 1303. (6.) The lines and routes of the several roads above described shall be definitely fixed and located on or before the first day of April next, after the passage of this act, and maps or plots, showing such lines and routes, shall be filed in the office of the governor of the state of Iowa, and also in the office of the secretary of state of the state of Iowa. It shall be the duty of the governor, after affixing his official

Maps and plats.

signature, to file such map in the department having the control of the public land in Washington; such location being considered final only so far as to fix the limit and boundary within which lands may be selected; and if it shall appear that the lands that have been donated by the act of congress aforesaid, for the construction of the several lines above indicated, can not be obtained by said companies within the limits and along any part of the line aforesaid, the governor shall from time to time appoint agents to make such selections as may be authorized or granted by congress for the lines aforesaid; but the compensation of such agents and the costs, expenses and charges attendant upon and occasioned by making such selections, shall be fixed, regulated, paid and borne by each of said railroad companies respectively, upon and for its own line.

Agents.

Branch.

SEC. 1304. (7.) The Iowa central air line railroad company shall furnish, equip and operate the branch of their railroad that will be constructed under this grant from Lyons city to the point of intersection with the main line of their road near Maquoketa, in the same manner with their main line from the west, and as completely as though the same was a continuation of said main line, and shall never give any preference to the main line of said road, or any part thereof, as defined in their articles of incorporation, by business arrangements, tariff of prices, or otherwise, over the said branch to their railroad.

Conditions.

SEC. 1305. (8.) The grants aforesaid are made to each of said companies respectively, upon the express condition, that in case either of such railroad companies shall fail to have completed and equipped seventy-five miles of its road within three years from the first day of December next, thirty miles in addition in each year thereafter, for five years, and the remainder of their whole line of road in one year thereafter, or on the first of December, A. D., 1865, then and in that case it shall be competent for the state of Iowa to resume all rights conferred by this act upon the company so failing, and to resume all rights to the lands hereby granted and remaining undisposed of by the company so failing to have the length of road completed in manner and time as aforesaid.

Gauge of road.

SEC. 1306. (9.) The roads aforesaid shall be constructed upon a gauge with a width of four feet, eight and one-half inches, and the iron

used in the track shall be of approved quality and pattern, and the said roads shall be completed and finished in a style and of a quality equal to the average of other first class western roads, and when the roads, or any of them, authorized to be constructed by this act, shall be intersected by the roads of any other railroad company now constructed, or hereafter to be constructed, it shall be the duty of such road or roads, receiving the benefit of this act, to furnish all proper and reasonable facilities and to join such other company in making all necessary crossings, turnouts, sidelings and switches, and other conveniences necessary for the transportation of all freight and passengers over either or any road or roads hereby mutually accommodated, whether said passengers or freight are brought by the roads benefited by this act, or any other road or roads now constructed, or which may hereafter be constructed, and at such rates as shall not in any case exceed the regular tariff of charges on such road or roads.

Style and quality.

Crossings, turnouts, &amp;c.

Rates limited.

SEC. 1307. (10.) All persons, who at the time said grant was made, held valid claims by actually occupation and improvement upon any of the lands embraced in said grant, shall be protected in the same, and entitled to purchase and enter the same upon the terms and conditions hereinafter provided.

Pre-emption.

SEC. 1308. (11.) Any person, wishing to avail himself of the provisions of this act, shall within three months of the passage thereof, file his application for that purpose with the judge of the county where such lands may be situate, and shall prove to the satisfaction of said judge that his claim is valid, and that the same existed at the time said grant was made; and upon such proof being made, such judge shall give to the applicant a certificate of the fact, and such certificate shall entitle the holder or his bona fide assignee to enter such land at the rate of two dollars and fifty cents per acre: *provided*, that no person, claimant, or the assignee of a claim, shall be entitled to more than one hundred and sixty acres of land under this act: *and provided further*, that the person asserting a claim, whether as claimant or assignee, shall file his affidavit that he has not either directly or indirectly received the benefits of the provisions of this act. Before any rights shall be acquired under such certificate, a copy of the same together with the evidence shall be served on the secretary of the company interested, and such company shall have the right to appeal from the decision of such judge to the district court, in the same manner as appeals are taken from the decisions of justice of the peace at any time within ninety days after the service of such papers, and the same shall be tried as other appeal cases, and an appeal may be taken to the supreme court by either party, in the same manner as appeals in other cases.

Application.

Price.

Appeal.

SEC. 1309. (12.) Such certificate on being filed with the secretary of the company upon whose line of road such lands may be situate, when no appeal has been taken as herein provided, shall entitle the holder or his assignee to the possession of said land, until the title shall become vested in the company; upon payment thereafter to the treasurer of the company for said land at the price above designated, such person shall receive from the secretary of the company a patent to such land, not exceeding in quantity one hundred and sixty acres. Such deed or patent shall vest in the purchaser all the title of said company in and to such lands, except so far as to reserve to the company all such right of way and station grounds as may be actually necessary for the uses of the company.

Certificate.

Effect of.

Deed.

SEC. 1310. (13.) The said companies shall each severally assent to and accept the provisions of this act, by a written instrument, under the

Assent and accept.

- Filed. seal of such corporation, with the signatures of the proper officers, within ninety days after the passage of this act, which said acceptance shall be filed in the office of the secretary of state, and be by the secretary recorded in the book by him kept for the recording of articles of association.
- Rules and regulations. SEC. 1311. (14.) Said railroad companies, accepting the provisions of this act, shall at all times be subject to such rules and regulations as may from time to time be enacted and provided for by the general assembly of Iowa, not inconsistent with the provisions of this act, and the act of congress making the grant.
- Report. SEC. 1312. (15.) It shall be the duty of the companies receiving the benefits of this act, to make a regular annual report of their proceedings at the usual time and place of electing their officers, exhibiting a detailed statement, as far as practicable, of the amount of their expenditures, liabilities, &c., a copy of which shall be filed in the office of the secretary of state.
- Conditions. SEC. 1313. (16.) *Be it further enacted*, That any of said companies accepting the grants of lands under this act, shall take the same with the conditions imposed and incumbrances specified in this act, and shall in no event have any claim or recourse whatever upon the state of Iowa, for a misapplication of said grant, incumbrances or conditions in this act imposed.

## ARTICLE 3.

## An Act granting to Railroad Companies the Right of Way.

[Passed Jan. 18, 1853, took effect Feb. 9, 1853, Laws of the Fourth General Assembly, Chapter 31, page 58 ]

- Right of way. SECTION 1314. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That any railroad corporation in this state heretofore organized, or that may be hereafter organized, under the laws of this state, may take and hold, under the provisions contained in this act, so much real estate as may be necessary for the location, construction, and convenient use of their road. Such corporation may also take, remove, and use for the construction and repair of said road and its appurtenances, any earth, gravel, stone, timber, or other materials, on or from the land so taken: *provided*, that the land so taken otherwise than by the consent of the owners, shall not exceed one hundred feet in width, except for wood and water stations, unless where greater width is necessary for excavation, embankment, or depositing waste earth.
- May take and use. SEC. 1315. (2.) Such railroad corporation may purchase and use real estate for a price to be agreed upon with the owners thereof, or the damages to be paid by such corporation for any real estate taken as aforesaid, when not agreed upon, shall be ascertained and determined by commissioners to be appointed by the sheriff of the county, where such real estate is situated, in conformity with the provisions of this act.
- Limit. SEC. 1316. (3.) Whenever any railroad corporation shall take any real estate as aforesaid, of any minor, insane person, or any married woman whose husband is under guardianship, the guardian of such minor or insane person, or such married woman, with the guardian of husband, may agree and settle with said corporation for all damages or claims by reason of the taking of such real estate, and may give valid releases and discharges therefor.
- Stations. SEC. 1317. (4.) If the owner of any real estate over which said
- Purchase. Without owner's consent. Proceedings in assessing damages. railroad corporation may desire to locate their road, shall refuse to grant

the right of way through his or her premises, the sheriff of the county in which said real estate may be situated shall, upon the application of either party appoint six disinterested freeholders of said county, not interested in a like question, unless a smaller number is agreed upon by the parties, whose duty it shall be to inspect said real estate and assess the damages which said owner will sustain by the appropriation of his land for the use of said railroad corporation and make report in writing to the sheriff of said county, who shall file and preserve the same, and if said corporation shall at any time before they enter upon said real estate for the purpose of constructing said road, pay to said sheriff the sum so assessed and returned to him as assessed, they shall be thereby authorized to construct and maintain their railroad over and across said premises: *provided*, that either party may have the right to appeal from such assessment of damages to the district court of the county where such lands are situated within thirty days after such assessment is made. But such appeal shall not delay the prosecution of the work upon said railroad, if said corporation shall first pay or deposit with the sheriff the amount so assessed by said freeholders, and in no case shall said corporation be liable for the costs on appeal, unless the owner of such real estate shall be adjudged, and entitled upon the appeal to a greater amount of damages than was awarded by said freeholders. The company shall in all cases pay the costs of the first assessment.

SEC. 1318. (5.) The freeholders so appointed shall be the commissioners to assess all damages to the owners of real estate in said county, and said corporation may at any time after their appointment, upon the refusal of any owner or guardian of any owner of lands in said county, to grant the right of way as aforesaid, by giving the said owner or guardian five days notice thereof in writing, either by personal service or by leaving a copy thereof at his or her dwelling, with some member of the family over fourteen years of age, have the damages assessed in the manner hereinbefore prescribed.

SEC. 1319. (6.) In case of the death, absence, or neglect, or refusal of any of said freeholders to act as commissioners as aforesaid, the sheriff shall summon other freeholders to complete the panel, and said commissioners shall proceed as directed in the preceding section. Said commissioners shall receive two dollars per day each for their services.

SEC. 1320. (7.) If, upon the location of said railroad, it shall be found to run through the land of any non-resident owner, the said corporation may give four weeks' notice to such proprietor, if known, and if not known, by a description of such real estate, by publication in some newspaper published in the county where such lands may lie, (if there be any, and if not, in one nearest thereto,) that said railroad has been located through his or her lands, and if such owner shall not within thirty days thereafter apply to said sheriff to have the damages assessed in the mode prescribed in the preceding section, said company may proceed as herein set forth, to have the damages assessed, subject to the same right of appeal as in case of resident owners, and upon the payment of the damages assessed to the sheriff for such owner, the corporation shall acquire all rights and privileges mentioned in the fifth section of this act.

SEC. 1321. (8.) Any railroad corporation may raise or lower any turnpike, plank road, or other way, for the purpose of having their railroad pass over or under the same; and in such cases said corporation shall put such turnpike, plank road, or other way, as soon as may be, in as good repair and condition as before such alteration.

- Same.** SEC. 1322. (9.) If the proprietors of said plank road or turnpike, or the trustees or city council having jurisdiction of such ways respectively, require further alterations or amendments of such turnpike, road, or way, and give notice thereof in writing to the agent or secretary of such railroad corporation, and if the parties can not agree respecting the same, either of the parties may apply to the county judge, who, after reasonable notice to the adverse party, shall make determination respecting such proposed alterations or amendments, and shall award costs in favor of the prevailing party.
- Proceedings.** SEC. 1323. (10.) If such railroad corporation shall unnecessarily neglect to make such alterations and amendments thus determined upon by the county judge, the said turnpike corporation, or aggrieved city or township, shall be entitled to their damages for such neglect.
- Damages.** SEC. 1324. (11.) Every railroad corporation whilst employed in raising or lowering any turnpike or other way, or in making any other alteration by means of which the same may be obstructed, shall provide and keep in good order suitable temporary ways, to enable travelers to avoid or pass such obstructions.
- Temporary ways.** SEC. 1325. (12.) Any railroad corporation may construct and carry their railroad across, over, or under railroad, canal, stream, or water course, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct their railroad crossings as not unnecessarily to impede the travel, transportation, or navigation upon the railroad, canal, or stream so crossed: said corporation shall be liable for the damages occasioned to any corporation or party injured by reason of said crossing.
- May cross canals, roads, &c.** SEC. 1326. (13.) Every railroad corporation shall maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct for the purpose of enabling their road to pass over or under any turnpike, road, canal, water course, or other way.
- Bridges.** SEC. 1327. (14.) Every railroad corporation shall be liable for all damages sustained by any person in consequence of any neglect of the provisions of this act, or of any other neglect of any of their agents, or by any mismanagement of their engineers, by the persons sustaining such damages.
- Liab. for damages.** SEC. 1328. (15.) Any railroad corporation shall be authorized to pass over, occupy, and enjoy, without payment of damages, any of the school, university, and saline or other lands of this state, provided no more of such lands shall be taken than is required for the necessary use and convenience of such corporation.
- May pass over state lands.** SEC. 1329. (16.) When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same.
- Causeways.** SEC. 1330. (17.) Any company organizing under this act shall, as soon as convenient after its organization, establish a principal office at some point on the line of its road, and change the same at pleasure, giving public notice in some newspaper of such establishment or change, and all process against said company shall be served on the president or secretary, or by leaving a copy at the principal office of the corporation.
- Principal office.** SEC. 1331. (18.) Every company organized under this act shall be required to erect at all points where their road shall cross any public road, at a sufficient elevation from such public road to admit of free passage of vehicles of every kind, a sign with large and distinct letters placed thereon, to give notice of proximity of the railroad, and warn

persons of the necessity of looking out for the cars; and every company neglecting or refusing to erect such sign, shall be liable in damages for all injuries occurring to persons or property from such neglect or refusal. To give warning.

ARTICLE 4.

An Act to authorize Railroad Companies to consolidate their Stock with the Stock of Railroad Companies in this, or an adjoining State, and to connect their Roads with the Roads of said Companies.

[Passed Jan. 25, 1855, took effect Jan. 31, 1855; Laws of Fifth General Assembly, Chapter 159, page 237.]

SECTION 1332. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That any railroad company heretofore organized, or that may hereafter organize under the laws of this state, shall have the power to intersect, join and unite their railroads, constructed, or to be constructed in this state, or in any adjoining state, at such point on the state line, or at any other point as may be mutually agreed upon by said companies. And such railroads are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the railroads thus connected, upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining state, with whose road or roads connections are thus formed: *provided,* that the consent of three-fourths of all the stockholders in amount in any road whose stock is proposed to be consolidated, shall so consent. May intersect.  
Consolidate stock.  
Consent.

SEC. 1333. (2.) Any railroad company heretofore organized, or which may hereafter be organized, under the laws of this state, for the purpose of constructing a railroad from any point within the state, to the boundary line thereof, is hereby empowered to extend said railroad into, or through any other state, or states, under such regulations as may be prescribed by the laws of such state or states, or through which said road may be so extended; and the rights and privileges of said company, over said extension, in the construction and use of said railroads, for the benefit of such company in controlling and applying the assets of said company, shall be the same as if their railroad had been constructed wholly within this state. Extension.  
Rights and privileges.

SEC. 1334. (3.) That any railroad company heretofore organized, or which may hereafter be organized under the laws of this state, and which may have constructed, or commenced the construction of their road so as to meet and connect with any other railroad in an adjoining state, at the boundary line of this state, shall have this power to make such contracts and agreements with any such roads, constructed in an adjoining state, for the transportation of freight and passengers, or for the use of its said road as to the board of directors may seem proper. Contracts.

ARTICLE 5.

An Act supplement to an act entitled an act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act of congress, entitled an act making a grant of land to the State of Iowa in alternate sections, to aid in the construction of railroads in said State, approved May 15th, 1856, which said act of the legislature of Iowa was approved July 14, 1856

[Passed Jan. 28, 1857, took effect Feb. 17th 1857; Laws of Sixth General Assembly, Chapter 182, page 278.]

SECTION 1335. (1.) *Be it enacted by the General Assembly of the* Disposition of lands.

*State of Iowa*, That the said companies may make such disposition of the lands granted by the act to which this is a supplement, by mortgage or deed of trust, as may be deemed proper for the purpose of securing any amount of construction bonds necessary for the completion of such roads; which may bear such rate of interest not to exceed ten per cent. per annum, and may sell the same for the best price that can be procured. Said companies, nor either of them, shall ever be allowed to plead that such bonds are usurious or invalid: *provided*, that the moneys realized from the sale of the bonds afore-said shall be applied exclusively to the construction and equipment of said roads.

Lien of mortgage.

SEC. 1336. (2.) Any mortgage or deed of trust made upon the lands, roads, or the property of either, shall bind and be a valid lien upon all the property mentioned in such deed or mortgage including rolling stock; and the purchasers under a trustees sale or foreclosure of mortgage, shall have and enjoy all the rights of a purchaser on execution sale: *provided further*, that nothing contained in this act shall be so construed as in any manner to interfere with, change or modify the rights of this state or of the United States to any lands granted by congress to this state and by this state to certain railroad companies therein, as a security for the completion of said roads, or to transfer any right in said lands otherwise than as subject to all the conditions imposed by the grant made by the United States to this state, and by the grant by this state to said companies or by either of said grants: and *provided further*, that the faith of the state is in no way pledged for the payment of said bonds.

Record.

SEC. 1337. (3.) Any mortgage or trust deed made as before mentioned shall be recorded in the office of the recorder of each county through which said road runs or wherein it owns or holds lands, and shall be notice to all the world of the rights of all parties under the same.

#### ARTICLE 6.

An Act for the benefit of Rail Road Companies.

[Passed March 20, 1858, took effect March 31, 1858; *Laws of Seventh General Assembly, Chapter 85, Page 119.*]

Section 689 of the code not to apply to R. R. companies.

SECTION 1338. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That section numbered six hundred and eighty-nine of the code, shall not be deemed and construed to be applicable to railroad corporations and corporators, and stockholders in railroad companies, shall be liable only for the amount of stock held by them in said companies.

Companies authorized to borrow money on their property.

SEC. 1339. (2.) The said companies shall have the power, and are hereby authorized to mortgage or execute deeds of trust, of the whole or any part of their property, and franchises to secure money borrowed by them for the construction and equipment of their roads, and may issue their corporate bonds in sums not less than five hundred dollars secured by said mortgages or deeds of trust, payable to bearer or otherwise, and if payable to bearer, negotiable by delivery, bearing interest at the rate not to exceed ten per centum per annum, and convertible into stock or not, as may be deemed expedient, and may sell them at such rates or prices as they deem proper, and if said bonds shall be sold below their nominal or par value, they shall be valid and binding on the company, and no plea of usury shall be put in or allowed by said companies in any suit or proceeding upon the same.

Bonds and their interest.



SEC. 1340. (3.) Said mortgages or deeds of trust may by their terms include and cover, not only the property of the companies making them at the time of their date, but property both real and personal which may thereafter be acquired by them, and shall be as valid and effectual for that purpose, as if the property were in possession at the time of the execution thereof.

Mortgages may cover property that may be acquired.

SEC. 1341. (4.) Said mortgages or deeds of trust, shall be recorded in the office of the recorder of each county through which the road mortgaged or deeded may run, or wherever it may hold lands, and shall be notice to all the world of the rights of all parties under the same, and for this purpose and to secure the rights of mortgages or parties interested under deeds of trust so executed and recorded, the rolling stock and personal property of the company, properly belonging to the road and appertaining thereto, shall be deemed a part of the road, and said mortgages and deeds so recorded, shall have the same effect both as to notice and otherwise, as to the personal, as to the real estate covered by them.

Mortgages recorded.

Rolling stock a part of the road

ARTICLE 7.

An Act regulating the interest on City and County Bonds.

[Passed Jan. 25, 1855, took effect July 1, 1855; Laws of Fifth General Assembly, Chapter 128, page 192.]

SECTION 1342. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That it shall be competent and lawful for every railway company organized under the laws of this state, to issue its bonds to secure the payment of money borrowed for construction or equipment, at such rate of interest as it may deem expedient, and may sell the same at such discount as may be necessary; and such bonds shall be legal and binding.

Bonds Railroad company.

SEC. 1343. (2.) That whenever any company shall have received, or may hereafter receive, the bonds of any city or county, upon subscription of stock by such city or county, such bonds may have interest at any rate not exceeding ten per cent., and may be sold by the company at such discount as may be deemed expedient.

Bonds city or county.

SEC. 1344. (3.) The provisions of this act shall apply to any railroad bonds which have been heretofore issued, as well as to those that may hereafter be issued.

Not apply.

[An act regulating the issue of county and corporate bonds, passed January 25, 1855, took effect February 7, 1855, laws of fifth general assembly, chapter 149, page 219; repealed by eighth general assembly, chapter 84]

ARTICLE 8.

An Act to prevent counties, incorporations, cities and towns from taking stock in works of Internal Improvement and Banking Institutions.

[Passed March 30, 1860, took effect May 2, 1860; Laws of Eighth General Assembly, Chapter 84.]

SECTION 1345. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That no county, incorporated city or town, in this state, shall in their corporate capacity, or by their officers, directly or indirectly, subscribe for stock, or become interested as a partner, shareholder or otherwise, in any banking institution, whether the same be a bank of issue, deposit, or exchange, nor in any plank road, turnpike, or railroad, or any other work of internal improvement, nor shall they be allowed to issue any bonds, bills of credit, scrip or other evidences of

Counties and cities not to subscribe stock in railroads, &c.

- Bonds void.** indebtedness for any such purposes—all such evidences of indebtedness for said purposes being hereby declared absolutely void: *provided, nevertheless*, that this act shall not be so construed as to prevent, or in any wise to embarrass, the counties, cities or towns, or any of them, in the erection of their necessary public buildings, bridges, laying off roads and highways, streets, alleys and public grounds, or other local works in which said counties, cities or towns may respectively be interested.
- Assignment not give validity.** SEC. 1346. (2.) All bonds or other evidences of debt hereafter issued by any corporation to any railroad company, as capital stock, shall be null and void, and no assignment of the same shall give them any validity.
- SEC. 1347. (3.) All laws contravening the provisions of this act, be and the same are hereby repealed.

DECISIONS. Sufficient report of road viewers, 1 G., 158; assessment of damages, *Deaton v. Polk Co.*, Dec., 1859; right to erect mill dam, 1 G., 348; requirements of petition under chap. 92, of 5th sess., 2 Iowa, 562; form of inquisition, *ibid.*; value of the finding of the jury, under the 92nd chap. of 5th sess., 6 Iowa, 548; what may be shown by defendant in answer to the *scire facias*, 6 Iowa, 548; proceedings under the act, *ibid.*; proceedings conclusive as to all parties thereto, as to all the land condemned, 8 Iowa, 33; see *Hunting et al. v. Curtis*, Dec., 1859.

## CHAPTER 56.

### TELEGRAPHS.

[Code—Chapter 47.]

- Privilege granted.** SECTION 1348. (780.) Any person or company may construct a telegraph line along the public highways of this state, or across the rivers or over any lands belonging to the state or to any private individual, and may erect the necessary fixtures therefor.
- Restrictions.** SEC. 1349. (781.) Such fixtures must not be so constructed as to incommode the public in the use of any highway or the navigation of any stream, nor shall they be set up on the private grounds of any individual without paying him a just equivalent for the damages he thereby sustains.
- Damages.** SEC. 1350. (782.) If the person over whose lands such telegraph line passes claims more damages therefor than the proprietor of the telegraph is willing to pay the amount of damages may be determined in the same manner as is provided in cases of railroads and other works of internal improvement.
- Duty and liability.** SEC. 1351. (783.) If the proprietor of any telegraph within this state, or the person having the control and management thereof, refuses to receive dispatches from any other telegraph line or to transmit the same with fidelity and without unreasonable delay all the laws of the state in relation to limited partnerships, to corporations, and to obtaining private property for the use of such telegraph shall cease to operate in favor of the proprietor thereof, and if private property has been taken for the use of such telegraph without the consent of the owner he may reclaim and recover the same.
- Same.** SEC. 1352. (784.) Any person employed in transmitting messages

by telegraph must do so without unreasonable delay, and any one who willfully fails thus to transmit them, or who intentionally transmits a message erroneously, or makes known the contents of any message sent or received to any person except him to whom it is addressed, or to his agent or attorney, is guilty of a misdemeanor.

SEC. 1353. (785.) The proprietor of a telegraph is liable for all <sup>same.</sup> mistakes in transmitting messages made by any person in his employment as well as for all damages resulting from a failure to perform any other duties required by law.

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## TITLE XII.

### OF THE POLICE OF THE STATE.

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#### CHAPTER 57.

##### THE SETTLEMENT AND SUPPORT OF THE POOR.

[Code—Chapter 48.]

##### ARTICLE I.

##### *The Support of Poor Persons by their Kindred.*

SEC. 1354. (786.) For the purposes of this chapter the word <sup>Definitions.</sup> “court” means “board of supervisors;” the word judge also means “board of supervisors;” the word “clerk” means clerk of said board, unless it be otherwise expressed, and both the word “court” and “judge” may mean “clerk of said board,” when the nature of the duty, the time of its necessary discharge or the rules to be made by the board of supervisors, shall so provide; and the word “directors” means directors of the poor house in counties where there is one.\*

SEC. 1355. (787.) The father, mother, children, grandfather if <sup>Who to support.</sup> of ability without his personal labor, and the male grand children who are of ability, of any poor person who is blind, old, lame, or otherwise impotent so as to be unable to maintain himself by work shall jointly or severally relieve or maintain such poor person in such manner as may be approved by the trustees of the township where such poor person may be or by the directors, but these officers shall have no control unless the poor person has applied for aid.

SEC. 1356. (788.) The word “father” in the preceding section <sup>Father.</sup> includes the putative father of an illegitimate child, and the question of

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\* See sections 312-21; 325; 330; 328. But does not the limited scope of the title of this last act confine the second section to roads and highways? There is little use in attempting to be more definite than I am in this section, as the board of supervisors will have to work this chapter in the harness of a set of rules which they will establish.

- his being the father may be tried in any action or proceeding to recover for or to compel the support of an illegitimate child. But there shall be no obligation to proceed against the putative father before proceeding against the mother.
- Proceeding to compel.** SEC. 1357. (789.) Upon the failure of such relative so to relieve or maintain a poor person who has made application for relief the township trustees or the directors may apply to the court of the county where such poor person resides for an order to compel the same.
- Notice.** SEC. 1358. (790.) At least fourteen days written notice of the application shall be given by summons which shall be served as original process in an action may be served and in any county by any officer thereof or by any other person.
- Notice.** SEC. 1359. (791.) The court shall make no order affecting a person not served but may notify him at any stage of the proceedings.
- Hearing and order.** SEC. 1360. (792.) The court may proceed in a summary manner to hear the allegations and proofs of the parties and order any one or more of the relatives of such poor person who appear to be able, to relieve and maintain him charging them as far as practicable in the order above named and for that purpose making new parties to the proceedings when necessary.
- Order.** SEC. 1361. (793.) Such order may be for the entire or partial support of the poor person and it may be for support either by money or by taking the poor person to the relative's house, or the order may assign the poor person for a certain time to one and for another period to another relative as may be adjudged just and convenient, taking into view the means of the several relatives.
- Value.** SEC. 1362. (794.) If the court order the relief in any other manner than in money it shall fix a just weekly value upon it.
- Manner.** SEC. 1363. (795.) The order may be specific in point of time or it may be indefinite until the further order of the court and may be varied from time to time when the circumstances require it on the application of the trustees of the poor person, or of any relative affected by it, upon fourteen days notice being given.
- Money.** SEC. 1364. (796.) When money is ordered to be paid it shall be paid to such officer as the court may direct.
- On failure.** SEC. 1365. (797.) If any person fails to render the support ordered, on the affidavit of one of the proper trustees or directors showing that fact the court may order execution for the amount due rating any support ordered in kind as before assessed. In such proceeding the county is plaintiff and the person sought to be charged defendant.
- Appeal.** SEC. 1366. (798.) An appeal may be taken from such judgment as provided in the chapter relating to the county judge.
- Abandonment.** SEC. 1367. (799.) Whenever a father, or a mother being a widow or living separate from her husband, abandons their children, or a husband his wife, leaving them chargeable or likely to become chargeable upon the public for their support the trustees of the township where such wife or children may be, or the directors, upon application being made to them may apply to the court of any county in which any estate of such father, mother, or husband may be for a warrant to seize the same, and upon due proof of the above facts the court may issue its warrant authorizing the trustees or directors to take into their possession the goods, chattels, effects, things in action, and the lands of the person absconding.
- Process.** SEC. 1368. (800.) By virtue of such warrant the trustees or directors may take the property wherever the same may be found in the same county and shall be vested with all the right and title to the personal

property and to the rents of the real property which the person absconding had at the time of his departure.

SEC. 1369. (801.) All sales and transfers of any such property real or personal and leases made by the person after the issuing of the warrant shall be absolutely void. Sales.

SEC. 1370. (802.) The said trustees or directors shall immediately make an inventory of the property so seized by them and return the same together with the proceedings to the court, there to be filed. Inventory.

SEC. 1371. (803.) The court upon inquiring into the facts and circumstances of the case may discharge the order of seizure, but if it be not discharged the court shall have power to direct from time to time what part of the personal property shall be sold and how, and how much of the proceeds of such sale and of the rents and profits of the real estate shall be applied to the maintenance of the children or wife of the person so absconding. Orders of sale, &c.

SEC. 1372. (804.) If the party against whom such warrant issued return and support the wife or children so abandoned or give security to the county satisfactory to the judge that such wife or children shall not become chargeable to the county the warrant shall be discharged by an order of the court, and the property taken and remaining restored. Party's return.

SEC. 1373. (805.) The defendant may demand a jury in the trial contemplated on the question of his ability and of his obligation to support a poor relative; and also on the questions of abandonment and of liability to become a public charge as provided above, which demand may be made upon the inquiry contemplated above, and such inquiry shall take place on the request of the defendant unless it be ordered on the motion of the court itself with notice to the defendant. Jury trial.

SEC. 1374. (806.) Any county having expended any money for the relief of a poor person under the provisions of this chapter may recover the same from any of his kindred mentioned in the second section of this chapter, by an action brought in any court having jurisdiction within two years from the payment of such expenses. Action by county.

SEC. 1375. (807.) A more distant relative who may have been compelled to aid a poor person may recover from any one or more of the nearer relatives, and one so compelled to aid may recover contribution from others of the same degree. By kindred.

## ARTICLE 2.

### *Legal Settlements.*

SECTION 1376. (808.) Legal settlements may be acquired in the counties as follows: How acquired.

1. Any white person having attained the age of majority and residing in this state one year without being warned as hereafter provided gains a settlement in such county;

2. A married woman follows and has the settlement of her husband if he have any within the state, and if she had a settlement at the time of marriage it is not lost by the marriage;

3. A married woman abandoned by her husband and having obtained authority to act as a single person may acquire a settlement as if she were unmarried;

4. Legitimate children follow and have the settlement of their father if he have one, but if he has none then that of their mother;

5. Illegitimate minor children follow and have the settlement of their mother, or if she have none then that of the putative father;

6. A minor whose parent has no settlement in this state, and a married woman living apart from her husband and having no settlement and whose husband has no settlement in this state, residing one year in any county gains a settlement in such county;

7. A minor bound as an apprentice or servant immediately upon such binding, if done in good faith, gains a settlement where his master has one.

- When lost. SEC. 1377. (809.) A settlement once acquired continues until it is lost by acquiring a new one.
- Lost cases. SEC. 1378. (810.) The provisions of the preceding sections apply to cases of settlements begun to be acquired or lost as well before as after the provisions of this chapter go into effect.
- Foreign paupers. SEC. 1379. (811.) A person coming from another state and not having become a citizen of nor having a settlement in this state, falling into want and applying for relief, may be sent to the state whence he came at the expense of the county under a warrant of the county court, otherwise he is to be relieved in the county where he applies.
- Warning. SEC. 1380. (812.) Persons coming from other states or counties who are, or of whom it is apprehended that they will become, county charges may be prevented from obtaining a settlement in a county by warning them to depart, and thereafter they shall not acquire a settlement except by the requisite residence for one year uninterrupted by another warning.
- If so given. SEC. 1381. (813.) Such warning shall be in writing and may be served upon the order of the trustees of the township or of the directors or of the court or judge. The service may be made by any person and the person making it shall make a return of his doings thereon to the officer issuing the order, and if not made by a sworn officer it must be verified by affidavit.
- Settlement in another county. SEC. 1382. (814.) When a poor person applying for relief in one county has a settlement in another he may be removed to the county of his settlement, if he be able to be removed, upon the order of the judge of the county where he applied for relief and delivered to any trustee of a township in the county where his settlement is or to a director, giving written notice of the fact to the county judge or clerk; or the judge of the county where the poor person applied for relief may in his discretion cause the judge of the county where the poor person has a settlement to be notified of his being a county charge in the first county, and thereafter it will become the duty of the judge of the county of the settlement to order the removal of the poor person if he is able to be removed, and if not able then to provide for his relief.
- Counties liable. SEC. 1383. (815.) The county where the settlement is shall be liable to the county rendering relief for all reasonable charges and expenses incurred in the relief and care of a poor person if notice of relief being rendered is given to the county of the settlement within a reasonable time after the county of the settlement is ascertained; and for the charges of removal and expenses of support incurred after notice given, in all cases.
- Removal and appeal. SEC. 1384. (816.) When an order of removal is made the county to which the removal is made may appeal from the order to the district court of the county where the order is made, by the judge of the county to which the removal is made causing a notice of such appeal signed and sealed by him to be filed in the office of the other county within thirty days after the service of the notice of the order. No other proceeding than the above shall be necessary to effect the appeal and the notice of

appeal and a transcript of whatever other proceedings or papers there may be relative to the matter shall be filed in the office of the district court, and the cause may be entitled as of the county issuing the order as plaintiff against the county appealing as defendant and appellant.

SEC. 1385. (817.) The cause may be tried as other actions, but there need be no pleading, the only issue being whether the poor person had a settlement in the county to which he was removed at the time of such order of removal.

SEC. 1386. (818.) Upon the application of the county appellant the district court may in its discretion change the venue of such cause to some convenient disinterested county.

### ARTICLE 3.

#### *Relief of the Poor where there is no Poor-House.*

SECTION 1387. (819.) The trustees in each township in counties where there is no poor-house have the oversight and care of all poor persons in their township so long as they remain a county charge and shall see that they are properly relieved and taken care of.

SEC. 1388. (820.) The poor must make application for relief to the trustees of the township where they may be, and if the trustees are satisfied that the applicant is in such a state of want as requires relief at the public expense, they may for the time being afford such relief as the necessities of the person may require and shall report the case forthwith to the judge, who is authorized to deny further relief to such person if he find cause.

SEC. 1389. (821.) All claims and bills for the care and support of the poor shall be certified to be correct by the proper trustees and presented to the judge, and if he is satisfied that they are reasonable and proper they are to be paid out of the county treasury.

SEC. 1390. (822.) The court may in its discretion allow and pay to poor persons who may become chargeable as paupers and who are of mature years and sound mind and who will probably be benefitted thereby such sums or such annual allowance as will not exceed the charge of their maintenance in the ordinary mode.

SEC. 1391. (823.) If any poor person on application to the trustees is refused the required relief he may apply to the county judge, who on examination into the matter may direct the trustees to afford relief or the judge may direct specific relief.

SEC. 1392. (824.) A person who is a resident of but having no settlement in this state falling into want and making application in one county but having his usual residence in another, may at his request be removed to such other county by the overseers where he applied, and he shall then be at the charge of such other county.

SEC. 1393. (825.) The judge is invested with authority to enter into contract, when he considers the same expedient, with the lowest bidder through proposals opened and examined at a regular session of the county court, for the support of all the poor at the time being of the county for one year only at a time and to make all requisite orders to that effect.

SEC. 1394. (826.) When such a contract is made the judge shall from time to time appoint some person to examine and report upon the manner the poor are kept and treated, which shall be done without notice to the person contracting for their support, and if upon due notice and inquiry the judge find that the poor are not reasonably and prop-

erly supported, treated, or cared for, he has power at a regular session to set aside the contract making proper allowances for the time it has been in operation.

**Employment.** SEC. 1395. (827.) Such contractor and every contractor under the overseers of a township may employ a poor person in any work for which his age, health, and strength is competent, but this shall be subject to the supervision and orders of the trustees, and in the last resort of the county judge.

#### ARTICLE 4.

#### *Relief of the Poor where there is a Poor-House.*

**Poor-house.** SECTION 1396. (828.) The county court of each county is hereby authorized to order the erection and establishment of a poor-house in such county whenever that measure is deemed advisable, and also the purchase of such land as may be deemed necessary for the use of the same, and the judge is invested with full authority to make the requisite contracts and to carry such order into effect, provided the cost of said poor-house and land shall be first estimated by said court and approved by a vote of the people at some regular election.

**Expenses.** SEC. 1397. (829.) The expense of such erection and purchase shall be defrayed by a tax levied on the general assessment roll for that express purpose, which shall constitute a separate and special fund to be collected and paid over in manner as other taxes are, but to be paid in money only.

**Directors.** SEC. 1398. (830.) When a poor-house is established the court has discretionary authority to appoint directors or not, and when it deems it expedient so to do, may appoint one or three in accordance with the provisions of the following sections; and until the court so appoint directors the judge is invested with all the authority and powers in relation to the poor and the poor-house which are given to the directors when they have been appointed.

**Same.** SEC. 1399. (831.) The directors when so appointed are to take charge of and manage the affairs of the poor and of the poor-house, and shall be a body corporate under the name of "The directors (or director) of the poor-house of — county" (naming the county).

**Qualification and duty.** SEC. 1400. (832.) They are required to take an oath faithfully to discharge the duties of their office previous to acting therein. They continue in office one year and until their successors are appointed and qualified. They shall keep a record of their doings. And if a vacancy occur in their body the judge may fill it by appointment to continue until the end of the year.

**Powers.** SEC. 1401. (833.) They may make all contracts and purchases requisite for the poor-house, and may prescribe rules or regulations for the management and good government of the same and for the introducing sobriety, morality, and industry among its occupants.

**Steward.** SEC. 1402. (834.) The directors may appoint a steward of the poor-house who shall be governed in all respects by the rules and regulations of the board and may be removed by them at pleasure, and who shall receive such compensation, perform such duties, and give such security for their faithful performance as the board may appoint.

**Receiving poor.** SEC. 1403. (835.) The steward shall receive into the poor-house any person producing an order as hereafter provided and enter in a book to be kept for that purpose the name and age and the date of the reception of such person.



SEC. 1404. (836.) He may require of persons admitted to the poor-house to perform such reasonable and moderate labor as may be suited to their ages and bodily strength, the proceeds of which shall be appropriated to the use of the poor-house in such manner as the directors may determine. Employment.

SEC. 1405. (837.) No person shall be admitted to the poor-house unless upon the written order of a township trustee, a director, or the county judge, and relief is to be furnished in the poor-house only, when the person is able to be taken there, unless the judge order otherwise. Admission.

SEC. 1406. (838.) When a trustee furnishes relief out of the poor-house to any person or gives an order of admission thereto such trustee is required to notify one of the directors forthwith of the fact with the sex, age, health, and property of the poor person, and the date when relief was first furnished, and the directors have authority to countermand such order or supply and to make any other provision in relation to him. Other relief.

SEC. 1407. (839.) The directors are empowered to bind out such poor children of the poor-house as they believe are likely to remain a permanent charge on the public, males until twenty-one and females until the age of eighteen unless sooner married, on such terms and conditions as prescribed in the chapter concerning master and apprentices. And they may bind for shorter periods on such conditions as they may adopt. Binding out.

SEC. 1408. (840.) When any inmate of the poor-house becomes able to support himself the directors may order his discharge. Discharge.

SEC. 1409. (841.) When a poor person applying for relief is in a condition that will not admit of his removal to the poor-house the directors may provide for his relief out of the county treasury until his condition will admit of his removal. Other relief.

SEC. 1410. (842.) The directors shall cause the poor-house to be visited at least once a month by one of their body who shall carefully examine the condition of the inmates and the manner in which they are fed and clothed and otherwise provided for and treated, ascertain what labor they are required to perform, inspect the books and accounts of the steward, and look into all matters pertaining to the poor-house and its inmates and report to the board. When there is no board of directors the county judge may perform the above duty or appoint a person therefor who shall report to him. Visitation.

SEC. 1411. (843.) The directors shall annually report to the county court the state of the poor-house with a full account of their contracts, disbursements, and proceedings. Report.

SEC. 1412. (844.) The expenses of supporting the poor-house shall be paid out of the county treasury by order of the judge on certificates signed by the directors; and in case the ordinary revenue of the county prove insufficient for the support of the poor the court may levy a poor-tax not exceeding one mill on the dollar to be entered on the county list and collected as the ordinary county tax. Expenses.

SEC. 1413. (845.) The judge may allow the directors out of the county treasury such sum as it deems reasonable for their services not exceeding one dollar and a half for each day employed in the duties of their appointment. Directors' pay

SEC. 1414. (846.) The directors are also invested with all powers before given to the trustees of townships in relation to the poor. Powers.

SEC. 1415. (847.) The county court is also invested with authority to let out the support of the poor with the use and occupancy of the poor-house and farm for a period not exceeding three years. Contract to support.

PRIOR LAWS. 1. "An act for the relief and settlement of the poor," passed April 22, 1833; M. D., 1833, p. 139.

2. "An act to authorize the establishment of poor-houses," passed July 22, 1830; M. D., 1833, p. 149; *repealed*, Wis., 2d sess., No. 22, p. 48.

3. An act to amend the same, passed March 12, 1833; M. D., 1833, p. 151; *repealed*, Wis., 2d sess., No. 22.

4. "An act in addition to the several acts for the relief and maintenance of the poor," passed March 7, 1834; 1st sess. of 6th legislative council of Mich., p. 51.

5. An act for the relief of the poor, passed Jan. 3, 1838; Wis., 2d sess., No. 22, p. 48; all the above acts repealed Aug. 30, 1840.

6. An act for the relief of the poor, passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 59, p. 83; repealed in part by reprint, 1843, chap. 118, p. 491.

7. An act for the relief of the poor, passed Jan. 16, took effect Feb. 16, 1842; I. T., 4th sess., chap. 67, p. 58; also, reprint, 1843, p. 490, amended; I. T., 6th sess., chap. 12, p. 18.

8. An act to authorize the establishment of poor-houses, passed Feb. 17, took effect March 17, 1842; I. T., 4th sess., chap. 93, p. 83; also, reprint, 1843, p. 494.

9. An act amending "An act for the relief of the poor, of Feb. 16, 1842," passed Feb. 12, 1844; I. T., 6th sess., chap. 12, p. 18.

DECISION. County may recover from a son what it expends in support of his mother, *Boone Co. v. Rule*, Dec., 1859.

## CHAPTER 58.

### ILLEGITIMATE CHILDREN.

[Code—Chapter 49.]

- Complaint.** SECTION 1416. (848.) When any woman residing in any county of the state is delivered of a bastard child or is pregnant with a child which if born alive will be a bastard, complaint may be made in writing by any person to the county court of the county where she resides stating that fact and charging the proper person with being the father thereof.
- Summons.** SEC. 1417. (849.) Upon the complaint being filed the county judge shall issue a summons requiring the person charged to appear at a time named, but not less than seven days distant, and answer to the county on the complaint of \_\_\_\_\_ (the complainant,) which with a copy of the complaint shall be served at least five days before the return day, and be served and returned in the manner required in other actions. If the accused be not found notice shall be given as in actions before justices of the peace when the defendant is not found.
- Service.** SEC. 1418. (850.) From the time of the issuing of the summons in such case the action shall be a perpetual lien and security upon the real property of the accused in the county where the action is pending, for the payment of any money and the performance of any order adjudged by the proper court.
- Lien.** SEC. 1419. (851.) Upon the return day of the summons if the legal service has been made the court shall proceed to hear the cause, examining the woman and other witnesses and permitting the accused to put interrogatories also; but continuances may be granted for good cause, and the accused may demand a jury.
- Hearing.** SEC. 1420. (852.) If on such examination the accused appear in the opinion of the court or the jury to be the father of the child he shall be adjudged to give security as directed by the court, to the county, con-
- Judgment.**

ditioned to save the county and also every other county in the state from all charges toward the maintenance of the child.

SEC. 1421. (853.) If upon appeal the judgment below (being against the accused) be sustained it shall be rendered and entered as a judgment of the district court. On appeal.

SEC. 1422. (854.) The issue in such case shall be whether the party is guilty or not and shall be tried as other issues. Issue.

SEC. 1423. (855.) If the accused be found guilty or confess the accusation in the court above, he shall be charged with the maintenance of the child in such sum or sums and in such manner as the district court direct and with the costs of the suit, and shall be required to enter into bond to the county with surety approved by the county judge, or in his absence by the clerk, to save the county and all other counties of the state from all charges for the maintenance of the child and for the performance of the orders of the said court, and execution may issue for costs and for any sum ordered to be paid immediately. Judgment and execution.

SEC. 1424. (856.) When money has been ordered to be paid from time to time or by instalments and when a bond has been ordered to be given with a condition for the performance of any act and the accused neglects to perform such order, a scire facias may issue from the county or district court (as the case may be) to the accused or to his executor, and from the district court to any heir or devisee holding under him any land subject to the lien, to show cause why judgment should not be rendered and execution issue for the sum due or for the breach of the condition ordered by the proper court. Scire Facias.

PRIOR LAWS. 1. An act for the support and maintenance of illegitimate children, passed April 12, 1827; M. D 1833, p. 334.

2. An act supplementary thereto, passed June 16, 1828; M. D. 1833, p. 337; repealed Aug. 30, 1840.

3. An act to provide for the support of illegitimate children, passed Jan. 4, took effect Feb. 4, 1840; I. T., 2d sess., chap. 24th, p. 29; also reprint, 1843, p. 198.

DECISIONS. Title of case, M., 420; not in the nature of a criminal prosecution, 2 G., 501; form of judgment in bastardy, 4 G., 242; discrediting the mother, 1 G., 150; use of certiorari in bastardy case, 4 G., 242.

## CHAPTER 59.

### INSANE PERSONS.

[Code—Chapter 50.]

[All chapter fifty of the code repealed by laws of the seventh general assembly, chapter 141, page 264, being article 1st hereof.]

#### ARTICLE 1.

An act for the government of the Insane Hospital, and the care of the Insane and Idiots.

[Passed March 23, 1858, took effect July 4, 1858; *Laws of Seventh General Assembly, Chapter 141, page 264.*]

SECTIONS (1) (2) (3) (4) [superseded by (1) (2) (3) and (4) of chapter 161 of laws of eighth session, being article 2 hereof.]

Trustees visit asylum.	SEC. 1425. (5.) It shall be the duty of one or more of the board of trustees to visit the institution monthly, and all or a majority thereof quarterly, and at such monthly visits they shall, with the superintendent, examine the accounts of the steward and certify their approval or otherwise, on the page with his monthly balances. They shall also at the same time register their names in a book to be kept for that purpose at the hospital and note therein the general condition of the hospital.
Minutes and reports.	SEC. 1426. (6.) The board of trustees shall make a record of their proceedings at all meetings in a book kept for that purpose, and at their annual meetings shall make a report to the governor, of the condition and wants of the hospital which shall be accompanied by full and accurate reports of the superintendent and a detailed account of all moneys received and disbursed by the steward.
Annual and special meetings.	SEC. 1427. (7.) The board of trustees shall hold their annual meeting on the first Wednesday in December, in each year, at the office of the hospital which shall be in the hospital building. Special meetings for the appointment of resident officers or for the transaction of general business, shall be held on the written request of the president or two members of the board, of which ten days' notice shall be given to each member in writing by the president, stating the object for which the meeting is called.
Trustees not interested in contracts.	SEC. 1428. (8.) No trustee or any officer of the institution shall be either directly or indirectly interested in the purchase of building material or any article of furniture or supply for the use of the hospital.
Trustee can not be superintendent.	SEC. 1429. (9.) No member of the board of trustees shall be eligible to the office of superintendent of the hospital during the term for which he was appointed, nor within one year after his term shall have expired.
Qualification and term of superintendent.	SEC. 1430. (10.) The medical superintendent of the hospital shall be a physician of acknowledged skill and ability in his profession. He shall be the chief executive officer of the hospital and shall hold his office for six years unless sooner removed by the trustees as provided for in the fourth section of this act. Before entering on the duties of his office he shall take and subscribe to an oath or affirmation faithfully and diligently to discharge the duties required of him by law. He shall have the entire control of the medical, moral and dietetic treatment of the patients, and he shall see that the several officers of the institution faithfully and diligently discharge their respective duties. He shall employ attendants, nurses, servants and such other persons as he may deem necessary for the efficient and economical administration of the government of the hospital, assign them their respective places and duties, and may at any time discharge any of them from service.
His powers.	SEC. 1431. (11.) The superintendent shall provide an official seal for the hospital upon which shall be the words "Iowa Insane Hospital, Mount Pleasant." He shall make reports to the trustees as provided for in section six of this act.
Seal.	
Reports.	
Assistant physician.	SEC. 1432. (12.) The assistant physician shall be a medical man of such character and qualifications as to be able to perform the ordinary duties of the superintendent during his absence.
Steward and his duties.	SEC. 1433. (13.) The steward under the direction of the superintendent and not otherwise, shall make all purchases for the hospital where they can be made on the best terms, keep the accounts, make engagements with, pay and discharge those employed in and about the hospital, have a personal superintendence of the farm, garden and grounds, and perform such other duties as may be assigned him.

SEC. (14.) [Superseded by section six of next article.]

SEC. 1434. (15.) The matron under the direction of the superintendent and not otherwise shall have the general supervision of the institution and do what she can to promote the comfort and restoration of the patients. Matron and her duties.

SEC. (16.) [Superseded by section seven of next article.]

SEC. 1435. (17.) \* The steward shall keep an accurate account in detail in a proper book always open to the inspection of the superintendent and trustees of all expenses paid out of the sums so advanced by the treasurer and shall settle the same with the superintendent and trustees monthly or oftener if required, and shall account for the whole sum of *one thousand dollars*† before another is approved.

SECS. (18) (19) (21) (22) (23) (24) (25) [repealed by chapter 161, laws of eighth session, being article 2 hereof.]

SEC. 1436. (26.) † If any person found to be insane, can not for any cause be admitted into the hospital, the probate judge shall direct the sheriff of the county or some other suitable person, to take charge of such lunatic until such cause shall be removed and if necessary may direct the confinement of such lunatic in the county poor house or jail, as the case may require, and if all things needful be not otherwise supplied he shall furnish them, and in such case the same shall be paid for out of the county treasury on the certificate of the probate judge and the order of the county auditor: *provided*, that such judge shall not in any case furnish any thing either in the way of clothing as provided in section twenty-five of this act, or for any other person who is not a poor person as understood in the sixty-first section of this act, and, *provided further*, no lunatic shall be confined in with a person charged with or convicted of a crime. Person not admitted to hospital taken care of in the county.  
Relatives furnish clothing.

SEC. 1437. (27.) Where a lunatic not entitled to admission into the hospital shall be at large, and his being so at large shall be dangerous to himself or others, upon such facts being established to the satisfaction of the probate judge, he shall immediately order such lunatic to be confined and provided for as directed by the twenty-sixth section of this act, and when any person be so confined and the attending physician shall certify that such person is restored to reason, or that it is not necessary longer to confine such person, or if the friends of such person shall agree to take the care of such person, the probate judge shall immediately order his discharge. Dangerous lunatics not permitted to be at large.

SECS. (28) and (29) [superseded by sections (13) (14) and (15) of next article.]

SEC. 1438. (30.) That if at any time it may become necessary for want of room or other cause, to discriminate in the general reception of patients into the hospital, a selection shall be made as follows: 1. Recent cases, i. e. cases of less than one year's duration shall have the preference over all others. 2. Chronic cases, i. e., where the disease is of more than one year's duration, presenting the most favorable prospects of recovery shall be next preferred. 3. Those for whom application has been longer on file, other things being equal, shall be next preferred, and 4. Where cases are equally meritorious, in all other respects, the indigent shall have preference. Order of preference if hospital is crowded.

SEC. 1439. (31.) Each county shall be entitled to send patients to Number of patients from each county.

\* The omitted part of this section is substituted by section (6) of next article.

† This sum seems made less definite by section six of the next article.

‡ Are not sections (26) (27) (30) (31) (32) (33) (34) (35) (36) (37) (39) and indeed all the sections to (62) of doubtful force? See sections 1494 and 1498.

- the hospital in proportion to the number of insane persons in the county, and in case that all the insane who may apply for admission, can not for some cause be accommodated, then in the selection of patients, the provisions of this section shall be regarded in selecting such as may be admitted, subject to the provisions of section thirty of this act.
- Recurrence of insanity provided for.** SEC. 1440. (32.) When any patient discharged from a hospital as cured, shall become insane, and any respectable physician shall file with the probate judge of the county, of which said insane person shall be an inhabitant, an affidavit setting forth the fact of the recurrence of the disease, and such other facts relating thereto as he may deem proper, the probate judge shall forthwith transmit a copy of such affidavit, authenticated by his official seal, to the superintendent of the hospital, and thereupon the same proceeding shall be had as provided in this act for persons found to be insane, upon inquest held for that purpose.
- Writ of habeas corpus allowed.** SEC. 1441. (33.) All persons confined as insane, shall be entitled to the benefit of the writ of habeas corpus, and the question of insanity shall be decided at the hearing, and if the judge shall decide that the person is insane, such decision shall be no bar to the issuing of the writ a second time, whenever it shall be alleged that such person has been restored to reason.
- Idiots supported by county.** SEC. 1442. (34.) Pauper idiots and lunatics, not within the meaning of this act, and those discharged from the hospital, shall be provided for in the same manner as other poor.
- Record made and papers filed.** SEC. 1443. (35.) In all cases of inquest held under the provisions of this act, the probate judge shall file and carefully preserve all papers filed with him, and shall make such entries upon his docket as will, together with the papers filed as aforesaid, preserve a perfect record of each case tried by him.
- Proceeding in case of death.** SEC. 1444. (36.) In all cases in which any patient shall die in the hospital, it shall be the duty of the superintendent to immediately give notice to the relations of such deceased patient, if known to him, and if not so known, he shall immediately notify the probate judge of the county from which such patient was sent, who shall forthwith cause a notice of the death of such patient to be published in the two leading newspapers of his county, or if there be no newspaper published in said county, a written notice shall be posted in two public places, one of which shall be at the court house in said county.
- Proceeding in case of escape.** SEC. 1445. (37.) If any patient shall escape from the hospital, and return to the county from whence he was committed, it shall be the duty of the sheriff of said county, when notified by the superintendent, to forthwith arrest such patient and return him to the hospital, for which service the sheriff shall be allowed and paid such fees as shall be allowed by law for the commitment of insane persons to the hospital, which fees shall be paid out of the state treasury on the certificate of the superintendent, and warrant of the auditor of state.
- Actions at law.** SEC. 1446. (39.) [Superseded by section (12) of next article.]  
SEC. 1446. (39.) For all debts due the hospital, an action may be maintained in the name of the superintendent of the hospital to which such debt may be due, and in such action the plaintiff shall be styled the superintendent of the Iowa Insane Hospital, and all suits against the hospital shall be brought against him as defendant.
- Counsel employed.** SEC. 1447. (40.) He shall employ an attorney who shall attend to any suit instituted in behalf of or against the hospital, who shall be entitled to a compensation of five per cent. on all sums collected for the hospital, and such fees as may be agreed upon for defending any suits brought against the hospital.

SEC. 1448. (41.) The taxable costs and expenses to be paid under the provisions of this act shall be as follows: to the probate judge, with whom the affidavit was filed, the sum of two dollars for holding an inquest under the provisions of this act. To the medical witness who shall make out the certificate required in the twenty-third section of this act, two dollars and witness fees such as are allowed by law in other cases. To the witnesses and constable the same as are allowed by law for like services in other cases. To each person employed by the probate judge to commit a lunatic to the county poor house, seventy-five cents per day. To the sheriff or other person than an assistant, for taking an insane person to the hospital, or removing one therefrom upon the warrant of the probate judge, mileage at the rate of five cents per mile, going and returning, and one dollar per day for the support of each patient on his journey to or from the hospital, and to each assistant, five cents per mile, and nothing more, the number of miles to be computed in all cases by the nearest route traveled, and costs specified in this section, to be paid out of the county treasury upon the certificate of the probate judge and the order of the county auditor.

Fees allowed.

SEC. 1449. (42.) The probate judge upon satisfactory proof that any person who is an inhabitant of the county in which he may be found, is an idiot or lunatic, and that it is necessary in order to preserve the property of such idiot or lunatic, shall appoint a guardian, which guardian shall by virtue of such appointment be the guardian of the minor children of his ward, unless the court shall appoint some other person their guardian.

Guardians appointed for idiots.

SEC. 1450. (43.) That when any person having a wife shall be declared to be an idiot or lunatic, it shall be lawful for the probate judge to appoint the wife of such person his guardian, if it be made to appear to the satisfaction of the judge that she is competent to perform the duties of such appointment, and any married woman appointed such guardian, shall in her said capacity, have power to enter into official bonds, and her sureties thereon shall be liable in the same manner and to the same extent as though said bond was executed by a sale.

Wife of idiot appointed guardian.

SEC. 1451. (44.) All laws relating to guardians for minors and their wards, and all laws pointing out the duties, rights and liabilities of such guardians and their sureties in force for the time being, shall be applicable to guardians for idiots and lunatics and their children, so far as the same are in conformity with the provisions of this act.

Laws governing guardians.

SEC. 1452. (45.) Such guardian may sue in his own name describing himself as guardian of the ward for whom he sues, and when his guardianship shall cease by his death, removal, or otherwise, or by the decease of his ward, any suit, action or proceeding then pending shall not abate, but his successor or guardian, or such idiot or lunatic, if he be restored to his reason, or the executor or administrator of such idiot or lunatic, as the case may require, and shall be made party to the suit or other proceedings, in like manner as is or may be provided by law for making an executor or administrator party to a proceeding of a like kind, when the plaintiff dies during its pendency.

Power of guardian in law.

SEC. 1453. (46.) Whenever the sale of the real estate of such ward is necessary for his support, or the support of his family, or the payment of his debts, or such sale will be for the interest of the estate of such idiot or lunatic or his children, the guardian may sell the same under like proceedings as is or may be required by law to authorize the sale of real estate by the guardian of a minor.

Idiot's real estate may be sold.

SEC. 1454. (47.) The guardian of any idiot or lunatic, whether appointed by a court in this state or elsewhere, may complete the real

Guardian completes idiot's contracts.

contracts of his ward, or any authorized contracts of a guardian who has died or been removed, in like manner, and by like proceeding as the real contract of a decedent may under an order of court, be specially performed by his executor or administrator.

Insolvent estate of idiots settled.

SEC. 1455. (48.) If the estate of the idiot or lunatic is insolvent, or will probably be insolvent, the same shall be settled by the guardian in like manner, and like proceedings may be had as is or may be required by law for the settlement of the insolvent estate of a deceased person.

The conditions on which foreign guardians may act in this state

SEC. 1456. (49.) The foreign guardian of a foreign idiot or lunatic appointed in any other state of the United States or the territories thereof, may possess, manage or dispose of the real and personal estate of his ward, situated in this state in like manner and with like authority as guardians of idiots or lunatics appointed by the courts of this state, after complying with the following requisitions:

1. An authenticated copy of the foreign commission of idiocy or lunacy proved, allowed and recorded in the county where such estate is situated, in like manner as is or may be provided by law for the admission to record of an authenticated copy of a will made in any other of the United States.

2. Evidence satisfactory to the court here, before whom such foreign commission is approved, that such idiocy or lunacy still continues.

3. The foregoing guardian shall file his bond with sureties residing in this state or elsewhere to the acceptance of the court, conditioned for the faithful administration of his guardianship.

Restored lunatics freed from guardianship.

SEC. 1457. (50.) Whenever the probate judge shall be satisfied that a lunatic is restored to reason, or that letters of guardianship have been improperly issued under this act, he shall make an entry upon the records of his court that said guardianship terminate, and the guardianship shall thereupon cease, and the accounts of the guardian shall be settled by the court.

Insane criminals provided for.

SEC. 1458. (51.) If any person in prison charged with a crime or misdemeanor, whether in needy circumstances or not, shall at any time before indictment be found against him, at the request of any citizen be brought before an examining court in the manner provided by law, and if it shall be found by the court that such person was an idiot or was insane when he committed the offense, the said court at their discretion shall proceed and the prisoner shall be dealt with in like manner as other idiots and lunatics are required to be after inquest.

Indicted criminals becoming insane provided for.

SEC. 1459. (52.) If any person in prison shall, after the commission of an offense, and before conviction become insane, whether he be in needy circumstances or not, and whether indicted or not, at the request of any citizen, an inquest may be instituted as provided for in this act, and if such court shall find that such person became insane after the commission of the crime or misdemeanor of which he stands charged, or indicted, and is still insane, the said court shall proceed, and the prisoner shall for the time being and until restored to reason, be dealt with in like manner as other lunatics are required to be after inquest had: *provided, however*, that if such lunatic be discharged, the bond given for his support and safe keeping shall also be conditioned that said lunatic shall when restored to reason, answer to said crime or misdemeanor, and abide the order of the court in the premises, and any such lunatic may, when restored to reason, be prosecuted for any offense committed by him previous to such insanity.

Restored criminals answer for crime.

Restored criminal changed from hospital to jail.

SEC. 1460. (53.) If the lunatic mentioned in the preceding section shall be confined in the hospital, the superintendent in whose charge he may be, shall as soon as such lunatic is restored to his reason, give notice



thereof to the district attorney of the proper county, and retain such lunatic in custody for such reasonable time thereafter as may be necessary for said attorney to cause a *capias* to issue and to be served, and no longer, and such *capias* may be issued upon precept filed by said attorney with the clerk of the district court, by virtue whereof the said person so restored to reason, shall be again returned to the jail of the proper county, to answer to the offense alleged against him.

SEC. 1461. (54.) When a person upon indictment for any crime or misdemeanor shall be acquitted on the sole ground that he was insane, the fact shall be found by jury in their verdict, and the prisoner shall be dealt with as provided in the two following sections. Acquittal for insanity.

SEC. 1462. (55.) If the prisoner is not in needy circumstances, and the court is satisfied from the nature of the offense or otherwise that it would be unsafe to permit the prisoner to go at large, such prisoner shall be dealt with in the manner provided in the twenty-fifth section of this act. Insane prisoner provided for.

SEC. 1463. (56.) If the prisoner is a poor person, the probate judge shall proceed, and the prisoner shall be dealt with in like manner as other insane persons are required to be after inquest had, as provided in the twenty-first section of this act. Poor prisoner provided for.

SEC. 1464. (57.) If any person, after being convicted of any crime or misdemeanor, and before the execution in whole or part of the sentence of the court, becomes insane, it shall be the duty of the governor of the state to inquire into the facts, and he may pardon such lunatic, or commute or suspend for the time being the execution in such manner and for such a period as he may think proper, and may by his warrant to the sheriff of the proper county or warden of the Iowa penitentiary, order such lunatic to be conveyed to the hospital and there kept until restored to reason. If the sentence of any such lunatic be suspended by the governor, the sentence of the court shall be executed upon him after such period suspension hath expired, unless otherwise directed by the governor. Convicted criminal becoming insane removed to hospital.

SEC. 1465. (58.) When any other person than those described in the seven preceding sections shall be confined in jail and shall be insane, they may be proceeded against by the probate judge and sent to the hospital, poor-house or jail, or discharged upon bond being given for their safe keeping and supported or otherwise as in other cases. Other insane convicts provided for.

SEC. 1466. (59.) If the probate judge, sheriff or any other person charged with duties under the act, shall refuse or neglect to perform any such duties, he shall forfeit a sum not exceeding fifty dollars, to be recovered with cost by an action in any court of competent jurisdiction in the name of the superintendent of the hospital, or shall be removed from office in the same manner as for any other neglect of duty. And if any insane person shall be conveyed to the hospital before the superintendent shall have given notice that he can be received as hereinbefore provided, no fees or compensation whatever shall be paid to those by whom he was so conveyed. Neglect of duty punished.

SEC. 1467. (60.) The county judge may allow any sum not exceeding fifty dollars per year, to be paid out of the county treasury for the support of any idiot or lunatic living or inhabitant of said county, who is not supported by the county in the jail or poor-house. Allowance for support of idiot.

SEC. 1468. (61.) The term insane as used in this act includes every species of insanity or mental derangement. The term idiot is restricted to persons foolish from birth, one supposed to be naturally without a mind. A person with a family is one who has a wife and child or either. Insanity. Idiocy. Family.

Poor single person.	The words poor person, wherever it occurs in this act, it is understood, when applied to a person without a family, shall mean one whose estate after payment of his debts and excluding from the estimate such part of the estate as is exempt from execution, is worth less in cash than five hundred dollars; and the same words, when applied to a person having a family, shall mean one whose estate estimated as aforesaid, is worth less in cash, after payment of his debts, than one thousand dollars: <i>provided</i> , that when the said words are applied to a married woman, her estate, and that of her husband, shall be estimated as aforesaid, and the amount shall determine the question as aforesaid, whether she be in needy circumstances or not, within the meaning of the act.
Poor married person.	
Salaries of officers.	Section (62) [superseded by section (23) of next article.] SEC. 1469. (63.) The salaries of the president, officers of the hospital named in section fourth of this act, shall be as follows: Of the superintendent* . . . . . \$1500.00 and residence in the hospital. Of the assistant physician . . . . . \$400.00 and residence in the hospital. Of the steward . . . . . \$500.00 and residence in the hospital. Of the matron . . . . . \$250.00 and residence in the hospital. These salaries to be paid quarterly by draft upon the treasurer of state upon the auditor's warrant.
Conflicting acts.	SEC. 1470. (64.) That chapter 50 of the code and all acts and parts of acts in regard to the care of the insane and idiots, which are inconsistent with the provisions of this act be and are hereby repealed.

## ARTICLE 2.

An Act for the Incorporation and Government of the Hospital for the Insane.  
[Passed April 3, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 161.]

Name and trustees.	SECTION 1471. (1.) <i>Be it enacted by the General Assembly of the State of Iowa</i> , That the hospital for the insane, located at Mount Pleasant, in Henry county, shall be known under the name and by the title of the Iowa hospital for the insane, and shall be placed under the charge of seven trustees four of whom shall constitute a quorum for the transaction of business.
Term of service and filling of vacancies.	SEC. 1472. (2.) That G. W. Kinkaid, of Muscatine county, J. B. Lash, Samuel McFarland, and Harper Riggs, of Henry county, Maturin L. Fisher, of Clayton county, D. L. McGugin, Lee county, and J. D. Elbert, of Van Buren county, be and are hereby constituted a board of trustees, provided for in the first section of this act. The first two named shall serve for two years; the second two, for four years; the last three, for six years; and as their terms expire, their successors shall be appointed for six years by the general assembly. All vacancies occurring shall be filled by the governor until the meeting of the general assembly, and until their successors are appointed and qualified.
Oath.	SEC. 1473. (3.) The trustees, before entering upon the duties of their office, shall take and subscribe an oath or affirmation to support the constitution of the United States, and of this state, and also faithfully to discharge the duties required of them by law, and the by-laws that may be established. They shall be paid their necessary expenses and two
Compensation.	

\* See section (26) of next article.

dollars per day during the time they are actually engaged in the discharge of their official duties; such payment to be made out of the state treasury, out of any moneys not otherwise appropriated, by an order drawn by the secretary of the board, and approved by the superintendent. The first meeting of the trustees shall be at any time after this act shall take effect, upon a notice from the chairman of the board of commissioners, when they shall organize by the election of a president and secretary, who shall serve until the annual meeting, which shall be held upon the first Wednesday of December in each year, in the hospital building, when the trustees shall choose one of their number president, and another secretary, for the year then ensuing, and until their successors are elected and qualified. Their officers.

SEC. 1474. (4.) The trustees shall have the general control and management of the hospital; they shall have full power to make all by-laws necessary for the government of the same, not inconsistent with the laws and the constitution of the state of Iowa, and to conduct the affairs of the institution in accordance with the laws and by laws regulating the same. They shall appoint a medical superintendent, and upon the nomination of the superintendent, they shall also appoint a steward, matron, and an assistant physician or physicians, who shall be styled the resident officers of the institution, and shall reside in the same and be governed and subject to all the laws and by-laws established for the government of the said institution. Said trustees shall fix all salaries not otherwise determined by law; and may, at their pleasure, remove any officer except the superintendent, who may be suspended by said board of trustees until he can have a hearing before the governor of the state, and may then be removed from office by the governor, by and with the advice and consent of said trustees. Powers of trustees and of their officers.

SEC. 1475. (5.) The superintendent before entering upon the duties of his office shall take and subscribe an oath or affirmation, faithfully and diligently to discharge the duties required of him by law and by-laws regulating the institution. Superintendent's oath.

SEC. 1476. (6.) The steward shall execute a bond to the institution in a sum and with such securities as the board of trustees shall approve, conditioned that he will faithfully perform the duties of his office, and pay over and account for all money that shall come into his hands belonging to the state. He shall have power to draw from the state treasury, out of money not otherwise appropriated, upon his order, approved by the superintendent and not less than two of the trustees, and under the seal of the hospital, a sufficient amount from time to time, for the purpose of defraying any deficiencies that may arise in the current expenses of the institution. Upon the presentation of such order, to the auditor of state, it shall be his duty to draw a warrant on the treasurer for the amount therein specified. Steward's bond and powers.

SEC. 1477. (7.) The board of trustees may take and hold in trust, for the hospital, any lands conveyed or devised, and any money or other personal property given or bequeathed, to be applied for any purpose connected with the institution. Power to take land.

SEC. 1478. (8.) Private patients may be admitted into the hospital by the superintendent, upon the written request of any relative, guardian, or friend of such patient, by filing with the superintendent an obligation signed by himself, together with two other persons, in words and figures in substance as follows, to wit:

*Obligation.*

In consideration of ——— being admitted a private patient into the

hospital for the insane, located at Mount Pleasant, at our request, we, the undersigned, jointly and severally promise and agree to pay said hospital, to the steward thereof, at said hospital, quarterly, on the first days of January, April, July and October, with interest at ten per cent. after said days respectively, the rate of board determined by the board of trustees of said hospital; to provide or pay for all requisite clothing, and for things necessary or proper for the health and comfort of said patient; to remove said patient when discharged; to reimburse funeral expenses in case of death; and if removed uncured, against the advice of the superintendent, before the expiration of three calendar months, to pay board for thirteen weeks, and also to indemnify said hospital for all expenses of suit, which it may incur in collecting said bills of board, supplies, and funeral charges; the same to be included in the damages to be recovered in such suit.

Witness our hands this ——— day of ———, 18——.

*Provided*, that the said obligation be duly certified by the county judge or the clerk of the district court of the county where such patient resides, that the signers are good and responsible persons, and able to pay any sum that might be adjudged against them by reason of their signing such obligation, and that their signatures are genuine. Duly certified copies of said obligation, attested with the seal of the hospital, shall be evidence in all cases of equal credibility with the original.

Of public patients.

SEC. 1479. (9.) Public patients may be admitted into the hospital by the superintendent upon the written certificate of the county judge of the county where such patient resides, with the seal of said county thereto attached, certifying that such patients, (naming them,) upon due examination had before him, have been found to be insane, and authorizing said superintendent to receive and maintain them at the expense of said county.

Power of county judges as to insane persons

SEC. 1480. (10.) The county judge of any county, upon information being filed before him that there are insane persons within the county needing care and attention, shall issue his warrant directed to the sheriff of said county, authorizing him to arrest the persons charged with insanity, and to bring them before him without delay. Upon the appearance of such person or persons before him, he shall proceed at once to an examination, summoning a jury of six persons, if a jury be demanded. And if upon examination by the judge or upon the verdict of a jury, the person or persons charged in the information, be found to be insane, the judge shall then make out a warrant, and place it in the hands of the sheriff of said county, who shall receive the persons therein named, and convey them to the hospital. Such warrant may be in form the following:

STATE OF IOWA, ——— County:

To the Superintendent of the Iowa Ho-pital for the Insane:

A——— B——— having been, upon examination, found to be insane, you are therefore required to receive him into the hospital, and keep him there until legally discharged.

In witness whereof I have hereunto set my hand, and affixed the seal of said county, this ——— day of ———, A D. 18——.

Upon receiving the patient and the certificate provided in section 9, the superintendent shall indorse upon said warrant a receipt substantially as follows:

Iowa Hospital for the Insane, A. D. 18—.

Received this — day of — the patient named in the within warrant.

C— D—,  
Superintendent.

The sheriff shall make return of the warrant to the county judge, who shall preserve the same in his office.

SEC. 1481. (11.) The sheriff shall be allowed the following fees: Fees of sheriff. For arresting and bringing a person charged with insanity, before the county judge, and subpoenaing witnesses, the same fees as now allowed by law in other cases. For taking an insane person to the hospital, or removing one therefrom, mileage at the rate of five cents per mile, going and returning, and one dollar a day for the support of each patient on his journey to and from the hospital, and to each assistant five cents per mile. Witnesses subpoenaed before the county judge, the same fees as allowed by law in other cases. Said fees and charges to be paid out of the county treasury.

SEC. 1482. (12.) The relatives of any person charged with insanity, or who shall be found to be insane under section 10 of this act, shall in all cases have the right to take charge of and keep said insane person or persons, if they shall desire so to do. But the county judge may require a bond of such relatives, conditioned for the proper and safe keeping of such person or persons. And if the relatives or friends of any patient kept in the hospital, shall ask the discharge of such patient, the superintendent may, in his discretion, require a bond to be executed to the state of Iowa, in such sum and such sureties as he may deem proper, conditioned for the safe keeping of such patient: *provided*, that no patient who may be under the charge of, or conviction of homicide, shall be discharged without the consent of the superintendent and board of trustees. Rights of relatives to personal custody.

SEC. 1483. (13.) Any patient may be discharged from the hospital upon the application of the superintendent to the trustees, and the order of one of the trustees thereupon. Incurable and harmless patients shall be discharged whenever it is necessary to make room for a recent case, as ordered by the trustees.

SEC. 1484. (14.) Whenever an order is made for the removal of a patient from the hospital, the superintendent shall immediately give notice thereof, under the seal of the hospital to the county judge of the county from which said patient was sent, and thereupon the county judge shall issue his warrant to the sheriff of said county, which shall be substantially as follows: Method of removal from hospital

STATE OF IOWA, — County:

Whereas, the proper authority has decided that —, a patient in the Iowa Hospital for the Insane, from this county, be removed from the hospital; you are, therefore, commanded forthwith to remove said patient, and return him to — township, in this county, whence he was taken to the hospital.

Witness my hand and the seal of said county, this — day of —, A. D. 18—.

County Judge.

Immediately upon receiving such warrant, it shall be the duty of the sheriff, forthwith to execute the same and return it to the county judge, by whom it was issued; and if any county judge, upon receiving such notice, shall refuse, or neglect, for the space of five days, to issue such

warrant and place it in the hands of the sheriff, or if the sheriff shall refuse to receive the same, or neglect for the space of twenty days after receiving the warrant, to demand such patient of the superintendent, the expense of the patient shall, from the date of the notice to the county judge until his removal, be charged at the rate of two and a half dollars per week against the person so offending, and the amount may be recovered in an action with the costs of suit by the hospital, against the judge or sheriff so offending; *provided, however*, that it shall in no case be necessary for the superintendent to give such notice to the county judge, when the friends of such discharged patient are ready and willing to remove him, but such patient may, at once, be entrusted to their care.

What given to patient on removal.

SEC. 1485. (15.) When any patient is discharged as cured, the superintendent shall furnish him with suitable clothing, and a sum of money, not exceeding twenty dollars, unless otherwise supplied; which clothing and money shall, in the case of private patients, be charged to the obligors of the bond filed by them who requested the admission of such patient into the hospital; and in the case of public patients, shall be charged to the county from which such patient was sent.

Trustees to fix price of attention to insane.

SEC. 1486. (16.) The trustees shall, from time to time, fix the sum to be paid per week for the board and care of patients; and to arrive at such sum, shall estimate the total outlay for the support of the hospital; ascertaining such outlay as far as possible from the sums actually paid per annum; and the weekly sum so fixed, shall be the sum said hospital shall be entitled to demand for the keeping of any patient; and the certificate of the superintendent, attested by the seal of the hospital, shall be evidence, in all places, of the amount due, as fixed.

Settlement with the debtor counties.

SEC. 1487. (17.) The superintendent shall certify to the auditor of state on the first days of January, April, July and October, the amount (not previously certified by him) due to said hospital, from the several counties having public patients chargeable thereto; and said auditor shall pass the same to the credit of the hospital. The auditor shall, thereupon, notify the county clerk of each county so owing, of the amount thereof, and charge the same to said county; and the board of supervisors shall add such amount to the next state tax, to be levied in said county, and pay the amount so levied into the state treasury.

Clerks to collect from property of public patient.

SEC. 1488. (18.) The county clerks of the several counties are authorized and empowered from time to time, to collect from the property of any public patient maintained at the hospital, at the cost of such counties, or from any person or persons legally bound to support such patient, the amount for which such county is liable for the support of such patient in the hospital; and the amount so certified as due from such county to the hospital for the maintenance of such patient, by the superintendent, attested with the seal of the hospital, shall be prima facie evidence of the correctness of such amount.

Description of clothing.

SEC. 1489. (19.) The clothing to be furnished each patient, upon being sent to the hospital, shall not be less than the following: For a male, three new shirts, a new and substantial coat, vest, two pairs of pantaloons of woolen cloth, three pairs of socks, a black or dark stock or cravat, two pocket handkerchiefs, a good hat or cap, a pair of new shoes or boots, and a pair of slippers. For a female, in addition to the same quantity of under garments, shoes and stockings, there shall be two woolen petticoats or skirts, three good dresses, a cloak or shawl, and a decent bonnet. Unless such clothing be delivered to the superintendent in good order, he shall not be bound to receive the patient: *provided*,

however, he may receive patients, and furnish them with proper clothing, charging the price thereof to the proper person or county.

SEC. 1490. (20.) It shall be the duty of the relatives or friends sending private patients to the hospital with the assistance of their family physician, and the county judge sending public patients with such assistance as he may be able to obtain, to annex full and precise answers to as many of the following questions as are applicable to the case, and forward the same to the superintendent, when the patient is sent to the institution.

1. What is the patient's age? Married or single? If children, how many?

2. Where was the patient born?

3. Where is his (or her) place of residence?

4. What has been the patient's occupation, and reputed pecuniary circumstances?

5. When were the first symptoms of the disease manifested, and what way?

6. Is this the first attack? if not, when did others occur, and what were their duration?

7. Does the disease appear to be increasing, decreasing, or stationary?

8. Is the disease variable, and are there rational intervals? if so, do they occur at regular periods?

9. Have any changes occurred in the condition of mind or body since the attack?

10. On what subjects, or in what way is derangement *now* manifested? Is there any permanent hallucinations?

11. Has the patient shown any disposition to injure others? and if so, was it from sudden *passion* or premeditations?

12. Has suicide ever been attempted? If so, in what way? Is the propensity *now* active?

13. Is there a disposition to filthy habits, destruction of clothing, breaking glass, &c.?

14. What relatives including grand-parents and cousins, have been insane?

15. Did the patient manifest any peculiarities of temper, habits, disposition, or pursuits, before the accession of the disease—any predominant passion, religious impressions, &c.?

16. Was the patient ever addicted to intemperance in any form, &c.?

17. Has the patient been subject to any bodily disease; epilepsy, suppressed eruptions, discharges or sores, or ever had any injury of the head?

18. Has restraint or confinement been employed? If so, of what kind, and how long?

19. What is supposed to be the cause of the disease?

20. What treatment has been pursued for the relief of the patient?

Mention particulars, and the effects.

21. State any other matter supposed to have a bearing on the case.

SEC. 1491. (21.) No idiot shall be admitted into the hospital.

SEC. 1492. (22.) The superintendent and steward shall report to the trustees from time to time, as shall be provided in the by-laws. The trustees shall report to the governor at their annual meeting, next preceding the meeting of the general assembly, and as much oftener as they may deem necessary, of the condition and wants of the hospital. Their biennial report shall be accompanied by full and accurate reports of the superintendent, and a detailed account of all moneys received and disbursed by the steward.

Questions to be answered by friends of applicant.

Reports to be made

- Notice and by-laws sent to county judges. SEC. 1493. (23.) The trustees shall furnish and mail, when printed, copies of the by-laws to all the county judges in the state; and shall also inform, by mail, said judges when the institution will be open for the reception of patients.
- Insanity defined. SEC. 1494. (24.) The term insane, as used in this act, includes every species of insanity or mental derangement.
- Private patients defined. SEC. 1495. (25.) Private patients mean those sent and maintained at the hospital by their relatives or friends. Public patients mean those sent and maintained at the expense of the counties.
- Salary. SEC. 1496. (26.) The salary of the superintendent shall be \$1.500 per annum.
- Appropriation. SEC. 1497. (27.) That for the purposes of furnishing the rooms and other apartments of said hospital and paying the salaries of offices and expenses of servants and other necessaries there is hereby appropriated the sum of \$8,000 dollars to be paid out of any moneys in the treasury not otherwise appropriated, to be audited and paid upon the order of the board of trustees: *provided*, that no money shall be drawn from the treasurer until the building is finished so as to receive patients.
- Repeal. SEC. 1498. (28.) Chapter 50 of the code, and all that part of chapter 141 of the session laws of the seventh general assembly in relation to insane persons, are hereby repealed.
- SEC. 1499. (29.) This act is hereby declared to be a public act, and shall take effect on the 4th day of July, A. D. 1860.

## ARTICLE 3.

An Act in relation to persons Insane and providing for the relinquishment of dower of Married Women who are Insane.

[*Passed April 3, 1860, took effect May 2, 1860; Laws of Eighth General Assembly, Chapter 141.*]

- Court of probate may release dower of insane wife. SECTION 1500. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That in cases where the wife of any person having any dower interest in any real estate situated within this state, shall be insane and for that reason incapable of executing a deed and relinquishing dower, the husband of said insane person may petition the court of probate of the county where such petitioner shall reside, or of the county where said real estate is situated setting forth the facts, and praying for an order authorizing the husband or some other person to execute deed or deeds of conveyance for said wife, and thereby relinquish the dower of the wife in such lands.
- Form of petition and mode of trial and proof. SEC. 1501. (2.) The petition shall be verified by the oath of the petitioner, and shall be filed in the office of the judge of probate of the proper county. Upon filing said petition the court shall fix a time for the hearing of said petition, which shall be within thirty days from the filing of said petition. The court shall also appoint some discreet person who shall act as the agent or attorney for the wife of said petitioner, and whose duty it shall be to ascertain as to the propriety, good faith and necessity of the prayer of the petitioner being granted, and shall have power to resist said application and subpoena witnesses to take depositions to disprove the petition and prove the impropriety of granting said petition.
- Form and condition of decree. SEC. 1502. (3.) Upon the hearing of said petition, if the court is satisfied that the same is made in good faith, and that the petitioner is the proper person to exercise the power and make the conveyances, and that such power is necessary and proper, said court shall enter up a decree, thereby fully authorizing said husband to execute in the name



of the wife all such conveyances, or the court may appoint some other person whose duty shall be to execute the conveyances by said decree authorized.

SEC. 1503. (4.) All deeds executed by the person authorized by the decree of the court, as herein provided, shall be valid in law, and shall convey all the dower interest of such insane wife to the real estate so conveyed, provided said power shall cease and become void as soon as the wife shall become sane and of sound mind, and apply to the court to revoke said power, and said court shall revoke said power, and such revocation shall in no wise affect conveyances personally made. Value of such deeds.

PRIOR LAWS. 1. An act empowering probate judge to appoint guardian of the insane, &c., passed April 12, 1827; M. D., 1833, p. 301.

2. An act concerning habitual drunkards, and to protect their estates, passed April 12, 1827; M. D., 1833, p. 475; the above repealed August 30, 1840.

3. An act concerning insane persons, passed Jan. 19, took effect Feb. 19, 1839; I. T., 1st sess., p. 275; also, reprint 1843, p. 285.

4. An act for the benefit of insane persons, passed Jan. 14, took effect Feb. 14, 1841; I. T., 3d sess., chap. 61, p. 49; also, reprint 1843, p. 287.

*Appropriations, &c., to Insane asylum; 5th sess., chap. 134; 5th sess., extra, chap. 47; 6th sess., chap. 155; 7th sess., chap. 23; 7th sess., chap. 139, repeals the appropriation of the 5th sess., extra.*

DECISIONS. What constitutes a defense on the ground of insanity, 4 G., 500; a distinction drawn between defense of insanity, which is *said*, not to be necessarily connected with the transaction, and other defenses which are, 7 Iowa, 347—value of the evidence of non professional witnesses unaccompanied by the facts basing opinion, *Pelamourges v. Clark*, June, 1859; form of question as to testator's capacity, *ibid.*; see case of mental unsoundness, 7 Iowa, 60.

## CHAPTER 60.

### LOST GOODS AND ESTRAYS.

[Code—Chapter 51.]

#### ARTICLE 1.

[SECTIONS (876) to (889) inclusive seem superseded by article two hereof.]

SEC. 1504. (890.) If the ownership of the property can not be agreed upon by the finder and the claimant they may make a case before the county judge or any justice of the peace, who may hear and adjudicate it, and if either of them refuses to make such case the other may make an affidavit of the facts which have previously occurred (and the claimant shall also verify his claim in his affidavit) and the judge or justice may take cognizance of and try the matter on the other party having one day's notice, but there shall be no appeal from the decision. This section does not bar any other remedy given by law. Ownership settled.

[Sections (891) to (893) inclusive seem superseded by article two hereof.]

Stallion, &c. SEC. 1505. (894.) Any stallion or jack, bull, boar, or ram running at large shall be accounted an estray.\*

## ARTICLE 2.

An Act to provide for the taking up of Water Crafts found adrift, lost goods and estray animals.

[Passed Jan. 24, 1853, took effect July 1, 1853; Laws of Fourth General Assembly, Chapter 104, page 165.]

SECTION 1506. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That if any person or persons shall hereafter stop, or take up, any keel or flat boat, ferry flat, batteau, pirogue, canoe, or other vessel, or water craft found adrift on any water course within the limits, or upon the boundaries of this state, and the same shall be of the value of five dollars, or upwards, including her cargo, tackle, rigging, and other appendages, it shall be the duty of such person or persons within five days thereafter, provided the same shall not have been previously proven and restored to the owner, to go before some justice of the peace of the proper county, and make affidavit in writing, setting forth the exact description of such vessel or water craft, where and when the same was found; whether any, and if so, what cargo, tackle, rigging or other appendages, were found on board or attached thereto; and that the same has not been altered or defaced, either in the whole or in part, since the taking up, either by him, her, or them, or by any other person, to his, her or their knowledge; and the said justice shall thereupon issue his warrant, directed to some constable of his township or district, commanding him forthwith to summon three respectable householders of their neighborhood, if they can not otherwise be had, whose duty it shall be to proceed, without delay, to examine and appraise such boat or vessel, her cargo, or tackle, rigging, and all other appendages as aforesaid, and to make report thereof, under their hands and seals, to the justice issuing such warrant as aforesaid, who shall enter the same, together with the affidavit of the taker up at large, in his estray book; and it shall be the further duty of such justice, within ten days after the said proceedings shall have been entered on his estray book aforesaid, to transmit a certified copy thereof to the clerk of the county judge of the proper county, to be by him recorded in his estray book and file the same in his office.

SEC. 1507. (2.) In all cases where the appraisement of any such boat or vessel, including her cargo, tackle, rigging, or other appendages, as aforesaid, shall not exceed the sum of twenty dollars, the taker up shall advertise the same on the door of the court house, and in three other of the most public places in the county, within five days after the justice's said certificate shall have been entered on the records of the county judge, and if no person shall appear to claim and prove such boat or vessel within six months from the time of taking up as aforesaid, the property in the same shall vest in the taker up; but if the value thereof shall exceed the sum of twenty dollars, it shall be the duty of the clerk of the county judge, within ten days from the time of the reception of the justice's said certificate at his office, to cause an advertisement to be set up on the door of the court house, and at three other of the most public places of the county; and also, a notice thereof to be published for three weeks successively in some public newspapers.

Take up.

Value.

Affidavit.

Justice of the peace to issue warrant.

Appraisers.

Report.

Estray book.

Copy.

Record.

Less than \$20.

Advertise.

Vest.

Exceed \$20.

Notice.

Newspapers.

\* (894) seems modified or perhaps superseded by article 3 hereof.

printed in this state, and if the said boat or vessel be not claimed or proven within ninety days after the advertisement of the same as aforesaid, it shall be the duty of the taker up to deliver the same to the sheriff of the county wherein such boat or vessel may have been so taken up, who shall thereupon proceed to sell the same at public auction to the highest bidder, for ready money having first given ten days' notice of the time and place of sale; and the proceeds of all such sales, after deducting the cost, and other necessary expenses, shall be paid into the county treasury.

Sell.  
County treasury.

SEC. 1508. (3.) If any person shall hereafter find any lost goods, money, bank notes, or other choses in action, of any description whatsoever, of the value of five dollars, and upwards, it shall be the duty of such person or persons to inform the owner thereof, if known, and to make restitution of the same, without any compensation whatever, except the same be voluntarily given, on the part of the owner; but if the owner be unknown, such person or persons shall, within five days after such finding as aforesaid, take such goods, money, bank notes, or other choses in action, before some justice of the peace of the proper county, and make affidavit of the description thereof, the time and place when and where the same was found; that no alteration had been made in the appearance thereof since the finding of the same; whereupon the justice shall enter a description of the property thus found, and the value thereof, as near as he can ascertain, in his estray book, together with the affidavit of the finder, to be taken as aforesaid; and shall also, within ten days after said proceedings shall have been entered on his estray book as aforesaid, transmit to the clerk of the county judge a certified copy thereof, to be by him recorded in his estray book, and file the same in his office.

Money.  
Description.

Return.

SEC. 1509. (4.) In all cases where such lost goods, money, bank notes, or other choses in action, shall not exceed the sum of ten dollars in value, it shall be the duty of the finder to advertise the same on the door of the court-house, and three other of the most public places in the county; and if no person shall appear to claim and prove such money, goods, bank notes, or other choses in action, within twelve months from the time of such advertisement, the right to such property, when the same shall consist in goods, money, or bank notes, shall be vested in the finder; but if the value thereof shall exceed the sum of ten dollars, it shall be the duty of the clerk of the county judge, within ten days from the time of the justice's said certificate, at his office, to cause an advertisement to be set up on the court-house door, or three of the most public places in the county; and also a notice thereof to be published for three weeks successively in some public newspaper printed in this state; and if the said goods, money, bank notes, or other choses in action, be not reclaimed within six months after the advertisement as aforesaid, it shall be the duty of the finder of the property, if the same shall consist in money or bank notes, to deliver the same to the county treasury, after deducting the necessary expenses hereinafter provided for; if in bank bills, notes of hand, patents, deeds of conveyance, articles of apprenticeship, mortgages, or other instruments of value, the same shall be delivered to the clerk of the county judge, to be preserved in his office, for the benefit of the owner, whenever legal application shall be made therefor; if in goods, wares, or merchandize, the same shall be delivered to the sheriff of the county, who shall thereupon proceed to sell the same at public auction to the highest bidder, for ready money, having first given ten days' notice of the time and place

Finder or taker up.

Vest in finder.  
Exceed \$10.

Advertise.

Newspaper.

County treasury.

Clerk.

Sheriff.

Sell.  
Notice

	of such sale; and the proceeds of all such sales, after deducting the cost and other expenses, shall be paid into the county treasury.
Duty of, when less than \$5.	SEC. 1510. (5.) In all cases where any vessel or water craft shall be taken up or any goods, money, or bank notes shall be found as aforesaid, which shall be of a value less than five dollars, it shall be his duty to advertise the same by setting up three advertisements in the most public places in the neighborhood; but in such cases, the taker up or finder shall be required to keep and preserve the same, in his or her possession, and shall make restitution thereof to the owner, without fee or reward, except the same be given voluntarily, whenever legal application shall be made for the same, provided it shall be done within three months from the time of such taking up or finding; but if no owner shall appear to claim such property within the time aforesaid, the exclusive right to the same shall be vested in the finder or taker up.
Householder's duty in taking up horses, &c.	SEC. 1511. (6.) Every person being a householder, who shall take up any estray horse, gelding, mare, colt, mule, or ass, shall, within five days thereafter, take the same before some justice of the peace of the county wherein such estray shall have been taken up: <i>provided</i> the same shall not have been previously proven by the proper owner or owners, and a tender of the compensation herein provided for, and make oath before such justice, that the same was taken up at his or her plantation, or place of residence, in said county, or otherwise, as the case may be, and that the marks or brands have not been altered by him or her, or any other person, to his or her knowledge, either before or after the same was taken up; the justice shall then issue his warrant, directed to a constable of his township, commanding him to summon three disinterested householders of the neighborhood, unless they can otherwise be had, to appraise such estray; and after they, or any two of them, have been sworn, to appraise such estray, without partiality, favor or affection, they shall forthwith proceed to appraise the same, and shall immediately make report thereof in writing under their hands and seals to the said justice, in which they shall be required to set forth a description of the marks, natural and accidental, brands, color and age of such horse, gelding, mare, colt, mule or ass; and the said justice shall thereupon enter the same in his estray book, and transmit a certified copy thereof, under his hand and seal together with the original return of the appraisers, to the county judge of said county within ten days thereafter, who shall enter the same in his estray book, and file the aforesaid transcript and report of the appraisers in his office; and the said judge shall, within twenty days from the time of the reception of the justice's said transcript, cause an advertisement thereof to be set up on the door of the court house, and at three other of the most public places in the county; and also, a notice to be published for three months successively in some public newspaper, printed in this state: <i>provided</i> , the newspaper publication may be dispensed with in all cases, where the value of such estray shall not exceed the sum of fifteen dollars.
Oath.	
Warrant.	
Appraisement.	
Marks.	
Return.	
Advertise	
Proviso.	
Cattle, &c.	SEC. 1512. (7.) Any person being a householder, who shall take up any head of neat cattle, sheep, goat, or hog, shall, within five days thereafter, cause the same to be advertised in three of the most public places in the neighborhood or township, and shall also, within ten days thereafter, unless such stray or strays shall have been previously reclaimed by the owner, go before some justice of the peace of the proper county, and make oath as is required in the taking up of any estray horse, whereupon such justice shall take from such taker up, on oath, a particular description of the marks, brands, color, and age of

such neat cattle, sheep, goat, or hog; and said justice shall also cause such estray or estrays last mentioned to be appraised in like manner as is required to be done in the case of an estray horse, after which the same entries and proceedings shall be made as is required in the sixth section, except that it shall not be necessary to make publication in a newspaper when the valuation of the property shall not exceed the sum of fifteen dollars: *provided*, that if two or more estrays of the same species are taken up by the same person, at the same time, they shall, in all cases, be included in one entry and in one advertisement, and in such cases, the said justice, clerk, and appraisers shall receive no more for their services, than is allowed in cases where but one of the same is taken up; but in all cases where the value does not exceed the sum of five dollars, no further proceedings need be had than for the justice to enter the same in his estray book, for which the justice shall be entitled to a fee of twenty-five cents; and when so posted and entered, the right, after the expiration of six months, shall vest in the taker up; and if the appraisement of any estray or estrays shall exceed five dollars, and does not exceed ten dollars, the right therein shall be vested in the taker up, by his paying all charges which may have accrued in posting the same.

Similar to sixth section.

Fees.

SEC. 1513. (8.) Any person being a householder, finding any estray horse, gelding, mare, colt, mule or ass, running at large without any of the settlements in this state, may take up the same, and shall forthwith take such estray or estrays before the nearest justice of the peace, and make oath as directed in the sixth section of this act, after which it shall be lawful for such person to post such estray or estrays in manner and in form as in other cases: *provided*, that nothing in this act shall be so construed, as to authorize any person to take up or stop any estray animal between the first day of May and the first day of November, unless the same be a work beast, and manifestly straying away from the owner.

Horses, &c.

Oath.

Proviso.

SEC. 1514. (9.) As a reward for the taking up of all boats and other vessels, and of estrays, and for finding of lost goods, money, bank notes, and other choses in action, there shall be paid by the owner, to the taker up or finder, before restitution of the property; or proceeds thereof shall be made, for every horse, mare, colt, mule or ass, the sum of one dollar, except when the same may have been taken up out of the settlement, in which case the taker up shall be allowed the sum of two dollars, for each head of neat cattle; twenty cents, for every sheep, or hog, ten cents; and in all cases where goods, money, or bank notes, shall be found, the finder shall be entitled to ten per cent., upon the value thereof, in addition to which said allowance, the owner shall also be required to pay to the taker up, or finder, all such cost and charges as may have been paid by him, or her, for services to be rendered as aforesaid, including the cost of publication; together with reasonable charges for keeping and taking care of such property, which last mentioned charge, in case the taker up, or finder, and the owner can not agree, shall be assessed by two disinterested householders of the neighborhood, to be appointed by some justice of the peace of the proper county, whose decision, when made, shall be binding and conclusive on all parties.

Compensation.

Horse, mule, ass, &c.

Cattle, 20 cents.

Sheep or hogs.

Goods or money.

Costs.

SEC. 1515. (10.) In all cases where any stray animal shall be taken up as aforesaid, and no owner shall apply or prove his or her property, within one year after advertisement shall be made as aforesaid, and the valuation exceed the sum of ten dollars, and no owner appear within the time aforesaid; the property may be vested in the taker up, by his paying the appraised value into the county treasury, after deducting all

No owner.

Within one year.

Vest.

- necessary expenses as hereinafter provided; but if the taker up or finder shall fail to comply as aforesaid, it shall be his duty to deliver the same to the sheriff of the county, who shall thereupon proceed to sell such stray or strays at public auction to the highest bidder, for ready money, having first given ten days' public notice of the time and place of sale, and the money arising from the sale thereof, after deducting the cost and charges paid by the taker up, and reasonable expenses for keeping the same, together with all other costs and charges which may be incident thereto, shall be paid into the county treasury: *provided*, that the taker up shall in all cases have the privilege, at the expiration of the year aforesaid, to pay into the county treasury the aforesaid value of such estray, after deducting the cost and charges aforesaid, and by so doing, shall acquire an absolute right to the property in such estrays: *and provided*, that the taker up and treasurer can not agree on the charges for keeping, it shall be assessed as aforesaid, by two disinterested householders, which decision shall be binding.
- Sheriff.**  
**Sell.**  
**County treasury.**
- County treasury.** SEC. 1516. (11.) The nett proceeds of all such sales, as may at any time be made by the sheriff in pursuance of this act, and all such money or bank notes, as may be paid over to the county treasurer, as directed in the tenth section of this act, shall remain in the hands of the county treasurer, in trust for the owner, if any such shall apply within one year from the time the same shall have been paid over, but if no owner shall appear within the time aforesaid, the said money shall be considered as forfeited, and the claim of the owner thereto forever barred, in which event the money shall remain in the county treasury for the use of common schools in said county.
- Owner apply.**  
**Use of schools.**
- Accidents.** SEC. 1517. (12.) If the taker up of any estray animal, water craft or lost goods, bank notes, or other choses in action, shall be faithful in taking care of the same, and if any unavoidable accident shall happen thereto, without the fault or neglect of the finder or taker up, before the owner shall have an opportunity of reclaiming the same, such taker up or finder shall not be accountable therefor: *provided*, that in all cases of accident as aforesaid, it shall be the duty of the taker up or finder, within ten days thereafter, to certify the same under his hand and seal to the clerk of the county judge, who shall make an entry thereof in his estray book.
- Not accountable.**  
**Notice.**
- Taker up disposing of property.** SEC. 1518. (13.) If any person shall trade, sell or loan, out of the limits of this state, any such property as may at any time be taken up or found as aforesaid, except such animals as are suitable for the harness or saddle, before he, she or they shall be vested with the right to the same, agreeably to the provisions of this act, he, she or they so offending shall forfeit and pay double the value thereof, to be recovered by any person who shall sue for the same, in any court, or before any justice of the peace having jurisdiction thereof, by action of debt, one-half thereof shall go to the person suing, and the other half to the county as aforesaid.
- Forfeit.**
- Failure to comply.** SEC. 1519. (14.) If any person shall take up any boat or vessel, or any estray beast, or shall find any goods, money, bank notes or other choses in action, and shall fail to comply with the requisition of this act, every such person so offending shall forfeit and pay the sum of twenty dollars, to be recovered before any justice of the peace; who will sue for the same, the one-half whereof, shall be for the use of the person suing, and the other half to be deposited in the county treasury, for the use of common schools: *provided*, that nothing herein contained shall prevent the owner from having and maintaining his action for the recovery of any damage he or she may sustain.
- Fine.**

SEC. 1520. (15.) In all cases where services shall be performed by any officer or other person under this act, the following fees or compensation shall be allowed, to wit: to the justice of the peace, for administering the oath to the taker-up or finder, making an entry thereof, with the report of the appraisers, and making and transmitting a certificate thereof to the clerk of the county judge, fifty cents; to the clerk\* for taking proof of the ownership of the property, and granting certificate of the same, twenty-five cents; for registering each certificate transmitted to him by the justice as aforesaid, ten cents; for advertisements, including the newspaper publication, fifty cents; to the sheriff, on account of sales made by him in pursuance of this act, four per cent. on the amount; to the constable, for each warrant served on appraisers, twenty-five cents; to each appraiser, twenty-five cents; all which said costs and charges, with the exception of the justices for granting a certificate of ownership, and the sheriff's commission, shall be paid by the taker up to the person entitled thereto, whenever the service shall be performed: *provided*, that in all cases where it shall be necessary to make publication in a newspaper, the taker up or finder, as the case may be, shall be required to deposit with the clerk of the county judge a sum of money sufficient to pay for the same, previous to the publication thereof, all which costs and charges shall be reimbursed to the taker up or finder, in all cases where restitution of the property shall be made to the owner, or the same shall be delivered to the sheriff to be sold, or where money or bank notes shall be paid into the county treasury, in addition to the reward to which such person may be entitled, for such taking up or finding as aforesaid.

Fees.  
Justice of the peace.  
Clerk.  
Sheriff.  
Constable.  
Appraiser.

SEC. 1521. (16.) For the more speedy recovery of the estrays or other lost property, it shall be lawful at all times for any person interested, to search and examine the estray book of the clerk for any information, he or she may want in relation to any property which may at any time have strayed away or been lost by any such person as aforesaid, for which said clerk shall be entitled to no compensation.

Estray book.

ARTICLE 3.

An Act to prohibit certain Male Stock from running at large.

[Passed January 25, 1855, took effect July 1, 1855; Laws of Fifth General Assembly, Chapter 135, page 199.]

SECTION 1522. (1.) *Be it enacted by the General Assembly of the State of Iowa, That no stallion or jack, bull, boar, or ram, shall, hereafter, be allowed to run at large; and it shall be lawful for any person aggrieved thereby, forthwith to distrain such animal, and give immediate notice thereof to the owner, if known, for which said owner shall pay a reasonable compensation to the person so aggrieved, for his trouble and for keeping the same.*

Male animals must be confined.  
Distrain.

SEC. 1523. (2.) If the owner of any such animal, after being notified as directed in the first section of this act, shall refuse to keep up, or prevent such animal from running at large, shall be subject to a fine not exceeding five dollars for every such offense, to be recovered by action of debt, before any justice of the peace of the proper township, or forfeit his right in such animal.

Notice.  
Owner refuse.  
Fine.  
Forfeit.

SEC. 1524. (3.) That where the owner is not known, such animals shall be considered estrays, subject to be taken up at any time, and dealt with according to the laws concerning estray animals.

Owner unknown.

\* See as to compensation of clerk, section 400.

Repeal.

SEC. 1525. (4.) All laws now in force in this state contravening the provisions of this act, be, and the same are hereby repealed.

PRIOR LAWS. 1. "An act concerning estrays," passed April 16, 1833; M. D., 1833, p. 119.

Repealed by "an act relating to strays," passed Jan. 19, 1838; Wis., 2d sess., No. 79, p. 260.

2. An act for the improvement of the breeds of horses, passed Jan. 17, took effect Feb. 17, 1839; I. T., 1st sess., p. 226; repealed by reprint, 1843, chap. 145, p. 602.

3. An act concerning water crafts, found adrift, lost goods and stray animals, passed Jan. 22, took effect May 1, 1839; I. T., 1st sess., p. 462; also reprint, 1843, p. 644, amended, reprint, chap. 20, p. 89; amended by No. 4 hereof.

4. An act amending same, passed Feb. 16, took effect March 16, 1843; reprint, chap. 20, p. 89.

5. An act regulating the keeping of jacks and studs, and to improve breed of horses, passed Jan. 28, took effect July 4, 1843; reprint, chap. 145, p. 602.

6. An act to amend the act of Jan. 22, passed Jan. 17, took effect April 12, 1846; I. T., 8th sess., chap. 21, p. 21.

DECISIONS. Declines determining whether the code, chap. 51, be repealed; construction of chap. 104, of 4th sess., 3 Iowa, 257.

## CHAPTER 61.

### FENCES.

[Code—Chapter 52.]

#### ARTICLE 1.

Partition fences.

SECTION 1526. (895.) The respective owners of lands inclosed with fences shall keep up and maintain partition fences between their own and the next adjoining inclosure so long as they improve them in equal shares unless otherwise agreed between them.

Neglect.

SEC. 1527. (896.) If any party neglect to repair or rebuild a partition fence or a portion thereof which he ought to maintain the aggrieved party may complain to the fence viewers, who after due notice to each party shall examine the same and if they determine the fence is insufficient shall signify it in writing to the delinquent occupant of the land and direct him to repair or rebuild the same within such time as they judge reasonable.

Penalty.

SEC. 1528. (897.) If such fence be not repaired or rebuilt accordingly the complainant may repair or rebuild it, and the same being adjudged sufficient by the fence viewers and the value thereof with their fees being ascertained by them and certified under their hands, the complainant may demand of the owner of the land where the fence was deficient the sum so ascertained, and in case of neglect to pay the same for one month after, demand may recover it with one per cent. a month by action.

Dispute.

SEC. 1529. (898.) When a controversy arises between the respective owners about the obligation to erect or maintain partition fences either party may apply to the fence viewers, who after due notice to each party may inquire into the matter and assign to each his share thereof and direct the time within which each shall erect or repair his share, in the manner provided above.



SEC. 1530. (899.) If a party neglect to erect or maintain the part Neglect.  
of fence assigned him by the fence viewers it may be erected and main-  
tained by the aggrieved party in the manner before provided, and he  
shall be entitled to double the value thereof to be recovered as directed  
above.

SEC. 1531. (900.) All partition fences shall be kept in good repair When kept.  
throughout the year unless the owners on both sides otherwise agree.

SEC. 1532. (901.) No person, not wishing his land inclosed and not Who required.  
occupying nor using it otherwise than in common, shall be compelled to  
contribute to erect or maintain any fence dividing between him and an  
adjacent owner, but when he incloses or uses his land otherwise than in  
common he shall contribute to the partition fences as in this chapter is  
provided.

SEC. 1533. (902.) When lands owned in severalty have been Inclosed com-  
inclosed in common without a partition fence and one of the owners is mon made sever-  
desirous to occupy his in severalty and the other refuses or neglects to alty.  
divide the line where the fence should be built or to build a sufficient  
fence on his part of the line when divided, the party desiring it may  
have the same divided and assigned by the fence viewers who may in  
writing assign a reasonable time, having regard to the season of the year,  
for making the fence, and if either party neglect to comply with the  
decision of the viewers the other after making his own part may make  
the other part and recover as directed above.

SEC. 1534. (903.) In the case mentioned in the preceding section, Throwing open.  
when one of the owners desires to throw his field open and leave it un-  
inclosed he shall first give the other party six months' notice of such  
intention, or such shorter notice as may be directed by the fence viewers  
on notice to the other party.

SEC. 1535. (904.) When land which has lain uninclosed is inclosed, Inclosing com-  
the owner thereof shall pay for one-half of each partition fence between mon.  
his land and the adjoining lands, the value to be ascertained by the fence  
viewers, and if he neglect for thirty days after notice and demand to  
pay the same, the other party may recover as before provided; or he  
may at his election rebuild and make half the fence, and if he neglect  
so to do for two months after making such election he shall be liable as  
before provided.

SEC. 1536. (905.) When a division of fence between the owners Division re-  
of improved lands may have been made, either by fence viewers or by corded  
agreement in writing and recorded in the office of the clerk of the township  
where the lands are, the owners and their heirs and assigns shall be  
bound thereby and shall support them accordingly, but if any desire to  
lay his lands in common and not improve them adjoining the fence  
divided as above the proceedings shall be as directed in the case where  
lands owned in severalty have been inclosed in common without a parti-  
tion fence.

SEC. 1537. (906.) In the provisions of this chapter the term Definitions.  
"owner" shall apply to the occupant or tenant when the owner does not  
reside in the county, but these proceedings will not bind the owner unless  
notified. The "fence viewers" means the fence viewers of the town-  
ship in which the division line in controversy is, and if that line is  
between two townships and both parties live in the same, then it means  
the viewers of that township, but if the parties live in different town-  
ships one viewer at least shall be taken from that of the party complained  
against.

SEC. 1538. (907.) When a person has made a fence or other improve- On another's  
land.

ment on an inclosure which on afterward making division lines is found to be on land of another, and the same has occurred through mistake, such first person may enter upon the land of the other and remove his fence or other improvement and material within six months after such line has been run, upon his first paying or offering to pay the other party for any damage to the soil which may be occasioned thereby, and when the parties can not agree as to the damage the fence viewers may determine them as in other cases.

Same. SEC. 1539. (908.) But such fence or other improvement (except substantial buildings) shall not be removed if they were made or taken from the land on which they lie, until the party pays the owner the value of the timber to be ascertained by the fence viewers, nor shall a fence be removed at a time when the removal will throw open or expose the crop of the other party, but it shall be removed in a reasonable time after the crop is secured although the above six months have passed.

Future questions. SEC. 1540. (909.) When any question arises between parties, other than those above stated, concerning their rights in fences, or their duties in relation to building or supporting or removing them, such question may be determined by the fence viewers upon the principles of this chapter.

Lines. SEC. 1541. (910.) A person building a fence may lay the same upon the line between him and the adjacent owner so that the fence may be partly on one side and partly on the other, and the owner shall have the same right to remove it as if it were wholly on his own land.

Same. SEC. 1542. (911.) The foregoing provisions concerning partition fences shall apply to a fence standing wholly upon one side of the division line.

Other proceedings. SEC. 1543. (912.) The foregoing provisions of this chapter do not bar any other legal proceedings for the determination of the title to land or the dividing line between contending owners, nor do they preclude agreements by the parties.

#### ARTICLE 2.

##### An Act concerning Fences.

[Passed January 24, 1853, took effect July 1, 1853; *Laws of Fourth General Assembly, Chapter 105, page 174*]

Fences. SECTION 1544. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That any fence constructed of strong materials, put up in a good and substantial manner, with sufficiently small spaces between the materials composing said fence, and raised to the height of four feet six inches, shall be considered a lawful fence, or such other construction or fences as may, in the opinion of the fence viewers, be of equal strength and security to the inclosure, shall in like manner be considered lawful.

Lawful.

#### ARTICLE 3.

##### An Act to amend an act entitled An act concerning Fences.

[Passed January 29, 1857, took effect July 1, 1857; *Laws of Sixth General Assembly, Chapter 235, page 394.*]

When hogs and sheep are restrained. SECTION 1545. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That in all counties in this state, where by a vote of the legal voters of such county, or by any act of the general assembly of this state, it has been or may be hereafter determined that hogs and

sheep, or either of them, shall be prohibited from running at large, a fence made of three rails of good substantial material, or three boards not less than six inches wide, and three quarters of an inch thick, such rails or boards to be fastened in or to good substantial posts, not more than ten feet apart, where rails are used, and not more than eight feet apart, where boards are used, or any other fence, which in the opinion of the fence viewers shall be equivalent thereto, shall be declared a lawful fence: *provided*, that the lowest or bottom rail or board shall not be more than twenty nor less than sixteen inches from the ground, and that such fence shall be fifty-four inches in height.

SEC. 1546. (2.) In all cases where fences are built upon county County lines. lines, between counties in one of which hogs and sheep are prohibited from running at large, and the other in which they are not prohibited from running at large, such fence shall be built in the manner prescribed in the act to which this act is amendatory: *provided*, that the owner of any hogs or sheep shall be liable for all damages sustained by any person in consequence of such hogs or sheep crossing such county lines by way of the highway.

SEC. 1547. (3.) In all cases of damages committed by trespassing Trespassing ani-  
imals. animals in any county wherein the above described fences are lawful, the same rights and liabilities shall attach as are now provided in like cases, or in cases of trespassing animals under the act to which this is amendatory: *provided*, that nothing in the foregoing provisions shall be so construed as to deprive drovers or other persons of their right to drive hogs, sheep, or other stock from one part of the state to another.

PRIOR LAWS. 1. An act defining a lawful fence, and providing against trespassing animals, passed Jan. 21, took effect May 1, 1842; I. T., 4th sess., chap. 15, p. 11; also reprint, 1843, p. 614; repealed by No. 2 hereof.

2. An act to define lawful fences, and restraining trespassing animals, passed Feb. 14, 1844; I. T., 6th sess., chap. 16, p. 21.

DECISIONS. Owner of cattle is not required to keep them in his close, 3 Iowa, 396; 5 Iowa, 490; *see also* 4 Iowa, 283; railroads not bound to make fences, 2 Iowa, 288-521; fence is part of realty and passes, even though built on public land by mistake, 2 G., 542—4 G., 146; question of lawful fence is one for jury, 4 Iowa, 283; liability for part of fence when not built under direction of fence viewers, *Schnare v. Gehman*, Dec., 1859; the common law rules not of force in Iowa, 5 Iowa, 490.

## CHAPTER 62.

### TRESPASSING ANIMALS.

[Code—Chapter 53.]

SECTION 1548. (913.) When any person is injured in his land by any kind of domestic animal he may recover his damages by an action Action or dis-  
tress. against the owner of the beasts or by distraining the beasts doing the damage: *provided*, that if the beasts were lawfully on the adjoining land and escaped therefrom in consequence of the neglect of the person suffering the damage to maintain his part of the division fence, the owner of the beasts shall not be liable for such damage.

Adjoining owner liable.	SEC. 1549. (914.) And if the beasts are not lawfully upon the adjoining close and came thereupon, or if they escaped therefrom into the injured inclosure, in consequence of the neglect of the adjoining owner to maintain any partition fence or any part thereof which it was his duty to maintain, then the owner of the adjoining land shall be liable as well as the owner of the beasts.
Distress.	SEC. 1550. (915.) If the person injured elect to distrain the beasts he shall proceed as directed in the chapter concerning stray beasts except as herein otherwise provided.
Appraisers	SEC. 1551. (916.) The fence viewers shall in all cases be the appraisers and shall find and certify the amount of damage done by the beasts.
No property vests.	SEC. 1552. (917.) The property in the beasts shall in no case vest in the distrainer but he shall receive his damages, the costs paid by him, and the expense of keeping the beasts.
Proceedings	SEC. 1553. (918.) The proceeding shall in all cases be as directed in relation to property appraised at a sum above ten and not more than thirty dollars, but the proceeds of the sale (after deducting the costs, charges for keeping, and damages) shall be paid into the county treasury for the use of the owner if claimed within twelve months from the sale.
Statement.	SEC. 1554. (919.) The distrainer shall in his statement show that the beasts were taken doing damage on his land, describing it, and the same shall appear in the advertisements, and he shall within forty-eight hours after di-straining the beasts notify the owner if known and living in the same township or within five miles of the injured inclosure in another township.

**PRIOR LAW.** An act to prevent injury by dogs, passed Feb. 16, took effect May 1, 1843; reprint, chap. 64, p. 237.

**DECISION.** Cattle and hogs are free commoners, and plaintiff should show such fence as would turn ordinary cattle before he can recover damage for their trespass, 5 Iowa, 491; trespassing animals, 4 Iowa, 283; common law as to animals being confined not of force here, 3 Iowa, 396—5 Iowa, 490.

## CHAPTER 63.

### MARKS OF ANIMALS.

[Code—Chapter 54.]

Books.	SECTION 1555. (920.) The county judge of each county shall procure at the expense of the county a book for each civil township in which to record the marks and brands of horses, sheep, hogs, and other animals.
Marks.	SEC. 1556. (921.) Any person wishing to mark or brand his domestic animals with any distinguishing mark may adopt his own mark and have a description thereof recorded by the clerk of the township in which the owner lives.
Another's mark.	SEC. 1557. (922.) No person shall adopt a mark or brand previously recorded to another person residing in the same township, nor shall the clerk record the same one to two persons.

SEC. 1558. (923.) The clerk will be entitled to twenty-five cents *Fee* for recording each mark or brand and making a certificate thereof.

PRIOR LAW. "An act respecting marks and brands for horses, cattle, sheep and hogs," passed Oct. 21, 1829; M. D., 1833, p. 123; repealed Aug. 30, 1840.

CHAPTER 64.

THE SALE OF INTOXICATING LIQUORS.

[Code—Chapter 55.]

ARTICLE I.

[924 to 936, each included, repealed by the 17th section of the following law.]

An Act for the Suppression of Intemperance.

[Passed Jan. 22, 1855, took effect July 1, 1855; *Laws of Fifth General Assembly, Chapter 45, page 58*]

SECTION 1559. (1.) *Be it enacted by the General Assembly of the State of Iowa*, No person shall manufacture or sell by himself, his clerk, steward or agent, directly or indirectly, any intoxicating liquors, except as hereinafter provided. And the keeping of intoxicating liquor, with the intent, on the part of the owner thereof, or any person acting under his authority or by his permission, to sell the same within this state, contrary to the provisions of this act, is hereby prohibited, and the intoxicating liquors so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided.\*

Sale of intoxicating liquors prohibited.

Declared a nuisance.

SEC. 1560. (2.) Nothing in this act shall be construed to forbid the sale by the importer thereof, of foreign intoxicating liquor imported under the authority of the laws of the United States regarding the importation of such liquors, and in accordance with such laws: *provided*, that the said liquor, at the time of said sale by said importer, remains in the original casks or packages in which it was by him imported, and in quantities not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages, and in said quantities only: *provided*, that nothing contained in this law shall prevent any person or persons from manufacturing in this state liquors for the purpose of being sold according to the provisions of this act, to be used for mechanical or medicinal purposes.

Importer.

Limitation.

Distilleries.

[Sections (3) and (4) repealed by section 1574.]

SEC. 1561. (5.) Every person who shall manufacture any intoxicating liquor, as in this act prohibited, shall be deemed guilty of a misdemeanor, and shall pay, on his first conviction for said offense, a fine of one hundred dollars and the costs of prosecution, and shall stand committed thirty days, unless the fine be sooner paid; on his second

Penalty for making.

\* The proviso was repealed by section 1574.

2d offense.	conviction, he shall pay a fine of two hundred dollars, and the costs of prosecution, and shall stand committed sixty days unless the fine be sooner paid. And on the third and every subsequent conviction for said offense, he shall pay a fine of two hundred dollars and the costs of prosecution, and shall be imprisoned in the county jail ninety days.
3d offense.	
Sale.	SEC. 1562. (6.) If any person by himself, his clerk, servant or agent, shall for himself, or any person else, directly or indirectly, or on any pretence, or by any device, sell, or in consideration of the purchase of any other property, give to any other person any intoxicating liquor, he shall be deemed guilty of a misdemeanor, and shall pay, on his first conviction for said offense, a fine of twenty dollars and the costs of prosecution, and shall stand committed ten days, unless the same be sooner paid; on the second conviction for said offense, he shall pay a fine of fifty dollars and the costs of prosecution, and shall stand committed thirty days, unless the same be sooner paid, and on the third and every subsequent conviction for said offense, he shall pay a fine of one hundred dollars and the costs of prosecution, and shall be imprisoned in the county jail not less than three nor more than six months. And in default of the payment of the fines and costs provided for the first and second convictions under this section the person so convicted shall not be entitled to the benefit of section 3268 of the code until he shall have been imprisoned sixty days. All clerks, servants and agents, of whatsoever kind, engaged or employed in the manufacture, sale or keeping for sale, in violation of this act, of any intoxicating liquor, shall be charged and convicted in the same manner as principals may be, and shall be subject to the penalties herein provided. Indictments and informations for violations under this section may allege any number of violations of its provisions by the same party, but the various allegations must be contained in separate counts, and the person so charged may be convicted and punished for each of the violations so alleged as on separate indictments or informations; but a separate judgment must be entered on each count on which a verdict of guilty is rendered. The second and third convictions, however, mentioned, in this section, shall be construed to mean convictions on separate indictments or informations.
Penalty.	
Second conviction.	
Third or other.	
Clerks, agents, &c.	
Any number of violations.	
Owning liquor.	SEC. 1563. (7.) No person shall own or keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquor with intent to sell the same in this state, (or to permit the same to be sold therein) in violation of the provisions of this act; and any person who shall so own or keep, or be concerned or engaged or employed in owning or keeping such liquor with any such intent, shall be deemed guilty of a misdemeanor, and shall, on his first conviction for said offense, pay a fine of twenty dollars and the costs of prosecution, and stand committed until the same be paid. On his second conviction for said offense, he shall pay a fine of fifty dollars and the costs of prosecution, and shall stand committed until the same be paid, and on his third and every subsequent conviction for said offense, he shall pay a fine of one hundred dollars and the costs of prosecution, and shall be imprisoned in the county jail not less than three nor more than six months. And upon the trial of every indictment or information for violations of the provisions of this section, proof of the finding of the liquor named in the indictment, or information in the possession of the accused in any place except his private dwelling house, or its dependencies, (or in such dwelling house or dependencies if the same be a tavern, public eating house, grocery, or other place of public resort,) shall be
Penalty.	
Second offense.	
Third or subsequent.	

received and acted upon by the court as presumptive evidence that such liquor was kept or held for sale contrary to the provisions of this act.

SEC. 1564. (8.) In cases of a violation of the provisions of either of the three preceding sections, the building or erection of whatever kind, or the ground itself in or upon which such unlawful manufacture or sale, or keeping with intent to sell, of any intoxicating liquor is carried on, or continued, or exists, is hereby declared a nuisance, and may be abated as the law provides; and in addition to the penalties prescribed in said sections, whoever shall erect, or establish, or continue, or use any building, erection, or place for any of the purposes prohibited in said sections, shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, in the manner provided by law. And proof of the manufacture, sale, or keeping with intent to sell, of any intoxicating liquor in violation of the provisions of this act in or upon the premises described by the party accused, or by any other person under the authority or by the permission of the party accused, shall be deemed sufficient as presumptive evidence of the offense provided for in this section.

Building declared a nuisance.

SEC. 1565. (9.) If any three persons, residents of any county, shall, before a justice of the peace for the same county, make written information, supported by their oath or affirmation, that they have reason to believe, and do believe, that any intoxicating liquor, described as particularly as may be, in said information, is in said county, in any place, described as particularly as may be in said information, owned or kept by any person named or described in said information as particularly as may be, and is intended by him to be sold in violation of the provisions of this act, said justice shall, (upon finding probable cause for such information,) issue his warrant of search, directed to any peace officer

Information.

Search warrant.

in said county, describing, as particularly as may be, the liquor and the place described in said information, and the person named or described in said information as the owner or keeper of said liquor, and commanding the said officer to search thoroughly said place, and to seize the said liquor, with the vessels containing it, and to keep the same securely until final action be had thereon; whereupon the said peace officer, to whom such warrant shall be delivered, shall forthwith obey and execute, so far as he shall be able, the commands of said warrant, and make return of his doings to said justice, and shall securely keep all liquors so seized by him, and the vessels containing it, until final action be had thereon: *provided, however,* that if the place to be searched be a dwelling house in which any family resides, and in which no tavern, eating house, grocery, or other place of public resort is kept, such warrant shall not be issued unless one at least of said complainants shall, on oath or affirmation, declare before said justice, that he has reason to believe, and does believe, that within one month next before the making of said information, intoxicating liquor has been, in violation of this act, sold in said house, or in some dependency thereof, by the person accused in said information, or by his consent or permission; nor unless from the facts and circumstances disclosed by such complaint to said justice, the said justice shall be of opinion that said complainant has adequate reason for such belief.

Seizure.

Proviso.

SEC. 1566. (10.) Whenever upon such warrant such liquors shall have been seized, the justice who issued such warrant shall within forty-eight hours after such seizure, cause to be left at the place where said liquor was seized, if said place be a dwelling house, store or shop, posted

Summons.

in some conspicuous place on or about said buildings, and also to be left with or at the last known and usual place of residence of the person named, or described in said information, as the owner or keeper of said liquor if he be a resident of this state, a notice summoning such person, and all others whom it may concern, to appear before said justice at a place and time named in said notice, (which time shall not be less than five nor more than fifteen days after the posting and leaving of said notices) and show cause if any they have, why said liquor, together with the vessels in which the same is contained, should not be forfeited; and said notice shall with reasonable certainty describe said liquor and vessels, and shall state where, when and why, the same were seized. At the time and place prescribed in said notice, the person named in said information, or any other person or persons claiming an interest in said liquor and vessels, or any part thereof, may appear and show cause why the same should not be forfeited. If any person shall then and there so appear, he shall become a party defendant in said case, and said justice shall make a record thereof, whether any person shall so appear or not, said justice shall at the prescribed time, proceed to the trial of said case, and said complainants, or either of them, may, and upon their default, the officer having such liquor in custody shall, appear before said justice, and prosecute said information, and show cause why such liquor should be adjudged forfeited. The proceeding in the trial of such case may be the same substantially as in cases of misdemeanor, triable before justices of the peace, and if any person shall appear and be made a party defendant as herein provided, and shall make written plea that said liquor or the part thereof, claimed by him was not owned or kept with intent to be sold in violation of this act, such party defendant may, at his option, demand a jury to try the issue, and if upon the evidence then and there presented, the said justice or jury as the case may be, shall find for verdict, that said liquor was, when seized, owned or kept by any person (whether said party defendant or not) for the purpose of being sold in violation of this act, the said justice shall render judgment that said liquor or said part thereof, with the vessels in which it is contained, is forfeited. If no person be made defendant in manner aforesaid, or if judgment be in favor of all the defendants, who appear and are made such, then the costs of the proceeding shall be paid as in ordinary criminal prosecutions where the prosecution fails. If the judgment shall be against only one party defendant appearing as aforesaid, he shall be adjudged to pay all the costs of the proceedings in the seizure and detention of the liquor claimed by him up to that time and of said trial. But if such judgment shall be against more than one party defendant claiming distinct interests in said liquor, then the costs of said proceedings and trial shall be according to the discretion of said justice equitably apportioned among said defendants, and execution shall be issued on such judgments against said defendants for the amount of the costs so adjudged against them. And any person appearing and becoming party defendant as aforesaid, may appeal from said judgment of forfeiture as to the whole, or any part of said liquor, and vessels claimed by him; and so adjudged forfeited, to the next term of the district court in said county, if on the rendition of the judgment, he, or some person for him, shall make, or cause to be made, an affidavit stating the facts, showing the alleged errors in the proceedings or judgment complained of; and if also on said rendition of judgment, he shall file with the justice a written undertaking in a sum and with sureties to be approved by said justice that said defendant will prosecute the appeal without delay, and will pay whatever sum may be adjudged against him in the

Time and place.

Trial.

Jury.

Forfeited costs.

Appeal

Bond



further progress of the action. On the allowing of such appeal, the justice shall file in the office of the clerk of said district court, a certified copy of the entries on his docket together with all the undertakings and papers in the cause, in the same manner as is provided in cases of appeals in misdemeanors triable before a justice of the peace. And if the party so appealing shall fail to appear before said district court at the next term thereof, and on the first day of said term to prosecute his appeal, the said court shall, without further proceedings, affirm the judgment from which such appeal was taken. But if the party so appealing shall appear, and if on trial had upon the issue or otherwise, as the case may be, it be found that said liquor, in respect to which an appeal was taken, was, when seized, owned or kept by any person for the purpose of being sold in violation of this act, then said liquor, and the vessels containing it, shall, by said court be adjudged forfeited, and the said court shall adjudge said defendant to pay the costs arising upon said appeal in addition to the costs adjudged against him by the justice of the peace.

Transcript.

Affirm.

Guilty.

Forfeiture.

SEC. 1567. (11.) Whenever it shall be finally decided that liquor seized as aforesaid is forfeited, the justice of the peace, or other court rendering final judgment of forfeiture, shall issue to the officer having said liquors in custody, or to some other peace officer, a written order, directing him forthwith to destroy said liquor and the vessels containing the same, and immediately thereafter to make return of said order to the court, whence issued, with his doings indorsed thereon, which return shall in all cases be sworn to. Whenever it shall be finally decided that any liquor so seized is not liable to forfeiture, the court by whom such final decision shall be rendered, shall issue a written order to the officer having the same in custody, or to some other peace officer, to restore said liquor, with the vessels containing the same, to the place where it was seized, as nearly as may be, or to the person entitled to receive it, which order the officer, after obeying the commands thereof, shall return to the said court with his doings thereon indorsed, and the costs of the proceedings in such case attending the restoration, as also the costs attending the destruction of such liquor in case of forfeiture, shall be taxed and paid in the same manner as is provided in case of ordinary criminal prosecution, where the prosecution fails.

Liquor and vessels to be destroyed.

Restoration.

Returns.

SEC. 1568. (12.) If any person shall be found in a state of intoxication, he shall be deemed guilty of a misdemeanor, and any peace officer may, without warrant, and it is hereby made his duty to take such person into custody, and to detain him in some suitable place, till an information can be made before a magistrate, and a warrant issued in due form, upon which he may be arrested and tried, and if found guilty, he shall pay a fine of ten dollars, and the costs of prosecution, and shall be imprisoned in the county jail thirty days. But the magistrate before whom such person is tried and convicted may remit any portion of such penalty.

Intoxication.

Arrested

Tried.

Time.

\* \* \* \* \*

[The lines omitted were repealed and substituted by section 1586.]

In cases arising under this section, appeals may be allowed as in cases of ordinary misdemeanor within the jurisdiction of justices of the peace.

SEC. 1569. (13.) In any indictment or information arising under this act, it shall not be necessary to set out exactly the kind or quantity of intoxicating liquors manufactured or sold, or kept for purposes of sale, nor the exact time of the manufacture, or sale, or keeping with

Unnecessary to set out kind, quantity or amount.

Not negative.	intent to sell, but proof of the violation by the accused of any provision of this act, the substance of which violation is briefly set forth within the time mentioned in said indictment or information, shall be sufficient to convict such person; nor shall it be necessary in any indictment or information to negative any exceptions contained in the enacting clause or elsewhere which may be proper ground of defense; and in any prosecution for a second or subsequent offense, as provided in this act, it shall not be requisite to set forth in the indictment or information the record of a former conviction, but it shall be sufficient briefly to allege such conviction, nor shall it be necessary in every case to prove payment in order to prove a sale within the true meaning and intent of this act, and the person purchasing any intoxicating liquor sold in violation of this act, shall, in all cases, be a competent witness to prove such sale.
Fees.	SEC. 1570. (14.) A justice of the peace shall be entitled to receive for causing notices to be posted up and left pursuant to section ten, fifty cents, for issuing an order pursuant to section eleven, fifty cents, and the officer who shall make service of any warrant for the seizure of any intoxicating liquor shall be allowed for such service the sum of one dollar, for the removal and custody of such liquor his reasonable expenses, and one dollar for delivery or destruction of liquor under order of court, his reasonable expenses, and one dollar, and for posting and leaving notices pursuant to section ten, one dollar.
Payments for liquor illegal.	SEC. 1571. (15.) All payments or compensation for intoxicating liquor hereafter sold in violation of this act, whether such payments or compensation be in money, goods, land, labor, or any thing else whatsoever, shall be held to have been received in violation of law and against equity and good conscience, and to have been received upon a valid promise and agreement of the receiver in consideration of the receipt thereof, to pay on demand to the person furnishing such consideration the amount of said money or the just value of such goods, land, labor, or other thing.
Sales, &c.	All sales, transfers, conveyances, mortgages liens attachments, pledges and securities of every kind which either in whole or in part, shall have been made for or on account of intoxicating liquors sold in violation of this act, shall be utterly null and void against all persons in all cases, and no rights of any kind shall be acquired thereby, and no action of any kind shall be maintained in any court in this state for intoxicating liquors, or the value thereof, sold in any other state or country contrary to the law of said state or country, or with intent to enable any person to violate any provision of this act, nor shall any action be maintained for the recovery or possession of any intoxicating liquor, or the value thereof, except in cases where persons owning or possessing such liquor with lawful intent, may have been illegally deprived of the same. Nothing, however, in this section shall affect in any way negotiable paper in the hands of <i>bona fide</i> holders thereof for valuable consideration, without notice of any illegality in its inception or transfer, or the holder of land or other property who may have taken the same in good faith, without notice of any defect in the title of the person from whom the same was taken, growing out of a violation of the provisions of this act, and all evidence given in actions brought by or against such <i>bona fide</i> holders, shall be in no way affected by the provisions of this section.
Void.	
No action to be maintained.	
Repeal.	SEC. (16) [repealed by section 1574.]
Saving clause.	SEC. 1572. (17.) The 55th chapter of the code of Iowa is hereby repealed, which repeal shall take effect at the time when this act shall go into operation: <i>provided, however</i> , that all prosecutions which shall have been commenced at the time when this act shall take effect, may

be carried on to final judgment and execution irrespective of this act, and shall be in no way affected by said repeal.

SEC. 1573. (18.) At the April election, to be holden on the first To be submitted.  
 Monday in April, A. D. 1855, the question of prohibiting the sale and  
 manufacture of intoxicating liquor, shall be submitted to the legal voters  
 of this state, and at said April election a poll shall be opened for that  
 purpose at the place of election in each township of each county. The  
 vote on said question shall be by ballot, and the voters in favor of such Balloting.  
 prohibition shall cast a ballot whereon shall be written or printed the  
 words "for the prohibitory liquor law" and the voters opposed to such  
 prohibition shall cast a ballot whereon shall be written or printed the  
 words "against the prohibitory liquor law." The said ballots shall be  
 received and canvassed by the judges of election in the same manner as Canvass.  
 ballots for the election of officers, and a return of the same shall be  
 made to the county judge in the same manner and at the same time as  
 provided for in the election of officers at the April election. Said return Returns.  
 shall be treated by the county canvassers in the same manner as returns  
 for the election of officers, and an abstract of said vote made upon a  
 separate sheet, shall be forwarded to the secretary of state in the same  
 manner and at the same time as provided for in the cases of abstracts  
 of votes for superintendent and district court judges, elected at any April  
 election. The returns of said vote, so returned to the office of the sec-  
 retary of state, shall be opened and examined by the board of state can-  
 vassers, in the same manner and at the same time as in the case of State canvassers.  
 returns of election of officers had at said April election. Immediately  
 after such examination and canvass, the said board of state canvassers  
 shall make and publish an official statement of said vote; and if it shall  
 appear from such official statement that a majority of the votes cast as  
 aforesaid upon said question of prohibition shall be for the prohibitory  
 liquor law, then this act shall take effect on the first day of July, A. D., Take effect.  
 1855: *provided, however,* that those portions of this act having relation  
 to the election provided for in this section shall be in force from and  
 after its publication in the Iowa Capital Reporter and the Iowa Repub-  
 lican.

ARTICLE 2.

An Act supplementary and amendatory to an act entitled an Act for the suppression  
 of Intemperance, approved Jan. 22, 1855.

[ Passed Jan. 28, 1867, took effect Feb. 21, 1867; Laws of Sixth General Assembly, Chapter 157,  
 page 231 ]

SECTION 1574. (1.) *Be it enacted by the General Assembly of the* Repeal.  
*State of Iowa,* That all that part of section first, after the word pro-  
 vided, in the eleventh line, and section third, fourth and sixteenth, are  
 hereby stricken out.\*

SEC. 1575. (2.) Any citizen of the state and resident of the county Who may sell  
and who prohib-  
ited.  
 in which he may be at the time, except hotel keepers, keepers of saloons,  
 eating houses, grocery keepers, and confectioners, are hereby permitted  
 to buy and sell intoxicating liquors for mechanical, medicinal, culinary  
 and sacramental purposes only: *provided,* he shall first procure the cer-  
 tificate of twelve citizens of the township in which he resides, that he is  
 of good moral character and a citizen of the county and state, and shall  
 give bond in the penal sum of not less than one thousand dollars, with

\* This section by a misprint read sixth instead of sixteenth and was made six-  
 teenth by section 1585. See decisions also.

two good and sufficient securities, to be approved by the county judge, that he will conform to the provisions of this act and the act to which this is amendatory.

Duty of county judge.

SEC. 1576. (3.) Upon the presentation of such certificate to the county judge, he shall cause such person, presenting such certificate, who desires to buy and sell intoxicating liquors, to enter into a bond as aforesaid; that he will faithfully conform to the provisions of this act and the act to which this is amendatory; that he will keep an accurate account in a book kept for that purpose, of all his purchases and all his sales, specifying in such account the kind and quantity and price of the liquor bought by him, the date of each purchase made by him and the name of the person of whom such purchase was made; the kind and quantity and price of liquor sold by him, the name of the purchaser at every such sale, and the use for which the liquor on every such sale was sold as stated by such purchaser, said account to be at all times open to the inspection of the county judge, prosecuting attorney, and grand jurors. The bond shall be deposited with the clerk of the district court, and suit shall be brought thereon at any time by the prosecuting attorney of the county in case said conditions mentioned in said bond shall be broken. All moneys collected on such bond shall go to the school fund of such county.

False statement.

SEC. 1577. (4.) If any purchasing intoxicating liquors of such person so authorized to sell, shall make to such person any false statement regarding the use to which such liquor is intended by the purchaser to be applied, such person so obtaining such liquor shall be deemed guilty of misdemeanor, and shall, upon conviction thereof, forfeit and pay a fine of ten dollars, together with costs of prosecution, and shall stand committed until the same is paid. For the second offense he shall pay a fine of \$20 and costs of prosecution, and be imprisoned in the county jail not less than ten nor more than fifty days.

Officers to inform.

SEC. 1578. (5.) It shall be the duty of all peace officers to see that this act and the act to which this is amendatory are faithfully executed, and when informed that the law has been violated, or when they have reason to believe that the law has been violated, and that proof of that fact can be had, it shall be the duty of such officers, and it is hereby made their special duty to go before a magistrate and make information of the same and of the person so violating the law. Upon the filing of such information before a magistrate it shall be his duty to institute a suit and proceed to the arrest and trial thereof according to law. Upon trials before a magistrate, it shall be the duty of the prosecuting attorney to appear for the state, unless the person filing such information shall select some other attorney. The prosecuting attorney, or any other attorney selected and appearing and prosecuting such trial before a magistrate, shall be allowed the sum of five dollars to be paid out of the county treasury by order from the county judge of such county; any peace officer failing to comply with the provisions of this section, shall be guilty of a misdemeanor, and pay a fine of not less than ten nor more than fifty dollars, and a conviction shall work a forfeiture of his office.

Trial.

Prosecuting attorney.

Principal and security.

SEC. 1579. (6.) The principal and securities in the bond mentioned in the preceding section shall be jointly and severally liable for all fines and costs that may be adjudged against the principal for any violation of any of the provisions of this act or of the act to which this is amendatory, and shall also jointly and severally be liable for all civil damages and costs that may be adjudged against such principal in any civil action

authorized to be brought against him by the provisions of this act or the act to which this is amendatory.

SEC. 1580. (7.) If any railroad conductor, freight agent, express- Carriers liable.  
 man, depot master, or other person in the employment or in any manner  
 connected with any railroad corporation, or any teamster, stage driver,  
 or common carrier of any kind, or any person professing to act as agent  
 for any other person or persons, whether within or without this state, or  
 any other individual of whatever calling, shall bring within this state Importing.  
 for any other person or persons, any intoxicating liquor, without first  
 having been furnished with a copy of the certificate authorizing such  
 person or persons to sell such intoxicating liquors, certified by some jus-  
 tice of the peace to be correct, such person or persons so offending, shall  
 be deemed guilty of a misdemeanor, and shall, upon conviction thereof,  
 forfeit and pay a fine for the first offense of twenty dollars, and be Penalty.  
 imprisoned in the county jail thirty days; for the second and each sub-  
 sequent offense shall forfeit and pay a fine of fifty dollars, and be im-  
 prisoned in the county jail ninety days.

SEC. 1581. (8.) Courts and jurors are requested to construe this Evasions.  
 act and the act to which this is amendatory so as to prevent evasion,  
 and so as to cover the act of giving as well as selling by persons not  
 authorized.

SEC. (9) [repealed by substitution as in section 1583.]

SEC. 1582. (10.) This act to take effect and be in force from and Take effect  
 after its publication in the Iowa City Republican and Iowa Capital  
 Reporter: *provided*, that the agents, appointed under the act to which  
 this is amendatory, who may have any intoxicating liquor on hand at  
 the time of the taking effect of this act, may sell the same according to  
 the provisions of this act or the act to which this is amendatory: *pro-*  
*vided further*, that all suits instituted under the act to which this is  
 amendatory, and pending upon the taking effect of this act, shall be  
 prosecuted the same as if this had not passed.

ARTICLE 3.

An Act to amend Section 9 of Chapter 157, of the acts passed at the regular ses-  
 sion of the Sixth General Assembly, approved Jan. 28, A. D. 1857.  
 [Passed March 23, 1858, took effect April 10, 1858; Laws of Seventh General Assembly, Chapter  
 143, p. 283.]

SECTION 1583. (1.) *Be it enacted by the General Assembly of the* Manufacture of  
*State of Iowa*, That section nine of chapter 157, of laws passed at the wine, beer and  
 regular session of the sixth general assembly be amended so as to read cider allowed.  
 thus, "wherever the words intoxicating liquors occur in this act or the  
 act to which this is amendatory, the same shall be construed to mean all  
 spirituous and vinous liquors: *provided*, that nothing in this act shall be  
 so construed as to forbid the manufacture and sale of beer, cider from  
 apples or wine from grapes, currants or other fruits grown in this  
 state.

SEC. 1584. (2.) So much of said section nine referred to in the Act repealed.  
 foregoing section as is inconsistent with this act is hereby repealed.

SEC. 1585. (3.) That section one of said chapter 157 be amended Act amended.  
 to read as follows:

*Be it enacted by the General Assembly of the State of Iowa*, That all  
 that part of section first after the word *provided*, in the eleventh line  
 and sections fourth, third and sixteenth are hereby repealed.

SEC. 1586. (4.) That the following words, when they occur in sec- Drunken men

discharged by giving information.

tion twelve of the "act for the suppression of intemperance," approved January 22d, 1855, to wit: the words "and order the prisoner to be discharged whenever he shall become satisfied that the object of this law and the good of the public, and the prisoner will be advanced thereby, be and they are hereby repealed;" and there is enacted in lieu thereof the following words: "and order the prisoner to be discharged upon his giving information under oath stating when, where and of whom he purchased or received the liquor which produced the intoxication, and the name and character of the liquor obtained."

Selling of mixed liquors punished.

SEC. 1587. (5.) That any person who shall mix any intoxicating liquor with any beer, wine or cider by him sold, and shall sell or keep for sale, as a beverage, such mixture shall be deemed guilty under section six of the said "act for the suppression of intemperance," and shall be punished accordingly.

PRIOR LAWS. 1. "An act to regulate taverns," passed April 23, 1833; M. D., 1833, p. 124.

2. An act concerning habitual drunkards, &c., passed April 12, 1827; M. D., 1833, p. 475.

3. An act to prevent the selling of spirituous liquors to Indians, passed Feb. 4, 1825; M. D., 1833, p. 482.

4. An act to punish the vendors of unwholesome liquors, &c., passed March 12, 1827; M. D., 1833, p. 482; all the above repealed Aug. 30, 1840.

5. An act of Dec. 9, 1836; Wis., 1st sess., No. 41, p. 76; repealed Aug. 30, 1840.

6. An act to prevent the sale of spirituous liquors to Indians, passed Jan. 3, took effect March 1, 1839; I. T., 1st sess., p. 274; repealed by reprint, chap. 80, p. 292.

7. An act regulating grocery license, passed Jan. 4, 1840, took effect June 1, 1840; I. T., 2d sess., chap. 22, p. 27; also, reprint 1843, p. 373; repealed 2d sess., chap. 67, p. 80.

8. An act to prohibit and punish the sale of intoxicating liquors to Indians, passed Jan. 23, took effect May 1, 1843; reprint, chap. 80, p. 292.

9. An act amending that of Jan. 4, 1840, passed Jan. 17, 1846; I. T., 8th sess., chap. 28, p. 25, repealed 2d sess., chap. 67, p. 80, by No. 11 hercof.

10. An act submitting to vote license or not in each county, passed Feb. 15, took effect Feb. 24, 1847; 1st sess., chap. 49, p. 62; repealed 2d sess., chap. 67, p. 80, by No. 11 hercof.

11. An act on grocery license, passed Jan. 13, took effect June 1, 1849; 2d sess., chap. 67, p. 80.

DECISIONS. Under the law of 1855, the information need not aver whether the selling was directly or indirectly, 4 Iowa, 447; where a ministerial officer acts in good faith he is liable only for real, not for exemplary damages, 5 Iowa, 314; kept intoxicating liquors to sell, is same as with intent to sell, 5 Iowa, 370; defendants being sued for the destruction of liquor answer that they did the same under a judgment of condemnation, setting out the proceedings antecedent thereto, which answer is denied. Held, that on trial the defendants may prove the proceedings, (the ground of objection is not shown,) 5 Iowa, 312; one suing for the value of liquors taken from him must prove that his possession was with lawful intent, 5 Iowa, 312; the word *sixth* should be *sixteenth*, 5 Iowa, 510; a contract for the carriage of liquor, is not *per se*, void, under the law of Jan. 22, 1855, 4 Iowa, 433; the ownership of liquors *in transitu*, within this state is not unlawful, nor are such liquors a nuisance, which any one can as a nuisance destroy, 4 Iowa, 432; under the sixth section any number of violations may be charged in one indictment, 5 Iowa, 508; liquors seized under the liquor law can not be replevied, 5 Iowa, 453; as to incompetency from drunkenness, 2 Iowa, 111; notice of election, 4 Iowa, 561; court will notice, 2 Iowa, 96; duty of board of canvassers, 7 Iowa, 390; *ibid.*, 186; see 2 G., 443; what is and what not repealed by act of Jan. 28, 1857; appeal under sec. 4, of chap. 31, of 4th sess.; intoxicating liquors, not property, when, 5 Iowa, 438; how to conduct a prosecution under chap. 22, of the 2d sess. of Iowa territory, 2 G., 443; chap 157 of 6th sess. does not repeal sec. 6, of chap. 45, of 5th sess.; *State v. Beneck*, June, 1859, and 8 Iowa, 396; sec. 15 of chap. 45, of 5th sess., not repealed by chap. 157, of 6th sess., *Stoneman v. Whaley*, Dec., 1859; right of him who illegally vends liquors, to replevin to recover them, 6 Iowa; replevin by party claiming liquors taken by warrant for violation of law, 5 Iowa, 438; in action for damages for the taking and destruction of liquor, what plaintiff must prove, 5 Iowa, 308; in action for value,

what is not a good defense, 6 Iowa, 410; see also what is not a good defense, in a carrier for not safely carrying liquor, 4 Iowa, 430; settlement of county judge with county agent, when binding on the county, *Powieshick Co. v. Stanley*; *same v. Ross*, both Dec. term, 1859.

CHAPTER 65.

An Act authorizing General Banking in the State of Iowa.

[Passed March 22, 1858, took effect July 29, 1858; Laws of Seventh General Assembly, Chapter 114, page 215.]

ARTICLE 1.

SECTION 1588. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the auditor of public accounts is hereby authorized and required to cause to be engraved and printed in the best manner to guard against counterfeiting, such quantity of circulating notes in similitude of bank notes in blank of different denominations not less than one dollar, as he may from time to time deem necessary, to carry into effect the provisions of this act, such blank circulating notes shall be countersigned, numbered and registered in proper books to be provided and kept for that purpose, in the office of the auditor and under his direction by such register or registers as the said auditor shall appoint for that purpose so that each such circulating notes shall bear the signature of such register, or one of such registers; of the notes furnished to any corporation organized under the provisions of this act, not more than ten per cent. of the amount shall be in notes of one dollar each, not more than ten per cent. in notes of two dollars each, and not more than twenty-five per cent. shall be in notes of all denominations under five dollars, and not more than fifty per cent. in notes of all denominations under ten dollars.

Auditor procure notes engraved.

Notes countersigned and registered.

Proportion of small notes.

SEC. 1589. (2.) Nothing herein contained shall be so construed as to prevent any corporation from procuring their own plate, dies and other materials for engraving and printing blank notes and furnishing them to the auditor and leaving them ever after in his custody and control, to be used and disposed of as though such auditor had procured them under the preceding section.

Bank may procure plates to be left with auditor.

SEC. 1590. (3.) Whenever any corporation formed for the purpose of banking under the provisions of this act shall lawfully transfer to and deposit with the auditor any portion of the public stock issued or to be issued by the United States or any state stocks on which full interest is annually paid, or the stocks of this state, said stocks to be rated at ten per cent. below their average value in the city of New York, for thirty days next preceding the time when such stocks may be left on deposit with the auditor, and in no case shall the auditor issue bills for banking purposes on bonds of this or any other state on which not less than six per cent. is regularly paid, such corporation shall be entitled to receive from the auditor an amount of such circulating notes of different denominations registered and countersigned as aforesaid, equal to the amount of stock actually deposited, rating said stock at ten per cent. less than its average value as aforesaid.

Stocks deposited.

Value in New York.

Circulating notes issued.

SEC. 1591. (4.) A descriptive list of the circulating notes so registered and signed, shall be delivered to the treasurer, who shall copy the

Treasurer keeps records of notes.

	same in the book hereinafter required, to be kept by him, for recording descriptive lists of securities deposited with him for safe keeping.
Notes put in circulation.	SEC. 1592. (5.) Such corporation is hereby authorized, after having executed and signed the circulating notes registered and countersigned as aforesaid, in the manner prescribed by this act, made payable on demand at the banking house of said corporation within this state, to loan and circulate the same according to the ordinary course of banking business, and no such corporation shall at any time, issue or have in circulation any note, draft, bill of exchange, acceptance, certificate of deposit or other evidence of debt, which from its character or appearance, shall be calculated or intended to circulate as money, other than such notes of circulation as are in this section provided for.
Other circulation prohibited.	
Lists of securities kept.	SEC. 1593. (6.) Three descriptive lists of the securities transferred to the auditor as aforesaid, shall be made and signed by the auditor and persons making the transfer; one in a well bound book to be kept by the auditor for that purpose, and one in a like book to be kept by the treasurer, and one in a book to be kept by the corporation, which book shall at all times be open to inspection, and said securities shall then be delivered to the treasurer for safe keeping, who shall receipt to the auditor for the same, and who shall be responsible for any loss or destruction thereof growing out of, or resulting from negligence or the want of reasonable precaution and care. The whole or any part of said securities may be re-delivered to the auditor for the purpose of being sold under the provisions of this act, or being used or disposed of under any order or decree of court, or of being returned to the owner in conformity with the provisions of this act, the auditor in either case giving a receipt upon the book kept by the treasurer aforesaid, specifying therein the purpose for which such re-delivery was made, which receipt shall discharge the treasurer from all further responsibility, but the auditor shall be liable in the same manner as the treasurer is while keeping or disposing of such security.
Stocks deposited with treasurer.	
Stocks may be delivered up for certain purposes.	
Auditor responsible.	
Bank may be established.	SEC. 1594. (7.) Any person may establish, or any number of persons may associate to establish offices of discount, deposit and circulation, and become incorporated upon the terms and conditions, and subject to the liabilities prescribed in this act; but the aggregate amount of the capital stock of any such corporation shall not be less than * <i>fifty</i> thousand dollars; and the auditor of state shall not deliver to any incorporation, notes for circulation, until such corporation shall have deposited with and transferred to him the full amount of * <i>fifty</i> thousand dollars worth of stocks as named in section three of this act, the same to be rated as provided in said section, and the capital stock as required in this section shall be paid up in cash and be and remain so much of the <i>bona fide</i> capital of such corporation. No portion of the capital stock paid in as aforesaid, shall be at any time withdrawn from such corporation so as to reduce the remaining paid up capital then actually held by and in the possession of such corporation below the estimated value of the stocks deposited with and then in the possession of the auditor or treasurer belonging to such corporation, which shall be paid up in cash, and be and remain so much of the <i>bona fide</i> capital of such corporation. No portion of the capital stock paid in shall be at any time or under any circumstance, withdrawn from such corporation, so as to reduce the remaining capital paid in actually and held by and then in the possession
Capital stock must be paid in.	
Withdrawal of capital.	

\* Made "twenty-five" by chapter 128 of the eighth general assembly. See special laws, page 97.



of such corporation below the estimated value of the stocks then held by and in the possession of the auditor or treasurer belonging to such corporation.

SEC. 1595. (8.) Such person or persons under their hands and seals, shall, previous to their receiving from the auditor, the circulating notes as aforesaid, make a certificate which shall specify :

1. The name assumed to distinguish such corporation, and to be used in its dealings. Certificate of  
Name of bank.

2. The place where the business is to be carried on, designating the particular city, town or village, and the county. Place of business.

3. The amount of capital stock which shall be divided into shares of \$100 each. Amount of capital stock.

4. The names and residences of the shareholders and the number of shares held by them respectively. Names of shareholders.

5. The period at which such corporation shall commence and terminate, which certificate shall be acknowledged and be recorded in the office of the recorder of the county where the office of such corporation shall be established, and a copy thereof shall be filed in the office of the secretary of state, and the auditor of state ; and upon the recording of which certificate, the person or persons aforesaid shall become a body politic and corporate, by the name assumed as aforesaid, for and during the time fixed in the certificate, which shall not be more than twenty years, and by such name shall have power to make contracts, to grant and receive, to sue and be sued, to plead and be impleaded, in all courts and places wherein legal or judicial proceedings may be had ; to have and to use a common seal and alter the same at pleasure ; to have, hold, use and enjoy property, real, personal, and mixed with the rents, issues and profits thereof, as hereinafter provided, and to exercise all other powers conferred by this act and all grants or conveyances of real estate shall be under the seal of the corporation, signed by the president and countersigned by the cashier. Length of incorporation  
Certificate filed and recorded.  
Time of incorporations.

6. The powers of the corporation, including the power to have, hold, use and enjoy property, real, personal, and mixed with the rents, issues and profits thereof, as hereinafter provided, and to exercise all other powers conferred by this act and all grants or conveyances of real estate shall be under the seal of the corporation, signed by the president and countersigned by the cashier. Powers of corporations.

SEC. 1596. (9.) A copy of the certificate required by the eighth section of this act, duly certified by the recorder of the county and secretary of state, or by either of these officers, may be used as evidence in all courts and places, by any such corporation, or any person when such evidence may be necessary on any civil or criminal trial. Certificate used as evidence.

SEC. 1597. (10.) Such corporations shall have power to carry on the business of banking by discounting bills, notes and other evidences of debt by receiving deposits, by buying and selling gold and silver bullion, foreign coins and bills of exchange, by loaning money on personal security, and by exercising such incidental powers as may be necessary to carry on such business, may choose one of their number as president, and appoint a cashier and such other officers and agents as their business may require ; but no loans shall be made, nor shall any bill, note or other evidence of debt be discounted or purchased having more than four months to run before maturity ; and in all cases, personal security shall be required. Corporation do a general banking business.  
Time of discounts and security.

SEC. 1598. (11.) The shares of such corporation shall be deemed personal property, and shall be transferable on the books of the corporation, only and in such manner as may be provided in the by-laws of such corporation ; and every person becoming a shareholder by such transfer, shall, in proportion to his shares, succeed to all the rights of the shareholder or shareholders by whom the transfer was made ; no change shall be made in the articles of association, or of the shareholders or members thereof, by which the rights, remedies or securities of

Shares transferable.

Rights of creditors can not be impaired.	its existing creditors may be impaired, such corporation shall not be dissolved by the death or insanity of any of the shareholders therein, when there is more than one shareholder in such association. Taxes shall be
Taxes levied.	levied on and paid by the corporation, and not upon the individual stockholders; the value of the property to be ascertained annually by the bank commissioners herein provided for; and the rate of taxation shall
Valuation of property.	be the same as that required to be levied on other taxable property by the revenue laws of the state.
Contracts made by officers of bank.	SEC. 1599. (12.) Contracts made by any such corporation, and all notes by them issued and put in circulation, shall be signed by the president and cashier thereof, and all suits, actions and proceedings brought or prosecuted by or in behalf of such corporation, may be brought or prosecuted in the name of the corporation; and no such suit, action or proceeding shall abate by reason of the death, resignation or removal from office of any president, but may be continued the same as if such death, resignation or removal from office had not taken place.
Suits not discontinued.	SEC. 1600. (13.) Any person or persons having demands against any such corporation, may maintain action or actions against such corporation, which suits or actions shall not abate by reason of the death, resignation, or removal from office of any president or other officer, but may be continued and prosecuted to judgment against the corporation; and all judgments and decrees obtained against such corporation for any debt or liability of such corporation, shall be enforced against the property of the same, except such judgments or decrees as may be obtained against shareholders as herein provided.
Actions may be brought against corporation.	SEC. 1601. (14.) The auditor shall give to any corporation so transferring stocks in pursuance of the provisions of this act, power of attorney to receive interests or dividends thereon, and apply the same to their own use; but such power may be revoked upon such corporation failing to redeem the circulating notes so issued, or whenever in the opinion of the auditor the principal of such stock shall become insufficient security; and whenever any such corporation shall go into liquidation, or in any other manner proceed to close up its affairs, the auditor shall, upon the application of the owner or owners of such stock, retransfer the same or any part thereof to such owner or owners upon receiving and canceling an equal amount of such circulating notes delivered to him by such corporation in such manner that the circulating notes outstanding, shall always be secured in full by the pledge of stocks, which canceled circulating notes after descriptive lists thereof have been made and recorded by the auditor and treasurer shall in presence of these officers be consumed by burning, and in case they shall fail to so burn any notes returned to them for that purpose, they shall be deemed guilty of felony, and liable to a fine of not more than \$5,000 and imprisonment in the penitentiary not less than five nor more than twenty years.
Bank receives the interest on stocks.	SEC. 1602. (15.) In case such corporation shall fail or refuse to pay any bill or note on demand in the manner specified in the 28th section of this act, the auditor, after ten days' notice given in two newspapers printed in the city of New York, shall proceed to sell at public auction in the city of New York, the public stock so pledged, or such portion as may be necessary, and out of the proceeds of such sale shall cancel and pay the said bill or note default in paying which shall have been made as aforesaid; but nothing in this act contained shall be considered as implying any pledge on the part of the state for the payment of said bills or notes beyond the proper application of the securities pledged to the auditor for their redemption.
Auditor may exchange stocks for circulating notes.	
Bank bills destroyed.	
Punishment for failure to destroy.	
Should bank suspend the stocks a. e. sold.	
State not responsible.	

SEC. 1603. (16.) The public stock deposited with the auditor by any such corporation shall be held, 1st, for the security of notes of such corporation put in circulation as money until the same are redeemed as herein provided; 2d, for the payment of depositors; 3d, for the payment of all other liabilities and the excess for the use of stockholders.

Public stock, applied to payment of liabilities.

SEC. 1604. (17.) The plate, dies and materials, which may be furnished by the auditor for the printing and marking of the notes provided for hereby, shall remain in his custody and under his direction, and the expense incurred in executing the provisions of this act shall be audited and settled by the auditor, and paid out of any money in the treasury not otherwise appropriated; and for the purpose of reimbursing the same, the said auditor is authorized and required to charge against and receive from such corporation applying for such circulating notes, such rate per cent. thereon as may be sufficient for that purpose.

Auditor retains plates, &c.

State pays expense.

Bank reimburses

SEC. 1605. (18.) It shall not be lawful for the auditor or other officer to countersign notes for any corporation, to any amount in the aggregate exceeding the public stock deposited with the treasurer by such corporation, rated as provided in the third section of this act, and any auditor or other officer who shall violate the provisions of this section, shall upon conviction be adjudged guilty of a felony and shall be punished by a fine of not less than five thousand dollars, and be imprisoned not less than five years in the penitentiary.

Countersigned notes limited.

Over issue punished.

SEC. 1606. (19.) Every corporation under the provisions of this act shall be liable to pay the holder of every note put in circulation, the payment of which shall have been demanded and refused, damages for the non-payment thereof in lieu of interest at the rate of twelve and one-half per cent. per annum from the time of such refusal, until the payment of such debt and the damage thereon: *provided*, that no damage shall be allowed on such demand after the bank has gone into liquidation. The president and cashier of every corporation formed pursuant to the provisions of this act, shall keep a true and correct list of the names of all the shareholders of such corporation, and shall file a copy of such list in the office of the clerk of the county where the office of such corporation may be located, and also in the office of the auditor on the first Monday in January in every year, but the holder of any claim against such bank or corporation payable on demand or due at the time of going into liquidation, shall be entitled to interest at the rate of ten per cent. per annum until paid, and all other claims shall bear the same rate of interest after maturity.

Bank pays damages arising from suspension.

Record of share holders made and filed.

Creditors allowed interest.

SEC. 1607. (20.) It shall not be lawful for any corporation under this act to make any of its notes put in circulation as money, payable at any other place than at the office where the business of the corporation is carried on; every corporation which may be authorized under the provisions of this act, shall be located in some city, town or village having a population of not less than five hundred inhabitants, nor shall the office where the business of such corporation is transacted be at any other place than the city, town or village, wherein such corporation is located.

Notes payable at bank

Place of transacting business.

SEC. 1608. (21.) No corporation shall issue or put in circulation any notes of such corporation unless the same be made payable on demand, and every such corporation shall always keep on hand an amount of specie sufficient to redeem all such bills or notes as may be presented at the place of payment.

Notes payable in specie on demand.

SEC. 1609. (22.) Each corporation shall always keep on hand an amount (in addition to that required to be kept on hand by the provisions of the preceding section,) equal to twenty-five per cent. of the

Amount of specie to be kept on hand.

- amount of specie deposits in specie, and the same proportion of its other deposits for the security of depositors; but no such corporation shall pay any interest on current deposits.
- Circulation of foreign notes prohibited.** SEC. 1610. (23.) No corporation organized under the provisions of this act shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of depositors, nor shall it in any mode put in circulation the notes of any bank or banking company, which notes shall not at that time be redeemable in specie at the place where such notes are made payable.
- Bank can not prefer creditors.** SEC. 1611. (24.) All grants, conveyances, assignments, transfers, sales or dispositions of property, rights, credits or effects by any such corporation, for the purpose or with the intent to secure the payment of one liability in preference to another or others, or in any manner to secure any priority or preference to any one or more creditors or which shall be intended to have such operation or effect, shall be void in respect to all other persons and creditors whose rights or remedies may be affected thereby.
- Purchase of real estate.** SEC. 1612. (25.) It shall be lawful for such corporation to purchase, hold and convey real estate for the following purposes: 1st, such as shall be necessary for its immediate accommodation, banking houses and buildings connected therewith, in the transaction of its business: 2d, such as it shall purchase at sales under judgments, decrees or mortgages held by such corporation and at sales under judgments and decrees in favor of others, where it is done with the sole view of securing and saving debts due or to become due to such corporation.
- For banking house.**
- To secure debts.**
- Bank can not buy real estate.** SEC. 1613. (26.) The said corporation shall not purchase, hold or convey real estate in any other case or for any other purpose whatever; and all conveyances of such real estate shall be made to the corporation and which the president and cashier or either may sell, assign, grant or convey under direction of the corporation free from any claim thereon in favor of or against the shareholders, or any person claiming under them.
- Conveyances.**
- An examination of the affairs of the bank may be ordered by the district judge.** SEC. 1614. (27.) Upon the application of the auditor or of any shareholder or shareholders whose shares shall amount to five thousand dollars or of any person or persons holding evidences of indebtedness against any such corporation to that amount, which application shall set forth in full the facts and circumstances upon which it is made and shall be verified by affidavit, the judge of the district court of the county in which the business of the corporation may be conducted, may order an examination to be made by any competent person or persons to be by him appointed, of the affairs of such corporation for the purpose of ascertaining the safety of its investments and the prudence of its management and the result of such examination together with the opinion of the judge thereon shall be published in such manner as he shall direct, and who shall make such order in respect to the expense of such examination as he may deem proper.
- Act of insolvency.** SEC. 1615. (28.) If any corporation organized under this act shall refuse to pay any of its circulating notes in gold or silver coin, the lawful currency of the United States, on which payment shall be lawfully demanded at its banking house or customary place of doing business, during usual banking hours, the holder of such note or notes making such demand may cause the same to be protested as hereinafter provided; such corporation shall only be allowed to make payment of any such demand in silver coin where the sum so demanded does not exceed the amount for which silver coin is a legal tender according to the laws of the United States; and when payment shall be demanded on more than one of its
- Refusal of specie payment.**
- Payment in silver.**

notes at the same time, the aggregate amount of such notes to the amount of one hundred dollars shall be considered on demand when any notes the payment of which has been refused as aforesaid are sought to be protested. The notary public who presents the same for protest shall present at each time so many of said notes, (if so many there be,) as will amount in the aggregate to the sum of one hundred dollars, and protest the same in like manner as if said notes were but a note, and so in like manner for all of such notes if they do not in the aggregate amount to one hundred dollars; and the auditor on receiving and filing in his office such protest, shall forthwith give notice in writing to the corporation, the maker or makers of such notes, to pay the same, and if he or they shall omit to do so, the auditor shall immediately thereupon, (unless such corporation shall satisfy him by affidavits, filed in his office, that they or he had a good defense as against the person presenting the same to a recovery thereof,) give notice in at least one paper printed (if any paper is so printed or published) at the place of business of such corporation so refusing payment of any notes, (and in one newspaper published at the seat of government of the state of Iowa,) that all the circulation issued by such corporation will be redeemed out of the trust funds belonging to the corporation which made and issued such protested note, to the payment *pro rata* of all such circulating notes, whether protested or not, and shall adopt such measures for the payment of such notes as will in his opinion most effectually prevent loss to the holders thereof; and as soon as any such note shall be protested as aforesaid, and a copy of such protest shall be delivered to the president, cashier or principal clerk, at the office or place of business of the corporation, the powers and duties of any such corporation over or with the same shall cease and determine, and all the officers connected with the same shall be prohibited from exercising any control over the same, unless by the decision or decree of the court in which proceedings may be had for the appointment of receivers and winding up of the affairs of the corporation it shall be determined that such corporation was not bound to pay the note or bill protested as aforesaid, the protest thereof to the contrary notwithstanding, providing that the legal existence of the corporation shall continue for purposes of proceedings in courts for and against the same and of avoiding the loss of property of any kind, for want of a person in being to hold the same, but for no other purpose whatever, and it shall be the duty of the auditor to apply to any judge of the district court of this state, whose duty it shall be to appoint (a disinterested person or persons) a receiver or receivers who shall reside in the county in which the bank is situated, to take the assets and property of every such corporation into his or their possession, and collect and apply all such assets and property as may come into his or their possession under the direction of the district court of the county in which the corporation was located; 1st, to the redemption or payment of circulating notes; 2d, to the payment of deposits; 3d, to the payment of all other indebtedness; 4th, to the payment of stockholders. If the auditor shall not proceed to wind up the affairs of such corporation on the reception and filing by him of the protest aforesaid, the holder or owner of such protested note shall have such rights at law and equity against such corporation as any creditor has against his debtor according to the laws of this state. Receivers appointed under the provisions of this act shall give bond and security as may be required by the judge or court appointing him.

Amount of notes in one demand.

Notes protested

Protest filed and auditor notified.

Stocks sold in case of refusal.

Powers of corporation cease after protest.

Bank continued for proceedings in court.

Receivers appointed.

Assets applied to redemption of notes, &c.

If auditor refuses creditor may proceed.

Bond of receiver.

Notes preferred to all liabilities.

SEC. 1616. (29.) That the distribution and application of all the means, assets and property of such corporation as shall come into the

	hands of any such receiver or receivers, or shall be in the hands of the auditor, shall first be applied in payment and satisfaction of all notes issued as and for a circulating medium by any such corporation.
Liability of stockholders.	SEC. 1617. (30.) Stockholders or shareholders in corporations organized under the provisions of this act shall be individually and severally liable to the creditors of the corporation of which they are stockholders or shareholders over and above the amount of stock by them held, to an amount equal to their respective shares so held, for all its liabilities accruing while they remained stockholders, and no transfer of stock shall affect such liability, and should any such association become insolvent and its assets be found insufficient to pay its debts and liabilities, its stockholders may be compelled to pay such deficiency in proportion to the amount of stock owned by each, and should the whole amount for which stockholders are individually responsible, as provided in this section, be found in any case to be inadequate to the payment of all the residue of the debts of any corporation after the application of its assets to the payment of such debts, then the moneys due from stockholders on account of their individual liabilities as such, shall be distributed equally among all the creditors of such corporation, in proportion to the amount due to each. The personal liability, in this section provided for, is over and above the stock owned by stockholders and any amount paid thereon.
Transfer of stock not affect liability.	
Statements made of.	SEC. 1618. (31.) It shall be the duty of the officers having charge of any bank established under the provisions of this act, to cause to be made out on the first Monday of January and July of each year duplicate statements showing the names at length and place of residence of each stockholder of such bank, together with the amount of stock owned by each, and the transfer of all stock, the date of such transfer, the amount so transferred, and the persons by and to whom transferred, one of which statements shall be posted in some conspicuous place in the banking house, and shall be continually exposed to public inspection during banking hours. The other of said statements shall be caused by the bank to be filed with the recorder of deeds of the county in which such bank is located, and a copy of such last named statement duly certified by the recorder in whose office the same is filed shall be
Names of stockholders. No. of shares and all transfers.	
Statements posted and filed.	<i>prima facie</i> evidence of the facts therein contained in any court of justice in this state.*
Evidence of facts.	
Act applies.	SEC. 1619. (32.) That each and all the provisions of this act shall apply to and control in all respects any banker who shall conduct business under the provisions of this law, whether the word banker is or is not used in any such provision.
Election of commissioners.	SEC. 1620. (33.) There shall be elected at each regular biennial session of the general assembly, by the two houses thereof in joint convention assembled, three electors of the state as bank commissioners, whose duties shall be to make semi annual examination, and as much oftener as they shall deem advisable, in respect to the affairs and business of associations incorporated under the provisions of this act, and in respect to the condition and management thereof, and the amount of specie on hand for the redemption of notes and per centage of deposits on hand, and also to inspect the securities filed with the auditor and treasurer so as to be able to determine whether or not any change has been made in said securities, as well as in respect to the sufficiency of such securities to meet the liabilities of the corporation, and also to determine whether said bank complies with the provisions of this law, and to report thereon to the auditor and to each corporation. Such commis-
Their duties.	
Powers of commissioners.	

\* See also section 1636.

sioners shall have power to examine all books, papers and documents appertaining to the business of the corporation, and to swear or affirm all officers, agents and others connected with the corporation in respect to any matter or thing about which they have the right to inquire, and their reports shall be published in some newspaper at the seat of government, and in a newspaper published in the county in which the bank does business, and if there be no paper published in such county, then in a newspaper published in the nearest county thereto: *provided*, that neither of the commissioners elected in accordance with the provisions of this section shall be engaged either directly or indirectly in banking under this act, either as stockholder, director or under officer, and should either of them so engage in banking, so elected, it shall be construed as a full resignation of his office as commissioner.

Reports published.

Eligibility of commissioners.

SEC. 1621. (34.) Such bank commissioners before entering upon the duties of their office shall take and subscribe an oath or affirmation faithfully and impartially to perform all the duties enjoined upon and required to be performed by them, which said oath or affirmation shall be filed in the office of the secretary of state.

Commissioners qualify.

SEC. 1622 (35.) If the said bank commissioners shall ascertain upon any examination which they may make that any change has been made in the securities deposited with the treasurer, or that any part thereof has been lost, destroyed or improperly withdrawn, or in any way or manner mis-used or misapplied, or that securities have from any cause become lessened in value or insufficient as security for the redemption of bills of circulation they shall notify the president and cashier of such corporation liable to be affected by any such state of facts of the discovery thereof, and require the transfer and deposit of other security of the like value with those originally transferred, to supply the place of those changed, lost, destroyed or improperly withdrawn, or which shall have become insufficient security as aforesaid, in a reasonable time to be fixed by said commissioners, or that said corporation surrender to the auditor a sufficient amount of bills to be burned to reduce the liability of such corporation to such sum as that the securities in possession of the treasurer will be sufficient for the redemption of all notes not so surrendered; and in case of any failure to comply with any such requisition the commissioners shall report the facts to the auditor, as well as to all the other corporations incorporated under the provisions of this act, and the auditor shall thereupon proceed to put such defaulting incorporation into liquidation as provided for in case of failure, to redeem or pay notes on demand. If the said bank commissioners shall ascertain upon any such examination that any bank has in any manner failed to comply with the provisions of this act, they shall immediately report the same to the auditor, who shall thereupon proceed to put such defaulting incorporation into liquidation, as provided for in case of failure to redeem or pay notes or bills on demand.

Stocks destroyed or depreciated must be replaced, or bills be refunded.

Failure to comply an act of insolvency.

Law not complied with an act of insolvency.

SEC. 1623. (36.) Thomas Hedge, of Des Moines county, George L. Daveuport, of Scott county, P. Gad. Bryan, of Warren county, Thomas A. Graham, of Tama county, and E. G. Potter, of Jackson county, shall be and they are hereby appointed bank commissioners, who shall hold their office until their successors are elected and qualified. Said commissioners shall, during their term of office, perform the duties prescribed by this act.

First board of commissioners appointed.

SEC. 1624. (37.) The bank commissioners created by this act, shall each be entitled to receive for their services, for every day actually spent in making the semi-annual examination by this act required, the

Salary of commissioners to be paid by banks.

- sum of five dollars per day, which said sum shall be apportioned among the said banks by the commissioners, in proportion to the amount of their capital, and when the said bank commissioners shall deem it necessary to visit any bank oftener than twice in each year, and shall make such visitation, said bank shall pay each of said commissioners the sum of five dollars for every day actually spent in such visitation.
- Examinations.** SEC. 1625. (38.) Said bank commissioners may cause such semi-annual or other examinations to be made by any one or more of their number as they may determine, but all action by them contemplated in section thirty five of this act shall be decided by a majority.
- Quarterly statements.** SEC. 1626. (39.) Every corporation who shall hereafter carry on banking business under the provisions of this act shall make out and transmit to the auditor of state, a full statement of its affairs, as they existed on the first Monday of January, April, July and October, of each year, verified by the oath of its President or cashier, which statement shall be deposited in the office of said auditor, by the twentieth day of each of said months in each year, which statement shall be published quarterly in the nearest newspaper, and such statement shall contain:
1. The amount of capital stock of the corporation paid in, and invested according to law.
  2. The value of the real estate, specifying what portion is occupied by the corporation for the transaction of business.
  3. The debts owing to the corporation, and the date and amount of each bill or note discounted, and when the same was made payable.
  4. The amount of debts owing by the corporation, and the amount deposited with other banks.
  5. The amount of notes or bills then in circulation of said corporation, of loans or discounts and specie on hand; what amount of notes of other banks is held by such corporation, and the amount loaned to directors and stockholders in such corporation.
  6. The amount of suspended debt held by such corporation.
  7. The amount of per centage of deposits on hand.
- Statement not made, an act of insolvency.** SEC. 1627. (40.) Every corporation that shall neglect or refuse to make out and transmit the statement required in the thirty-fifth section of this act, shall be restrained from further prosecution of the banking business, and shall forthwith go into liquidation.
- Method of closing.** SEC. 1628. (41.) Whenever any corporation desirous of relinquishing the banking business, shall have redeemed at least ninety per cent. of their circulating notes, and shall produce a certificate from the state treasurer, certifying that such corporation has deposited in his office, subject to the order of the auditor, a sum of money equal in amount to the notes of such corporation then outstanding, it shall be lawful for the auditor to receive the same and to give up all the securities theretofore deposited by such corporation, for the redemption of the notes issued, which sum so deposited with the state treasurer as aforesaid, shall be appropriated solely to the redemption of the outstanding notes of such corporation, subject to the provisions hereinafter mentioned.
- Fraud and false entries punished by fine and imprisonment.** SEC. 1629. (42.) Every officer, agent or clerk of any incorporation authorized by this act, who shall willfully and knowingly subscribe or make any false statements or false entries in the books of such incorporation, or shall knowingly subscribe or exhibit false papers with the intent to deceive any persons authorized to examine as to the condition of such incorporation, or shall willfully or knowingly subscribe or make false reports, shall be deemed guilty of felony, and upon conviction thereof shall be fined not exceeding ten thousand dollars, and be imprisoned in



the state prison not less than two nor more than fourteen years, and be forever after rendered incapable of holding any office created by this act.

SEC. 1630. (43.) Such corporation, after having complied with the provisions of the preceding sections of this act, may give notice for two years in a paper published at the seat of government, and also in at least one paper published in the county where the said corporation shall have been located, that all circulating notes issued by said corporation, must be presented at the auditor's office within two years from the date of said notice, or that the funds deposited for the redemption of the notes will be given up to the corporation, and on receiving satisfactory proof of the giving of such notice for the time aforesaid, the auditor shall surrender to the order of said corporation, any securities which he may hold for the payment of any unredeemed notes of the said corporation, and the treasurer shall deliver over to such corporation any moneys in his hands which have been deposited with him for such purpose, on the production of such certificate, such notice to be published at least three weeks in each six months of each year.

Two year's notice of final redemption of notes.

End of bank.

SEC. 1631. (44.) Each corporation organized under the provisions of this act may take, receive, or charge on any loan or discount made or upon any note or bill of exchange or other evidence of debt discounted or purchased by them, interest at the rate of ten per centum per annum on the amount of any such note, bill of exchange or other evidence of debt so discounted or purchased, and no more until the first day of January, A. D. 1863, after which time no more than eight per cent. shall be so taken, received or charged: *provided, however*, that interest may be reserved or taken in advance at the time of making the loan or discount according to the usual rates of banking, or as calculated in "Rowlet's Interest Tables," and the knowingly taking, reserving or charging on any debt or demand discounted or purchased by any corporation a rate of interest greater than that allowed by this section, shall be held and adjudged a forfeiture of said debt or demand, but the purchase of a *bona fide* bill of exchange or note payable at another place, than the place of such purchase or discount, and the taking or reserving interest thereon at the rate aforesaid from the time of such purchase or discount, until the maturity of such bill or note shall not be held usurious, although exchange on the place where it is made payable is at the time of such purchase or discount, worth a premium, nor shall the discount or purchase of a *bona fide* bill or note payable at a place between which and the place of discount or purchase there may be a difference in exchange, and the taking in addition to the rate of interest aforesaid, the rate of exchange between such places be deemed usurious: *provided*, that in no case shall more than the current rate of exchange between such places be taken.

Ten per cent. discount allowed until 1863.

Bank discount.

Usury punished

SEC. 1632. (45.) No corporation organized under the provisions of this act, shall exist longer than twenty years.

Duration of charter.

SEC. 1633. (46.) The stockholder or shareholder as used in this act shall apply not only to such persons as appear by the books of the association, to be such, but also to be equitable owner of stock, although the same may appear on such books in the name of another person, and also to every person who shall have advanced the installment or purchase money of any stock in the name of any person under twenty-one years of age, and while such person remains a minor to the extent of such advance and also to every guardian or other trustee, who shall voluntarily invest any trust funds in such stock, and no trust funds in the hands of such guardian or trustee shall be in any way liable under the provis-

Stockholders defined.

Trust funds not liable.

Guardians responsible.

ions of this act, by reason of any such investment, nor shall the person for whose benefit any such investment may be made, be responsible in respect to such stock, until thirty days after the time when such persons respectively become competent and able to control and dispose of the same, but the guardian or other trustee making such investment as aforesaid, shall continue responsible as a stockholder until such responsibility devolves upon the person beneficially interested therein, and in respect to stock held by a guardian or other trustee under a transfer of the same by a third person or under positive directions by a third person for such investment, the person making such transfer or giving such directions, and his executors and administrators shall for the purpose of this act be deemed a stockholder, and the estate of such person, if he be deceased, shall be responsible for the debts and liabilities chargeable on such stock according to the provisions of this act.

Circulation of foreign bills prohibited

SEC. 1634. (47.) No corporation organized under the provisions of this act shall put in circulation in this state the bills or notes of any bank or banking company out of the state, except such as are received in the usual course of business, nor shall any corporation either directly or indirectly exchange its notes intended to circulate as money with any bank or banking company out of this state, or with the agents of such bank or banking company, for the notes of such bank or banking company, with a view to circulate the same as money.

Take effect.

SEC. 1635. (48.) This act to be in force from and after its approval by a majority of all the electors of this state, voting for and against it at an election provided by law, and not otherwise.

#### ARTICLE 2.

An Act requiring Banking Corporations to make Quarterly Statements.

[Passed April 2, 1860, took effect July 4, 1860: Laws of the Eighth General Assembly, Chapter 129]

Statement to be made quarterly.

SECTION 1636. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all associations now organized, or which may hereafter be organized under the general incorporation laws of this state, for the purpose of transacting a banking business, either in the way of buying or selling exchange, receiving deposits, discounting notes, &c., shall hereafter on the first Monday in January, April, July and October in each year, make a full, clear and accurate statement of the condition of such association on that day, which shall be verified by the oath of the president or vice-president, cashier or secretary, and two of the directors; which statement shall contain,

1. The amount of the capital stock actually paid in, and then remaining as the capital of such association.

2. The amount of debts of every kind due to banks, bankers or other persons, other than regular depositors.

3. The total amount due depositors, including sight and time deposits.

4. The amount subject to be drawn at sight, then remaining on deposit with solvent banks or bankers of the country, specifying each city or town and the amount deposited in each and belonging to such association.

5. The amount of gold and silver coin and bullion belonging to such association at the time of making the statement.

6. The amount then on hand, of bills of solvent specie paying banks.

7. The amount of bills, bonds, notes and other evidences of debt, discounted or purchased by such association, and then belonging to the

same, specifying particularly the amount of suspended debts, the amount considered good, the amount considered doubtful, and the amount in suit or judgment.

8. The value of real or personal property held for the convenience of such association, specifying the amount of each.

9. The amount of the undivided profits (if any) then on hand.

10. The total amount of all liabilities to such associations on the part of the directors thereof: which statement shall be forthwith transmitted to the auditor of state, and be by him filed in his office.

SEC. 1637. (2.) An abstract of every statement showing the condition of such association as required in section first of this act, shall be immediately published by such association, in some daily newspaper; and if there be no daily, then in some weekly newspaper printed in the county where such association shall transact its business. Its publication

SEC. 1638. (3.) Any failure or neglect of the proper officers of such association to comply with the provisions of this act, shall be regarded as a forfeiture of all the rights and privileges of such association. Failure to comply.

SEC. 1639. (4.) Any officer whose duty it is made to make statement and publication as afore-said, who shall neglect or refuse to do so shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not less than one hundred dollars, nor more than one thousand dollars, or by imprisonment not less than three months nor more than three years in the penitentiary. Misdemeanor.

SEC. 1640. (5.) This act shall be in force and take effect from and after its publication according to law.

DECISIONS. Legislative power to repeal bank charter M., 482; 1 G., 553-561 presumption as to value of paper from suspension of payment, 1 Iowa, 53.

Bank notes available to redeem land sold on execution—certificate of deposit not 4 G., 92.

One assuming publicly to redeem bills of another is originally liable, 7 Iowa, 163.

## CHAPTER 66.

### STATE BANK.

An Act to Incorporate the State Bank of Iowa.

[Passed March 20, 1858, took effect July 23, 1858; Laws of the Seventh General Assembly, Chapter 87, page 125.]

SECTION 1641. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the State Bank of Iowa be and the same is hereby incorporated with all the powers hereinafter granted, and by that name shall be capable of contracting and being contracted with, and of prosecuting and defending actions as fully as natural persons, and of doing all other acts necessary to effect the objects contemplated in this act by the creation of said corporation. State Bank incorporated.

SEC. 1642. (2.) That as soon as five or more branches of the State Bank of Iowa shall be organized as in this act is authorized, the directors of the said State Bank of Iowa appointed by such branches, shall meet in Iowa City at such time as shall be designated by the board of bank commissioners, who shall give ten days previous notice to each branch, of the time of such meeting, and provided two-thirds of the Five or more branches may organize  
Meet at Iowa City.

- whole number of such directors shall be convened, they shall organize by taking an oath, diligently, faithfully, and impartially to perform the duties imposed upon them by this act, a certificate of which oath, signed by each director, shall be filed and preserved in the office of the secretary of state, and by electing some one of their number as president, who shall preside at the meetings of the board and sign its official documents; and thereafter the directory of the state bank shall be composed of one director, appointed by each branch of said bank, two-thirds of whom shall be a quorum; and other branches may be organized under such directory as is herein provided.
- Elect president.** SEC. 1643. (3.) The directors shall, when they deem it necessary, elect a vice president, whose duties shall be prescribed by the by-laws. They shall appoint a secretary, who shall keep a fair and true record of the proceedings of the bank. They shall keep an office in Iowa City, which together with their books, papers, records, and accounts of every description, shall at all times be open to the inspection of any committee of the general assembly, or either branch thereof, and of any commissioner or commissioners specially appointed for that purpose by the general assembly, or either branch thereof, or by the governor of the state.
- Directors may elect a vice president and secretary.** They shall procure and furnish each branch with notes for circulation, and decide on the amount to be furnished from time to time to each, within the limits and agreeably to the rules and restrictions prescribed by this act. They may prescribe rules for the settlement of balances between branches, revise their by-laws and regulations concerning charges for making collections, and cause both to be made uniform, or as nearly so as may be expedient. They shall have power by themselves, or by a committee of one or more members of their own body, or by a special agent appointed by them for that purpose, whenever, and as often as they shall think proper, to visit any branch, inspect its books, records and accounts, and all the evidences of debt due to and securities held by such branch, examine and ascertain the amount of money and other property held by such branch; examine on oath the president, vice president, and directors, and cashier, and all other officers, agents, clerks, or servants of the branch, touching its condition, means and liabilities, they shall have power to require any branch to reduce its circulation or other liabilities within such limits as they shall, after full inquiry into its condition, deem necessary to secure from loss either the dealers with such branch, or the other branches of the State Bank of Iowa. They shall, as soon after the first Monday of every month as practicable, publish in some newspaper printed at Iowa City, a consolidated abstract of the monthly reports of all the branches, showing their assets, liabilities, and condition, which statement shall be recorded in a book or books to be kept for that purpose. They may
- Office kept at Iowa City.** appoint an executive committee of not less than three, of whom the vice president shall be one, to act in behalf of the bank in all such cases as shall be prescribed by the by-laws of said bank, not inconsistent with this act.
- Open to inspection.** SEC. 1644. (4.) The president, vice president, secretary, and all other officers or agents of the bank, shall each receive such compensation for their services as said bank shall allow, which shall be assessed upon the several branches of the State Bank of Iowa, in the ratio of their capital stock. The bank may also allow the executive committee such compensation as it may deem just and reasonable, to be paid by the several branches in the same manner; and the expenses of procuring plates and printing notes of circulation, shall be paid by the several branches in the ratio of the notes of circulation received by each.
- Furnish branches with notes.**
- Examine branches.**
- May reduce circulation.**
- Publish abstracts of monthly reports.**
- Ex. committee.**
- Compensation of officers.**
- Expense of plates.**

SEC. 1645. (5.) Each director of the bank, appointed by the branches, shall continue in office until the first Monday in February next after his appointment, and until his successor shall be appointed and qualified. Vacancies in the board shall be filled by the branch by which the appointment vacated was made. In voting, each member shall be entitled to two votes, and to one additional vote for every fifty thousand dollars of the amount of capital stock paid into the branch represented by him over one hundred thousand dollars, at the time of such voting. The president and vice president of the bank shall hold their offices for one year, and until their successors are appointed; but they may be removed by a resolution of the board. They and all other officers and agents of the bank shall take an oath faithfully, diligently, and impartially, to fulfill the duties of their appointments, and not knowingly violate any of the provisions of this act. They shall be required to give bond in such sum, and with such securities, as the bank shall prescribe, and all vacancies in said appointment shall be filled by the bank.

Appointment of directors.

Vacancies filled. Ratio of voting.

Term of officers.

Take oath.

Give bond.

SEC. 1646. (6.) All notes designed for circulation by the branches shall be furnished by the State Bank of Iowa; but no notes shall be delivered to any branch until they are numbered and countersigned by some person authorized by the State Bank of Iowa to countersign the same as register, and a full record of such numbering and countersigning made in a book provided for that purpose; and all such notes shall have stamped or printed on their face the words, "Registered by the State Bank of Iowa." All notes so worn, defaced, or mutilated, as to be unfit for circulation, shall be returned by the branch by which they were issued, to the bank, and an equal amount of new notes received therefor; all such notes so returned by a branch, shall be credited, and all new ones delivered in their stead shall be charged to such branch on the books of said bank; and the notes so returned shall be burned to ashes in the presence of the president or vice president, and at least two of the directors of said bank.

State Bank to furnish branches with notes, registered and numbered.

Worn and defaced notes exchanged and destroyed.

SEC. 1647. (7.) Before the bank shall deliver to any branch, notes for circulation, it shall require such branch to pay over or deposit to the credit of said bank, as said bank shall order, either in money or United States stocks, or interest paying state stocks at their current value in the city of New York, but in no instance above their par value, an amount equal to twelve and one-half per cent. on the amount of the notes for circulation, which shall be delivered to such branch. And so from time to time as any branch, by the paying of an additional amount of its capital stock, or by not having received the amount of notes for circulation to which it was previously entitled, shall receive an additional amount of notes for circulation; such branch shall deposit with the bank twelve and one-half per cent. on the amount of notes so received; and the stocks and money so deposited shall be denominated the "safety fund," and shall be invested as hereinafter provided, and held by the bank as the property of said branch, in trust for the benefit of the several branches of the state bank of Iowa, and as a fund for the redemption of the notes of circulation of any one or more of said branches that may fail to redeem its notes, to be applied to that purpose in the manner pointed out in this act.

Branches to furnish stocks as security for notes.

Branches deposit stocks as a safety fund for the redemption of notes.

SEC. 1648. (8.) All money so deposited or paid to the bank on account of the safety fund by any branch, shall be under the direction of said bank, invested either in interest-paying stocks of states or of the United States. Each branch shall be entitled to receive the interest

Bank holds the stocks.

Branches receive the interest.

<p>Insolvent branches' stocks first converted into money.</p> <p>Bank furnishes notes.</p> <p>Twice the first hundred thousand.</p> <p>One and three-fourths times the second hundred thousand.</p> <p>One and a half times the third hundred thousand.</p> <p>The per cent of small notes furnished each branch.</p> <p>Branch refusing to redeem in specie declared insolvent, and state bank takes possession.</p> <p>May redeem in specie only to amount of legal tender.</p> <p>Notes to \$100 one demand.</p> <p>State bank appoints an examining com., and receivers for insolvent branch.</p> <p>Give public notice.</p>	<p>accruing on the stocks in which its portion of the safety fund shall have been invested, and in case of the insolvency of any branch, the stocks in which the money of such branch shall have been invested as aforesaid, if the proceeds of such stock shall be sufficient to redeem its outstanding notes of circulation, shall as far as practicable be first converted into money and applied to that purpose, before any part of the safety fund belonging to other branches, shall be so applied.</p> <p>SEC. 1649. (9.) The state bank of Iowa shall not furnish to any branch, circulating notes to an amount bearing a greater proportion to the capital stock of said branch actually paid in and at the time remaining undiminished by losses, or withdrawal, than the proportion hereinafter specified, that is to say: on the first hundred thousand dollars, or any lesser amount of its capital, not more than twice the amount of such capital, on the second hundred thousand dollars, or part thereof, not more than one and three-quarters the amount of such capital, over one hundred thousand; on the third hundred thousand dollars or part thereof, not more than one and a half the amount of such capital, over two hundred thousand; nor shall said bank furnish to any branch circulating notes of any other denomination than of one dollar, two dollars, three dollars, five dollars, ten dollars, twenty dollars, fifty dollars and one hundred dollars. Of the notes furnished to any branch not more than ten per cent. of the amount shall be in notes of one dollar each, not more than ten per cent. in notes of two dollars each, and not more than twenty-five per cent. shall be in notes of all denominations under five dollars, and not more than fifty per cent. in notes of all denominations under ten dollars.</p> <p>SEC. 1650. (10.) If any branch of the state bank of Iowa shall refuse to pay its notes of circulation, or any of them, in gold or silver coin, the lawful currency of the United States, on which payment shall be lawfully demanded at its banking house or customary place of doing business, during the usual banking hours, such branch shall be deemed to have committed an act of insolvency, and thereupon all its property, credits, securities, liens and assets of every description shall forthwith vest in and be the property, credits, securities, liens and assets of the state bank of Iowa, for the uses and purposes declared in this act. And the said branch shall only be allowed to make payment of any such lawful demand in silver coin where the sum so demanded does not exceed the amount for which silver coin is a legal tender according to the laws of the United States, and when payment shall be demanded on more than one of its notes at the same time, the aggregate amount of such notes so presented for payment to the amount of one hundred dollars shall be considered but one demand.</p> <p>SEC. 1651. (11.) The state bank of Iowa, on receiving information that any branch has committed such act of insolvency, shall forthwith appoint a committee of one or more of its directors, or others, who shall make immediate inquiry into the truth of such information, and report thereon to the bank; and if the bank shall be satisfied from the report of the committee, that such branch has suspended the payment of its notes in gold and silver as provided in section ten, (10) it shall forthwith appoint a suitable receiver, or receivers, who shall take immediate possession of the books, records, money, choses in action and property of such branch, of every description, and hold the same for the joint use of the other branches of the state bank of Iowa, and the creditors of the failing branch, and the state bank of Iowa shall immediately provide money and place the same in such solvent branch or branches, as may</p>
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be most convenient for the purpose of redeeming the notes of such failing branch, and shall give public notice thereof in some newspaper printed in the place where such failing branch is located, also in some newspaper of general circulation published in Iowa City.

SEC. 1652. (12.) Each solvent branch shall contribute in the ratio of the circulation to which it is entitled, to the sum necessary for redeeming the notes of the failing branch, as provided in the preceding section, on the requisition of the state bank of Iowa, and may be remunerated for such contribution from the safety fund, as soon as money sufficient can be raised from that fund, by a sale or hypothecation of the stock, funds, or other securities belonging thereto.

Solvent branches make up losses of insolvent branches.

Reimbursed from safety fund.

SEC. 1653. (13.) The receiver or receivers appointed as provided in the eleventh section, shall be required to give bond in such sum, and such securities as the state bank of Iowa, or executive committee, shall judge sufficient, and under the direction of said bank, shall proceed to settle up the affairs of such branch, and convert its assets into money; the money so made shall be applied:

Receivers give bond.

1. To reimburse all moneys which shall have been advanced by the several branches, for the redemption of the notes and bills of the insolvent branch, and which may not have been previously reimbursed from the safety fund.

Reimburse all moneys from branches.

2. To reimburse all moneys advanced from the safety fund, other than moneys derived from that portion of the safety fund furnished by the failing branch.

Reimburse the safety fund.

3. To the payment and discharge of all the remaining liabilities of such branch: and

Pay the liabilities of insolvent.

4. The residue shall be divided among the stockholders of the failing branch, in proportion to the stock by them respectively held.

Stockholders take what is left

SEC. 1654. (14.) If any branch against which the state bank of Iowa shall have instituted proceedings on account of any supposed act of insolvency as prescribed by the eleventh section of this act, shall deny having committed such act of insolvency, such branch may apply to any court of competent jurisdiction for a writ of injunction to said state bank of Iowa, to suspend all further proceedings against such branch as an insolvent bank; and such court, after citing said state bank of Iowa to appear and show cause why such writ should not be granted, and after the finding of a jury that such branch has at all times continued, and still continues to redeem in gold and silver coin, its notes of circulation, shall make an order enjoining the state bank of Iowa from all further proceedings against such branch on account of the supposed act of insolvency on which such proceedings were instituted, and thereupon all the property and assets of such branch shall be restored to its directors.

Branch may enjoin the state bank.

Prove redemption in specie, and receive its assets from state bank.

SEC. 1655. (15.) If the state bank of Iowa shall, in any case, fail to proceed in the manner prescribed in the foregoing sections of this act, in providing for the payment of the outstanding notes of circulation, and in closing the affairs of any branch that shall have committed an act of insolvency, the holder of any of its notes of circulation, or other creditor of such branch, may, in case payment of such notes of circulation or other claim has been refused when lawfully demanded, and remains unpaid, apply to any court of competent jurisdiction for its writ, commanding the state bank of Iowa so to proceed; and it shall be the duty of such court, after citing such bank to appear and show cause why such writ should not issue, and upon the finding of a jury that such act of insolvency has been committed, to issue their writ com-

If state bank fails to proceed against insolvent, any holder of notes may apply to a court for a writ to compel it.

manding said bank forthwith to proceed in the manner pointed out in the preceding sections of this act, to provide for the payment of the outstanding notes of such branch, close up its affairs, and make application of its assets.

A branch refusing to reduce circulation, increase specie, pay in stock, or obey the state bank, may be enjoined by any district, or higher court, on petition of bank, or any director thereof.

SEC. 1656. (16.) That if any branch shall neglect or refuse to comply with any order of the state bank of Iowa, requiring such branch to reduce its circulation or other liabilities, or provide a larger amount of specie or other means, or to pay in its stock, or to do, or to cause to be done any other matter or thing which said bank may deem necessary for the security of such branch, or any other branch or branches, said bank or any director thereof, acting for said bank, may apply to any judge of the supreme court or district court, or any judge of a superior court, or to any judge of any other court not inferior to the district court, by petition, in which the state bank of Iowa shall be made petitioner, and the branch implicated defendant, setting forth the substance of such order, or orders, and such neglect or refusal on the part of the branch, its officers or agents, to comply therewith; and if the president, vice president, or any director of the bank, shall make affidavit of the truth of the facts therein stated, it shall be the duty of such judge to allow an injunction, and to enjoin such branch, its officers and agents, and all others in its employ, or connected therewith, from doing, or suffering, or permitting to be done, any business whatever as a bank, and from intermeddling with, or in any manner disposing of, the books, papers, moneys, choses in action, assets, or property of the branch, until the further order of the supreme court as soon as an injunction is allowed.

Injunction allowed, receiver takes possession of property of branch.

SEC. 1657. (17.) Upon the allowance of such injunction, the property, credits, securities, liens and assets of every description, of such branch, shall forthwith vest in the state bank of Iowa, who shall appoint a receiver to take possession of the same as provided in the eleventh section of this act. A certificate of appointment of such receiver, by the judge, or court, or clerk thereof, making the same, shall be sufficient authority to him to take possession of the books, property and rights of every description of such branch, and shall be full authority to the sheriff of the county where the branch is located, to take and give full possession of such books, property, and rights, with the aid of the county, if required; and said bank receiver shall be governed by the provisions of this act as provided in cases of suspension; and upon the dissolution of such injunction, or a discontinuance of such suit by the bank, all the rights and property of such branch shall be restored to and vest in such branch.

Sheriff gives him full possession and he proceeds according to law.

Not less than five persons may form a branch.

SEC. 1658. (18.) Natural persons, not less in number than five, may associate and form branches of the state bank of Iowa, for the purpose of carrying on the business of banking, each at such place in this state as shall be designated in the certificate hereinafter required to be made, subject to the contingencies, restrictions, conditions and liabilities prescribed in this act.

Certificate of name of branch.

SEC. 1659. (19.) Persons associating to form a branch shall, under their hands and seals, make a certificate, which shall specify,

Capital stock.

Name, residence and shares of each stockholder, and the date of incorporation.

1. The name assumed by such branch, and by which it shall be known in its dealings, in which name shall be included the name of the city, village or town in which its banking operations shall be carried on.

2. The amount of the capital stock of such branch, and the number of shares into which the same is divided.

3. The name and place of residence and the number of shares held by each member of the company.



4. The time when such company shall have been formed.

Which certificate shall be acknowledged before a justice of the peace or notary public, and shall be recorded by the recorder of the county where such branch is to be established, in a book to be kept by him for that purpose, which shall at all times during office hours be kept open for the inspection of any person wishing to examine the same; One copy of which certificate, duly certified, shall be transmitted to the secretary of state, who shall record and carefully preserve the same in his office, and another to the bank commissioners in this act named, until the organization of the state bank of Iowa, and thereafter to said bank.

Certificate acknowledged and recorded.

Copy filed with secretary of state

SEC. 1660. (20.) The officers of each branch shall at the end of every month, cause to be prepared a statement of the number, names and place of residence of each stockholder in such branch, also the amount of stock owned by each, and the date of the transfers of any stock with the names of the transferer and transferee, one copy of which statement shall be posted up in some conspicuous place in the bank, and one copy shall be caused by the bank to be filed in the office of the recorder of deeds in the county wherein such branch is located, which last mentioned copy or a certified copy of the same under the hand of the recorder shall be *prima facie* evidence in any court of justice in this state in a suit between the branch or state bank of Iowa and any third person.

Statement of names, residences and shares of stockholders, filed and posted up.

Which shall be *prima facie* evidence in any suit.

SEC. 1661. (21.) No branch shall be permitted to commence or carry on the business of banking under this act, unless its capital stock shall be at least \$50,000, nor shall the capital stock of any such branch ever be increased to exceed \$300,000.

Amount of capital stock.

At least fifty per cent. of the capital stock of each branch shall be paid in gold and silver coin, and shall be in the actual possession and *bona fide* the property of the branch at the time of the commencement of its banking business, and the remainder of the capital stock of such branch shall be paid in gold and silver as aforesaid in installments, each of at least ten per cent. on the whole amount of capital subscribed, as frequently as once in every four successive months, from the time of commencing business until the whole amount of such capital shall be paid up: *provided*, that the directors may postpone the payments of the deferred installments, or any part thereof, to the branches when satisfied that the public interest does not require them to be paid as frequently as above provided for.

50 percent in specie paid in at commencement.

Remainder paid in.

SEC. 1662. (22.) If any shareholder or his assignee shall fail to pay any installment on his stock when the same shall be required to be paid, the branch may sell said stock at public auction having given three weeks previous notice thereof in a newspaper published in the county where the branch is located, (and having mailed a written notice to such delinquent shareholder or his assignee) to any person who will pay the highest price therefor, not less than the amount unpaid thereon; and the excess, if any, after paying the expenses of the sale, shall be refunded to the delinquent stockholder.

Any stockholder failing to pay his installments, his stock sold after notice is given.

If no bidder can be found who will pay for such stock, the amount unpaid thereon to the branch, and costs of advertisement and sale, the amount previously paid shall be forfeited to the branch, and such stock may be subsequently sold in such manner as the branch may order.

If stock can not be sold, it is forfeited to branch.

The capital stock of each branch shall be divided into shares of one hundred dollars each, and a stock book shall be kept by each branch bank, showing who are the stockholders, and what amount is held by each individual or company, which stock shall be assignable only on the

Record of shares kept in stock book.

- books of the branch in such manner as its by-laws shall prescribe, but no shareholder shall have power to sell or transfer any shares held in his own right for the purpose of escaping liability when a bank is involved, or so long as he shall be liable either as principal, debtor, surety, or otherwise, to the branch for any debt, nor shall such shareholder, when liable to the branch for any debt that is overdue, be entitled to receive any dividends, interest or profit on such shares so long as such liability shall continue, but all such dividends, interest or profits shall be retained by the branch and applied to the discharge of such liabilities.
- Stock transferable except when bank is involved or holder indebted to bank.** SEC. 1663. (23.) No branch shall take as security for any loan or discount, a lien on any part of its capital stock, or any other than personal security and the same security, both in kind and amount, shall be required of shareholders, as of persons not shareholders; and no branch shall be the holder or purchaser of any portion of its capital stock, or of the capital stock of any other incorporated company, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, on security which at the time was deemed adequate to insure the payment of such debt, independent of any lien upon such stock; or in case of forfeitures of stock for the non-payment of installments due thereon, as provided in the twenty-second section; and stocks so purchased shall in no case be held by the branch so purchasing for a longer period of time than six months, if the same can be sold for what the stock cost, or at par.
- Loans secured by personal property only.** SEC. 1664. (24.) In all elections of directors, and in deciding all questions at meetings of the stockholders, each share shall entitle the owner thereof to one vote; stockholders may vote by proxies duly authorized in writing, but no officer, clerk, teller or book-keeper of the branch shall act as proxy, and no stockholder whose liability to the branch is past due and unpaid shall be allowed to vote.
- No branch shall buy its own or any other stocks.** SEC. 1665. (25.) The affairs of each branch shall be managed by not less than five nor more than nine directors. Every director shall be a citizen of the United States, and shall during his whole term of service reside in this state.
- One note to each share.** Each director shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the branch, and not knowingly violate or willingly permit to be violated any of the provisions of this act; that he is a *bona fide* owner in his own right, of the stock standing in his name on the books of the branch, and that the same is not hypothecated, or in any way pledged as security, for any loan obtained or debt owing; which oath, subscribed by himself and certified to by the officer before whom it is taken, shall be filed and carefully preserved in the office of the recorder of the county in which the branch is located; but no person shall be president or director of more than one branch at the same time.
- Proxies allowed, but no officer shall act as such.** SEC. 1666. (26.) The stockholders collectively of any branch, shall at no time be liable to such branch, either as principals, debtors or sureties, or both, to an amount exceeding three-fifths part of the capital stock of such branch, then actually paid in, and remaining as capital stock, nor shall the directors, collectively, be so liable to an amount exceeding one-fifth part of the stock actually paid in, standing in their names, and of which they are, collectively, the *bona fide* owners in their own right.
- Number of directors and qualification.** SEC. 1667. (27.) The directors of any branch, first elected, shall hold their places until the first Monday in January next thereafter, and until their successors shall be elected and qualified; all subsequent elections shall be held annually on the first Monday of January, and the
- Directors take oath.**
- Oath filed with county recorder.**
- Stockholders collectively not to owe over three-fifths of amount of paid in capital.**
- Directors not more than one-fifth.**
- Election of directors and terms of office.**

directors so elected shall hold their places for one year, and until their successors are elected and qualified; any director removing from the state, or ceasing to be owner of the requisite amount of stock, shall thereby vacate his place. Any vacancy in the board shall be filled by appointment by the remaining directors; the director so appointed shall hold his place until the next annual election; and if, from any cause, an election of directors shall not be made at the time appointed, the branch shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days notice thereof having been given in a newspaper printed in the county where the branch is located.

Vacancies.  
How filled.

SEC. 1668. (28.) Every branch authorized to carry on the business of banking under this act, shall be held and adjudged to be a body corporate, with succession, from the date of its certificate of association until the first day of July, A. D. 1878, and thereafter until its affairs can be closed; and by its corporate name shall be competent to contract, prosecute and defend actions of every description, as fully as natural persons; and process against such branch may be served upon its president or cashier, or by leaving a copy thereof at its usual place of business, during the usual business hours.

Each branch a corporate body from 1878  
Powers

Each of said branches shall, during the term aforesaid, if so long it shall comply with the provisions of this act, have power to issue notes for circulation furnished it by the State Bank of Iowa, to loan money, buy, sell and discount bills of exchange, notes, and all other written evidences of debt, except such as it shall be prohibited by this act, from buying, selling and discounting; but no such loan shall be made on any note, bill of exchange or other evidence of debt having more than four months to run before maturity; shall have power to receive deposits; buy and sell gold and silver coin and bullion; collect and pay over money, and transact all other business properly appertaining to banking, subject, however, to the provisions and restrictions of this act; may acquire, hold and convey such real estate as may be necessary for the convenient transaction of its business, and no more; but may, however, acquire title to any real estate pledged to secure any debt previously contracted, or purchased on an execution or order of sale, to satisfy any judgment or decree in its favor, or which shall have been conveyed to it in payment of any previous debt, but shall not hold any real estate so acquired longer than in the judgment of the board of directors, is necessary to save the said branch holding such real estate from loss, and it is hereby made the duty of the board of directors of each branch to offer any real estate so acquired for sale at least once in each year, first giving thirty days notice in some newspaper published in the county where such real estate is situated, of the time and place of such sale, if any newspaper be published in such county, and if not, then in some newspaper published the nearest thereto; and at such sale, if the amount bid for such real estate be sufficient to reimburse the said branch in the amount for which such real estate was taken by the branch, with interest and costs, then it shall be the duty of the board of directors of such branch to sell and convey such real estate, but not otherwise, unless in their judgment it be deemed necessary for the interest of the said branch to do so.

May transact general banking business

Hold real estate.

SEC. 1669. (29.) No branch shall at any time issue or have in circulation any note, draft, bill of exchange, acceptance, certificate of deposit, or other evidence of debt, which, from its character or appearance, shall be calculated or intended to circulate as money, other than such notes of circulation as are by this act described, and which such

Branch shall not calculate any other notes than their own

The branches must take each other's notes at par	bank is by this act authorized to issue for the purpose of being circulated as money.
Branch have 25 per cent. specie on hand.	SEC. 1670. (30.) Each branch shall receive at par at the office or banking house of such branch, in payment of debts due at such branches, for notes of hand, bills of exchange, or other evidence of debt, discounted or purchased by, or belonging to such branch, the notes of circulation issued by any other branch of the State Bank of Iowa.
Shall not issue notes with a less amount in safe.	SEC. 1671. (31.) Each branch shall at all times have on hand in gold and silver coin in its vault, an amount equal to at least twenty-five per cent. of the amount of its outstanding notes of circulation; and whenever the amount of its outstanding notes of circulation shall exceed the above named proportion, no more of its notes shall be paid out, or otherwise put in circulation by such branch, nor shall such branch increase its liabilities by making any new loans or discounts, other than discounting or purchasing bills of exchange, payable at sight, nor make any dividend of its profits, until the required portion between its outstanding notes of circulation and gold and silver coin on hand shall be restored.
Branch keep 25 per cent. of deposits on hand.	SEC. 1672. (32.) Each branch of the state bank shall be required to keep in its vaults over and above the amount required to be kept for the protection and redemption of its circulation, as required in the last preceding section, at least twenty-five per cent. of its current deposits, and shall be prohibited from paying interest on current deposits.
No interest on deposits.	SEC. 1673. (33.) No branch authorized under this act shall at any time be indebted or in any way liable to an amount exceeding two-thirds of its capital stock at such time actually paid in, and remaining as capital stock undiminished by losses or otherwise, except on the following accounts—that is to say:
Branch must not be in debt over two-thirds of its capital stock.	<ol style="list-style-type: none"> <li>1. On account of its notes of circulation.</li> <li>2. On account of moneys deposited with or collected by such branch.</li> <li>3. On account of bills of exchange or drafts drawn against money actually on deposit to the credit of, or due to such branch.</li> <li>4. Liabilities to its stockholders on account of money paid in on capital stock, dividends thereon, and undivided profits.</li> </ol>
Notes not to be exchanged for capital stock.	Nor shall any branch, either directly or indirectly, pledge, hypothecate, or exchange any of its notes of circulation for the purpose of procuring money, to be paid in on its capital stock, nor pledge or hypothecate directly or indirectly, any of such notes to be used in its ordinary banking operation.
Capital stock not to be withdrawn.	SEC. 1674. (34.) No branch shall, during the time it shall continue its operations as a branch, withdraw or permit to be withdrawn, either in form of dividends or loans to stockholders, for a longer period of time than four months, or in any other manner, any portion of its capital stock; and if losses shall at any time have been sustained by any branch, equal to, or exceeding its undivided profits then on hand, no dividends shall be made, and no dividends shall ever be made by any branch while it shall continue its banking operations to an amount greater than its net profits then on hand, deducting therefrom its losses and bad and suspended debts; and all debts due and unpaid for a period of six months, unless the same shall be well secured, and shall be in the process of collection, shall be considered bad or suspended debts, within the meaning of this section.
Dividends declared only on net profits.	SEC. 1675. (35.) The directors of each branch shall semi-annually on the first Monday of May and November, declare a dividend of so much of the net profits of the branch as they shall judge expedient and
Semi-annual dividends.	

as shall be approved by the state bank; and on each dividend day the cashier shall make a full, clear and accurate statement of the condition of the branch as it shall be on that day, after declaring the dividend, which shall be verified by the oath of the cashier, president, and two of the directors; and similar statements verified in like manner, shall also be made on the first Monday in each month in each year, which statement shall contain:

1. The amount of the capital stock actually paid in, and then remaining as the capital stock of the branch. Cashier's bank statement, showing:  
The capital stock.

2. The amount of the bills or notes of the branch then in circulation, specifying the amount of each denomination. Bills in circulation.

3. The greatest amount in circulation at any time since the making of the last previous statement, as shall have been exhibited by the weekly statements of the cashier, specifying the time when the same occurred. Greatest circulation at one time

4. The amount of debts of every kind due to the branches of the state bank of Iowa, the amount due to other banks of the state, and the amount due to banks not of this state. The debts.

5. The amount due to depositors. The deposits.

6. The total amounts of debts and liabilities of every description, and the greatest amount since the making of the last previous statement, specifying the time when the same occurred, as exhibited by the weekly statement of the branch. The debts of all kind.

7. The total amount of dividends declared on the day of making the statement. The dividends.

8. The amount of gold and silver coin and bullion belonging to such branch and in its possession at the time of making the statement, designating the amount of each. The gold and silver.

9. The amount subject to be drawn at sight, then remaining on deposit with solvent banks, or bankers of the country, specifying each city or town, and the amount deposited in each. The exchange.

10. The amount then on hand, of bills or notes issued by branches of the state bank of Iowa, the amount issued by other banks of this state, and the amount issued by banks not of this state. The currency.

11. The amount of balances due from branches of the state bank of Iowa, the amount due from other banks of this state, and the amount due from the banks not of this state, excluding in the latter case, deposits in the cities of New York, Philadelphia, Boston, Baltimore, and other cities and towns, subject to sight drafts. The balances in the banks.

12. The amount on hand of bills, bonds, notes, and other evidences of debt, discounted or purchased by the branch, specifying particularly the amount of suspended debts, the amount considered good, the amount considered doubtful, and the amount in suit or judgment. The bills receivable.

13. The value of real and personal property held for the convenience of the branch, specifying the amount of each. The banking-house and fixtures.

14. The amount of real estate taken in payment of debts due the branch. The real estate.

15. The amount of undivided profits of the branch. The undivided profits.

16. The total amount of the liabilities to the branch by the directors thereof, collectively specifying the gross amount of such liabilities as principal debtors, and the gross amount as indorsers or sureties. The liabilities of directors.

17. The total amount of liabilities to the branch of the stockholders thereof, collectively specifying the gross amount of such liabilities as principal debtors, and the gross amount as indorsers or sureties; which statement shall be forthwith transmitted to the state bank of Iowa, and the auditor of state. The liabilities of stockholders.

Statement published	An abstract of every statement, showing the condition of the branch, shall be immediately published by the branch in some newspaper printed in the county where such branch is situated, a copy of which statement shall be sent to each branch of the state bank of Iowa.
Tax on bank stock.	SEC. 1676. (36.) The general assembly shall never impose any greater tax upon property employed in banking under this act, than is or may be imposed upon the property of individuals.
Interest and discount at 10 per cent. till 1863.	SEC. 1677. (37.) Each branch may take, receive, or charge on any loan or discount made, or upon any note or bill of exchange, or other evidence of debt, discounted or purchased by them, interest at the rate of ten per centum per annum on the amount of any such note, bill of exchange, or other evidence of debt so discounted or purchased and no more, until the first day of January, 1863, after which time no more than eight per cent. shall be so taken, received or charged: <i>provided, however,</i> that interest may be reserved or taken in advance at the time of making the loan or discount, according to the usual rates of banking, or as calculated in Rowlet's tables; and the knowingly taking, reserving or charging on any debt or demand discounted or purchased by any branch, a rate of interest greater than that allowed by this section, shall be held and adjudged a forfeiture of such debt or demand, but the purchase of a bona fide bill of exchange or note payable at another place than the place of such purchase or discount, and the taking or reserving interest thereon at the rate aforesaid, from the time of such purchase or discount until the maturity of such bill or note, shall not be held usurious, although exchange on the place where it is made payable is at the time of such purchase or discount, worth a premium; nor shall the discount or purchase of a bona fide bill or note, payable at a place, between which and the place of discount or purchase, there may be a difference in exchange, and the taking in addition to the rate of interest aforesaid the rate of exchange between such places, be deemed usurious: <i>provided,</i> that no loan to, or discount in favor of any director or stockholder in which more than such interest as is allowed in this section shall be taken, reserved, or charged, shall be forfeited, but the same shall be valid against such party: <i>provided, further,</i> that in no case shall more than the current rate of exchange between such places, be taken.
Bank discount allowed	
Usury forfeits the whole debt.	
Purchase of exchange not usurious.	
Loan to director, &c., not forfeited.	
Rate of exchange.	
No one person or firm can be indebted more than one-fourth of the circulation.	SEC. 1678. (38.) The total liabilities of any person, or of any company or firm (including in the liabilities of a company or firm, the liabilities of the several members thereof,) to any branch as acceptor or acceptors of bona fide bills of exchange payable out of this state, shall at no time exceed one-fourth of the amount of the notes which such branch is authorized to circulate, exclusive of liabilities as acceptor or acceptors, one-tenth, and exclusive of all liabilities on such bills of exchange one-twentieth part of the amount of such notes.
No branch shall put doubtful notes into circulation.	No branch shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of depositors, nor shall it in any mode put in circulation the notes of any bank or banking company which notes shall not at that time be receivable at par in payment of debts by the branches so paying out or circulating such notes, nor shall it knowingly pay out or put in circulation any notes issued by any bank or banking company which at the time of such paying out or putting in circulation is not redeeming its notes in gold and silver.
Bills receivable made payable to branch only.	All notes, bills, and other evidences of debt, excepting bills of exchange, discounted by any branch, shall be made by the terms thereof, or by special indorsement, payable solely to such branch, and no such evidence of debt shall be assignable except for collection, or for the following purposes:

1. To pay and redeem the circulating notes of such branch.

When assignable.

2. To pay other liabilities of such branch, and after such liabilities shall have been discharged ;

3. To divide among the stockholders on their stock.

No branch shall be permitted, in receiving payment at its banking-house, or other places, than where the same was payable, of any note, bill, or other evidence of debt, due to such branch, and payable at a place other than its banking-house, to receive in addition to the amount of such debt and the legal interest due thereon, any sum whatsoever as premium, exchange or damages : *provided*, that nothing in this section contained, shall prevent such branch from receiving damages allowed by law upon any bona fide bill of exchange, duly protested for non-acceptance or non-payment.

No evasion of the usury law.

Legal costs allowed.

SEC. 1679. (39.) All transfers of notes, bonds, bills of exchange, and other evidence of debt owing to any branch, or of deposits to its credit ; all assignments of mortgages or other securities on real estate, or of judgments or decrees in its favor ; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its stockholders or creditors ; all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner provided by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be held utterly null and void.

All transactions for preferred credits, or for disposing of assets, declared null and void.

SEC. 1680. (40.) If the directors of any branch shall knowingly violate, or knowingly permit any of the officers, agents or servants of such branch to violate any of the provisions of this act, all the rights, privileges and franchises of such branch shall thereby be forfeited ; such violation shall, however, be determined and adjudged by a court of competent jurisdiction, agreeably to the laws of this state and the practice of such court, before the corporation shall be declared dissolved, and in case of such violation, every director who participated in, or assented to the same, shall be held liable in his personal and individual capacity for all damages which the branch, its stockholders, or any other persons, body politic or corporate shall have sustained in consequence of such violation.

Any violation of this act punished with forfeiture of privileges.

Directors individually responsible.

SEC. 1681. (41.) Every president, director, cashier, teller, clerk or agent of any branch, who shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of such branch, or shall without authority from the directors, issue or put in circulation any of the notes of such branch, or shall without such authority, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, sign any note, bond, draft, bill of exchange, mortgage, or other instrument of writing, or shall make any false entry on any book, report or statement of the branch, with an intent in either case to injure or defraud such branch, or to injure or defraud any other company, body corporate or politic, or any individual person, or to deceive any officer or agent appointed to inspect the affairs of any branch, or shall make, or shall omit to make, or shall advise or consent to the making of any report or statement required by this act, in such manner as shall be designed to evade the provisions of this act, shall be deemed guilty of a felony, and upon conviction thereof, shall be confined in the penitentiary at hard labor not less than one nor more than twenty years.

Dishonesty of bank officers punished.

SEC. 1682. (42.) Stockholders in branches, shall each be individually and severally liable to the creditors of the branch of which they are the stockholders, over and above the amount of stock by them held, to

Stockholders individually liable.

- an amount equal to their respective shares so held for all its liabilities, accruing while they remain stockholders and no transfer of stock shall affect such liability, and should any such branch become insolvent, and its assets be found insufficient to pay its debts and liabilities, its stockholders may be compelled to pay such deficiency in proportion to the amount of stock owned by each, and should the whole amount for which stockholders are individually responsible, as provided in this section, be found in any case to be inadequate to the payment of all the residue of the debts of any branch after the application of its assets to the payment of such debts, then, the moneys due from stockholders on account of their individual liabilities as such, shall be distributed equally among all the creditors of such branch, in proportion to the amount due to each; the personal liability in this section provided for, is over and above the stock owned by stockholders, and any amount unpaid thereon.
- Transfer of stock does not change liability.** SEC. 1683. (43.) The term stockholder or shareholder, as used in this act, shall apply not only to such persons as appear by the books of the association to be such, but also to every equitable owner of stock, although the same may appear on such books in the name of another person, and also to every person who shall have advanced the installments or purchase money of any stock in the name of any person under twenty-one years of age, and while such person remained a minor to the extent of such advance and also to every guardian or other trustee, who shall voluntarily invest any trust funds in such stock, and no trust funds in the hands of such guardian or trustee shall be in any way liable under the provisions of this act, by reason of any such investment, nor shall the person for whose benefit any such investment may be made, be responsible in respect to such stock until thirty days after the time when such persons respectively become competent and able to control and dispose of the same; but the guardian or other trustee making such investment as aforesaid, shall continue responsible as a stockholder, until such responsibility devolves upon the person beneficially interested therein, and in respect to stock held by a guardian or other trustee under a transfer of the same by a third person, or under positive directions by a third person for such investment, the person making such transfer or giving such directions, and his executors and administrators shall, for the purpose of this act be deemed a stockholder, and the estate of such person, if he be deceased, shall be responsible for the debts and liabilities chargeable on such stock according to the provisions of this act.
- Stockholders defined.** SEC. 1684. (44.) The general assembly may alter or repeal this act at pleasure, in the manner provided in the constitution of this state, but no act altering or repealing this act, shall impose any injustice or wrong upon the stockholders of any branch.
- By proxy.** SEC. 1685. (45.) Every branch shall have power to make all necessary and proper by-laws for the management and control of its business, and to fix and regulate the rate of charges for making collections, subject to be controlled therein by the state bank of Iowa.
- Guardians stockholders.** SEC. 1686. (46.) No branch shall issue any notes intended for circulation as money, except the notes furnished for that purpose by the state bank of Iowa, and all such notes shall be payable at the branch by which they are issued, in gold and silver coin, the lawful currency of the United States, as provided for in section ten of this act, on demand; they shall be signed by the president or vice president of the proper branch, and countersigned by the cashier thereof, made payable to bearer, and shall be negotiable by delivery; all other evidences of debt, issued by any branch, shall be negotiable or transferable in the same manner
- Trustees stockholders.**
- Responsibility of guardians.**
- The legislature may alter and repeal.**
- By-laws of branches.**
- Notes issued redeemable in specie.**
- Signed and countersigned.**



as if issued by a natural person, and shall be binding on the branch, whether under seal or not; and all such evidences of debt, other than notes of circulation, shall be payable to the order of some person therein named.

Certificates made payable to order.

SEC. 1687. (47.) No branch shall be put in circulation in this state, the bills or notes of any bank or banking company out of the state, except such as are received in the usual course of business; nor shall any branch either directly or indirectly exchange its bills or notes intended to circulate as money with any bank or banking company out of the state, or with the agents of such bank, for the bills or notes of such bank or banking company, with a view to circulate the same in this state.

Special circulation of foreign bills prohibited.

SEC. 1688. (48.) When any number of persons shall have associated together for the formation of a branch as provided for in section nineteen, they shall give twenty days public notice in some newspaper published in the town or city where it is proposed to establish such branch, of their purpose to open a book for the subscription of the capital stock of said branch, specifying the time and place thereof; such book shall be kept open for two successive days, between the hours of ten A. M. and two P. M. of each day, under the control and direction of such association, and shall be accessible to every person desiring to subscribe to stock of the proposed branch. On the first day no person, company or business firm, composed of one or more individuals shall be permitted to subscribe to more than ten shares, and on the second day to no more than fifty shares, unless at the time for closing the book on that day the aggregate amount of stock subscribed shall not exceed the amount of capital authorized in section twenty-one.

Persons forming a bank shall give notice.

Stock books opened.

Subscription of stock regulated.

SEC. 1689. (49.) The number of branches of the state bank of Iowa shall not exceed thirty. The board of directors of the state bank of Iowa may increase the capital stock of any branch whose capital does not equal three hundred thousand dollars, by authorizing such branch to receive at any time such additional subscription to its capital stock as will increase the same to any amount less than three hundred thousand dollars, if said board of directors shall be satisfied that such additional amount of capital is demanded by the public interest, and can be safely and profitably employed; but the aggregate capital of all the branches shall not exceed six millions of dollars. No branch shall be established in any town with a less population than five hundred, nor shall two branches be established in the same town or city.

Number of branches.

Stock of each branch.

Aggregate capital.

SEC. 1690. (50.) The branches shall continue to exist so long as necessary for the settlement of their affairs, notwithstanding the repeal of this act; and no law shall ever be passed diverting or appropriating the assets of any such branch to any person other than to the payment of its debts and liabilities, and the distribution of the residue among its stockholders, in proportion to the stock by them severally owned.

The branches continued to wind up. Appropriation of assets.

SEC. 1691. (51.) To carry into effect the provisions of this act, C. H. Booth, of Dubuque county, E. H. Harrison, of Lee county, Ezekiel Clarke, Johnson county, J. W. Dutton, of Muscatine county, Wm. J. Gatling, of Polk county, C. W. Slagle, of Jefferson county, Elihu Baker, of Linn county, William S. Dart, of Mahaska county, L. W. Bab-bitt, of Pottawattamie county, and Edmund T. Edgerton, of Lucas county, shall be and they are hereby appointed commissioners, and they, or a majority of them, after taking an oath diligently, faithfully and impartially to perform the duties assigned them by this act, a certificate of which oath shall be filed and carefully preserved in the office of the secretary of state, shall constitute a board, to be designated the board of

Bank commissioners.

Qualification.

<p>Vacancies filled. Bank directors.</p> <p>Compensation.</p> <p>Terms of office. Successors elected.</p> <p>Eligibility.</p> <p>Commissioners meet.</p> <p>Choose presi- dent.</p> <p>Minutes of pro- ceedings.</p> <p>Commissioners examine certifi- cates of branches.</p> <p>Appoint agent to examine con- dition of branch, stock paid in, character of managers, if the law is complied with, to take ac- knowledgment of statement. Report of direct- ors.</p> <p>Commissioners report to gov- ernor.</p>	<p>bank commissioners, which board shall continue until the organization of the state bank of Iowa, as herein provided for, and thereafter the duties which they are required to perform by this act shall be performed by the said bank; and if any of said commissioners shall refuse to serve, shall die or resign, his place shall be filled by appointment by the governor. Hoyt Sherman, of Polk county, Benjamin Lake, of Clinton county, and Elias H. Williams, of Clayton county, are hereby appointed directors of the state bank of Iowa, on the part of the state, who shall have the same powers as the directors on the part of the bank, and who shall be paid by the state, and shall receive three dollars per day for the time actually engaged in their duties, and mileage the same as members of the general assembly. The term of service of said directors shall be for two years and until their successors are elected and qualified. It shall be the duty of the general assembly to elect three directors of the state bank of Iowa at each regular biennial session. No person shall be eligible to the office of state director who holds any office or appointment under any of the branches or owns any stock in the same, and the acceptance of any office of trust or profit from any branch, or the acceptance of any stock in any branch by a state director during his term of service shall be deemed a resignation, and the governor shall fill by appointment the vacancy.</p> <p>Said commissioners shall meet at Iowa city, at such time, within thirty days after the adoption of this act, as shall be appointed by the governor, who shall notify each member of his appointment, and of the time and place of meeting. They shall, when met, appoint one of their number to be their president, who shall, under the order of the board, sign all official documents; and they shall cause a fair and true record of all their official proceedings to be kept in a book to be provided for that purpose, which shall be delivered by the president of said board to the state bank of Iowa, as soon as the same shall be organized.</p> <p>SEC. 1692. (52.) The board of bank commissioners shall examine their certificates of the formation of branches transmitted to them, as required by this act, and shall, by one of their own number, or other special agent appointed by them for that purpose, who shall not be a stockholder in any of the branches formed under this act, immediately proceed to examine the condition of each of the branches which shall have transmitted to said board the required certificate; and it shall be the special duty of such agent to carefully count and otherwise ascertain the amount of money paid in on account of its capital stock; to ascertain the name and place of residence of each of the directors of such branch, and whether their stockholders, directors and officers are men of responsibility and integrity, and entitled to the public confidence, and the amount of capital stock of which each is the bona fide owner; whether such branch has complied with all the requirements of this act, necessary to entitle the branch to engage in the business of banking; and shall cause to be made, and attested by the oath of a majority of the directors, and by the cashier of such branch, a statement of all the material facts necessary to enable the board of bank commissioners to determine whether such branch is lawfully entitled to commence the business of banking under the provisions of this act; and such agent shall immediately report to the board of bank commissioners such statement, and his proceedings in the premises.</p> <p>SEC. 1693. (53.) If, upon a careful examination of the certificates of association, and the reports and statements of the special agents appointed to ascertain whether the branches so organized have complied with the provisions of this act, it shall appear that five or more such</p>
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branches have been formed, and that their stockholders, directors and officers are men of responsibility and integrity, and entitled to public confidence, and that such branches are lawfully entitled to commence the business of banking, the commissioners shall certify the same to the governor, and shall immediately notify each of said branches thereof; and within ten days after receiving such notice, each branch shall appoint, in such manner as the directors thereof shall prescribe, one person to be a director of the state bank of Iowa. Branches choose officers.

SEC. 1694. (54.) The governor, if he be satisfied that the law has in all respects been complied with, shall issue his proclamation, setting forth that such branches are authorized to commence and carry on banking, at the places severally designated in their certificates of association; which proclamation shall be recorded in the office of the governor, and a copy of said record certified under the great seal of the state of Iowa, shall be prima facie evidence of the organization of such bank. Governor issues proclamation.  
Record evidence of organization.

SEC. 1695. (55.) The bank commissioners, and all agents appointed by them, shall each be entitled to receive for their services under this act, five dollars per day for every day necessarily employed in the discharge of their duties, and the same mileage as is received by the members of the general assembly, to be paid by the state bank of Iowa. Compensation of commissioners and agents.

SEC. 1696. (56.) This act shall take effect and be in force from and after its approval by a majority of all the electors of this state voting for and against it, at an election provided by law, and not otherwise. Takes effect.

## CHAPTER 67.

### AGRICULTURE.

#### ARTICLE 1.

An Act for the encouragement of Agriculture.

[Passed Jan. 28, 1857; took effect Sept. 5, 1857? Laws of Sixth General Assembly, Chapter 188, page 297.]

SECTION 1697. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That it shall be the duty of all county agricultural societies in this state, whether now organized or hereafter to be organized, annually to offer and award premiums for the improvement of stock, tillage crops, implements, mechanical fabrics and articles of domestic industry, and such other articles and improvements as they may deem proper. And it shall also be their duty so to regulate the amount of premiums and the different grades of the same, as that it will be competent for small as well as large farmers and artizans to compete therefor. County societies.

SEC. 1698. (2.) It shall be the duty of each county society to publish annually a list of the awards, and an abstract of the treasurer's account, in one or more newspapers of the county or adjoining counties, and to make a report of their proceedings during the year, and a synopsis of the awards. And also make a report of the condition of agriculture in their county to the board of directors of the Iowa state agricultural society; which shall be forwarded by mail or otherwise to the secretary of said society, on or before the first of December of each Publish awards and make reports.

year, and a failure to make such report shall forfeit twenty per cent. upon the amount said society is entitled to draw from the state treasury, and the secretary shall be liable to the society for that amount. And it shall be the duty of the auditor of state, before issuing his warrant in favor of said societies for any amount, to demand the certificate of the secretary of the state society that such report has been made.

Officers of state society.

SEC. 1699. (3.) That the present officers and directors of the Iowa state agricultural society shall continue to hold their respective offices till the second Wednesday of January, one thousand eight hundred and fifty-eight, and until their successors are elected as hereinafter determined: *provided*, said society shall at its next annual meeting alter or amend its articles of incorporation in such manner as not to conflict with the provisions of this act.

Meet and elect directors.

SEC. 1700. (4.) It shall be the duty of the officers and directors of the said state society, together with the presidents of all county societies, to meet at the capital of the state on the second Wednesday of January, one thousand eight hundred and fifty-eight, and proceed to elect by ballot, a president, vice-president, secretary, treasurer, and ten directors, who together, or a quorum of five of their number, regularly convened, shall constitute the board of directors of the Iowa state agricultural society. The president, vice-president, secretary, and treasurer, shall serve one year. The time that each director shall serve, shall be determined by ballot, so that the term of service of five of the number shall expire in one year from their election, and the remaining five in two years; and at all subsequent elections, directors shall be chosen for two years; and the president of the society shall have power to call meetings of the board whenever he may deem it expedient.

Meeting of the board.

SEC. 1701. (5.) There shall be held at the capital of the state, on the second Wednesday of January in each year, an annual meeting of the board of directors of the Iowa State Agricultural Society, together with the president of each county society in the state, or other delegate therefrom, duly authorized in writing, who shall for the time being, be ex officio, members of the board, and entitled to all the rights and privileges of any other member; and at such annual meeting, officers and directors shall be chosen, the place for holding the next annual exhibition shall be determined, premiums on essays and field crops shall be awarded, and all questions relating to the agricultural development of the state may be considered.

Publish list and rules.

SEC. 1702. (6.) The premium list and rules of exhibition shall be determined and published by the board of directors prior to the first of April in each year.

Duty of board.

SEC. 1703. (7.) It shall be the duty of the said board of directors to make an annual *report*\* to the general assembly of the state, or to the governor in the alternate years when the general assembly may not be in session, embracing the proceedings of the said society and board of directors for the past year, and an abstract of the proceedings of the several county societies, as well as a general view of the condition of agriculture throughout the state, accompanied with such essays, statements and recommendations as they may deem interesting and useful, which reports shall be published by the state, under the supervision of the secretary of the society.

State assist Co. societies.

SEC. 1704. (8.) That when any county or district society, composed of one or more counties, shall have made their report to the state society

\* See section 1741.

as above provided, and raised during the year any sum of money for actual membership, they shall be entitled to an equal sum, not exceeding two hundred dollars, from the state treasury, upon the affidavit of the president, secretary or treasurer of said county society that such sum was raised for the legitimate purpose of the society during the current year.

SEC. 1705. (9.) That the sum of two thousand dollars be appropriated annually for the benefit of the Iowa State Agricultural Society, and shall be paid by the auditor of state upon the order of the president of said society, in such sums and at such times as may be for the interests of said society. Annual appropriation.

SEC. 1706. (10.) That the act for the encouragement of agriculture approved February 5, 1851, and the act amendatory thereto, approved January 21, 1852,\* appropriating money to county agricultural societies, and also an act affording aid and patronage to the state agricultural society, approved January 22, 1855, be and the same are hereby repealed. Repeal.

SEC. 1707. (11.) No person or persons shall be permitted to sell any intoxicating liquors of any kind, or exhibit any animal or other curiosity for money, or hold auction for the sale of any goods, or sell by lottery or chance any articles of property within the enclosure or within eighty rods of said enclosure where any state or county agricultural fair is being held, without a written permit from the executive officer of the association holding said exhibition, and a regular license from the proper authorities. Regulations of fairs.

SEC. 1708. (12.) The president of said association may arrest or cause to be arrested, any person or persons violating the provisions of the eleventh section of this act, without warrant, and cause the same to be sent forthwith before any justice of the peace or other magistrate of competent jurisdiction; and if the magistrate shall find the person or persons so arrested, guilty of the offense charged, he shall each person so found guilty, in a fine of not less than five dollars nor over one hundred dollars, for each offense: *provided*, that this act shall not interfere with the prosecution of any regular legitimate business, carried on in a permanent manner, in an established business house. Offenders.

SEC. 1709. (13.) This act shall take effect from and after its publication in the Iowa Farmer and North Western Farmer.

ARTICLE 2.

An Act to authorize County Judges to subscribe Stock in Agricultural Societies.

[Passed March 22, 1858, took effect April 7, 1858; *Laws of Seventh General Assembly, Chapter 101, page 200.*]†

SECTION 1710. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That in any county in which an agricultural society shall have or may hereafter be organized under the laws of this state, the county judge of such county shall, upon being petitioned to that effect, by a majority of the legal voters of such county, as shown by the last election preceding for county officers, subscribe in the name of the county to the stock of such agricultural society, such sum as may be so petitioned for, not to exceed one thousand dollars, nor more than five hundred dollars in counties with less than four thousand inhabitants, to be expended in fitting up fair grounds. County judge may subscribe upon petition of voters.

\* 1852 in archives, but 1853 meant?

† Does the act creating board of supervisors affect this act?—see section 312.

- Money paid upon certificates of stock. SEC. 1711. (2.) That the county *judge*, upon the receipt of the certificate of stock of such society, duly issued and authenticated, as directed by the articles of association of such society, shall issue orders on the treasury of the county for the amount, in such sums as shall seem best, and when the same is paid, such county shall hold such stock in the same manner and subject to the same rules as other shareholders, and the county *judge* shall represent the county in all meetings of the stockholders.
- Money expended. SEC. 1712. (3.) The money received by the associations from the county treasury, shall be expended under the direction of the board of directors of the association.
- Money repaid in four years. SEC. 1713. (4.) The amount so paid out of the treasury, shall be levied and collected as other taxes are—one-fourth of the amount in each year thereafter, until the same is all levied and collected.

## ARTICLE 3.

*Agricultural College.*

An Act to provide for the establishment of a State Agricultural College and Farm, with a Board of Trustees, which shall be connected with the entire Agricultural interests of the State of Iowa.

[Passed March 22, 1858, took effect March 31, 1858; *Laws of Seventh General Assembly, Chapter 91, page 173.*]

- A college established. SECTION 1714. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That there is hereby established a state agricultural college and model farm, to be connected with the entire agricultural interests of the state.
- Board of managers. SEC. 1715. (2.) Said college and farm shall be under the management of a board of eleven trustees, and the governor, the president of the state agricultural society, and the president of the state agricultural college, who shall be ex officio members of said board.
- Terms of office. SEC. 1716. (3.) The board of trustees shall at their first meeting under this act determine by lot their several periods of service, five of whom serving for two years, and six serving for four years, and until their successors are elected and qualified. At the annual meetings in the fall before vacancies occur in this board, each county agricultural society in the state may nominate one person for trustee, from whom the general assembly shall choose trustees to fill vacancies every two years as they occur, discriminating so as to give, if possible, one trustee to each judicial district in the state. Any vacancy in the board of trustees, caused by death, resignation or removal from the state, may be filled by a vote of the majority of the members of said board. Each trustee is required to give a satisfactory bond to the state in such sum as may be required by the governor, for the faithful discharge of the duties imposed upon them.
- Official bond. SEC. 1717. (4.) The president of the college shall be president of the board of trustees. It shall be his duty to preside at all meetings of the board. He shall control, manage and direct the affairs of the college and farm herein established, subject to such rules as may be prescribed by the trustees.
- President of college. SEC. 1718. (5.) Said board shall have power:
- Powers of trustees. 1. To elect a president for the state agricultural college and farm, and in the absence of the president, a president pro tempore, a secretary, and such other officers as may be required in the transactions of the business of the board.
- Elect officers.

2. To make all necessary rules and regulations for the government of the college and farm. Establish rules.

3. To purchase lands and erect buildings thereon, in accordance with the further provisions of this act. Purchase lands.

4. To keep a full and complete record of all their proceedings, and do such other things as may be found necessary to carry out the intent and meaning of this act. Keep a record.

SEC. 1719. (6.) The trustees shall receive no compensation except for mileage in traveling to and from the meetings of the board, which shall be at the same rate and computed in the same manner as the mileage allowed to members of the general assembly; and the auditor of state is hereby authorized to audit and allow the claims for such attendance, upon not more than three meetings annually. Compensation of trustees.

SEC. 1720. (7.) The first session of the board of trustees shall be held at the capitol of the state, on the second Monday in January, 1859. First session.

SEC. 1721. (8.) A majority of the board of trustees shall be a quorum for the transaction of business. Quorum.

SEC. 1722. (9.) Said board of trustees are hereby authorized to select and purchase suitable lands, not less than six hundred and forty acres, for the use and purposes of the college herein established. Purchase suitable land.

SEC. 1723. (10.) Said board shall receive proposals for sale of lands for the use of said college before purchasing the same, and in the purchase, the price, location, quality and variety of soil, advantages of water, timber, stone, et cetera, shall be considered. Proposals of sale and advantages of location.

SEC. 1724. (11.) There is hereby appropriated the proceeds of the sale of five sections of land heretofore granted to the State of Iowa by congress for the erection of capitol buildings, for the use and benefit of the college herein established: *provided*, congress diverts the same for this purpose; and also the proceeds of the sale of all other lands granted or which may be granted by congress to the state of Iowa for the purposes contemplated by this act. Land appropriated for building.

SEC. 1725. (12.) There is hereby appropriated out of any moneys in the treasury of the state, not otherwise appropriated, the sum of ten thousand dollars for the purchase of lands as provided in section nine of this act, and the improvement of the same. \$10,000 appropriated.

SEC. 1726. (13.) Upon the execution and delivery to the secretary of state of the proper conveyance or conveyances of the land purchased as hereinbefore provided, with a certificate of the attorney general of the state, that he has examined the title to the same and finds it unencumbered and perfect and in accordance with this act, and that the location has been approved by the trustees, the auditor of state shall draw his warrant or warrants on the state treasurer for the amount of such purchase in favor of the party or parties to whom such sum or sums may be due; said purchase or purchases to be made in the year eighteen hundred and fifty-nine previous to the first day of July of that year. Deed of conveyance. Auditor's warrants. Purchase completed.

SEC. 1727. (14.) If any moneys remain unexpended after the purchase of said farm or lands, the trustees are hereby authorized to appropriate the same, or so much thereof as is needed for the erection of the necessary buildings for the college on the farm, and otherwise improving the same. Buildings erected.

SEC. 1728. (15.) The course of instruction in said college shall include the following branches, to wit: natural philosophy, chemistry, botany, horticulture, fruit growing, forestry, animal and vegetable Studies pursued

	anatomy, geology, mineralogy, meteorology, entymology, zoology, the veterinary art, plain mensuration, leveling, surveying, book keeping, and such mechanic arts as are directly connected with agriculture. Also, such other studies as the trustees may from time to time prescribe, not inconsistent with the purposes of this act.
Professorships.	SEC. 1729. (16.) The board of trustees shall establish such professorships as they may deem best to carry into effect the provisions of this act.
Tuition free.	SEC. 1730. (17.) Tuition in the college herein established shall be forever free to pupils from this state over fourteen years of age and who have been resident of the state six months previous to their admission. Applicants for admission must be of good moral character, able to read and write the English language with ease and correctness, and also to pass a satisfactory examination in the fundamental rules of arithmetic.
Qualification for admission.	
Hours of labor.	SEC. 1731. (18.) The trustees upon consultation with the professors and teachers shall, from time to time, establish rules regulating the number of hours, to be not less than two in winter and three in summer, which shall be devoted to manual labor and the compensation therefor; and no student shall be exempt from such labor except in case of sickness or other infirmity.
Book keeper elected.	SEC. 1732. (19.) The board shall elect annually from the teachers or more advanced pupils, a competent book keeper, who shall keep an accurate account of the receipts and disbursements of said college and farm from all sources; he shall also keep a minute and accurate account with each field and of each crop, which shall embrace the time and manner of cultivation, the amount of seed and the product, condition of the field before planting and sowing, and after harvesting, and kind and amount of fertilizers used; also a list of animals and the value thereof, kept on the farm and the treatment of the same; also, a daily register of the weather; of all of which he shall make an annual statement or synopsis of the same, to the secretary of the board of trustees.
Record of crops, &c.	
Account with farm.	SEC. 1733. (20.) Said college and farm shall be charged with the amount of crops, the proceeds of sales, and the increase of animals raised on the farm.
Secretary chosen.	SEC. 1734. (21.) The trustees shall elect at their first annual meeting in January, 1859, and every two years thereafter, a secretary from their own number, who shall hold his office two years, and until his successor is elected and qualified. He shall reside at the capital of the state and have an office in the legislative building. It shall be his duty to keep a record of the transactions of the board of trustees and college and farm, which shall be open at all times to the inspection of any citizen of this state. He shall also have the custody of all books, papers, documents and other property which may be deposited in his office, including specimens of the vegetable and animal kingdom of the state or country; also, keep and file all reports which may be made from time to time by county and state agricultural and horticultural societies, and all correspondence of the office from other persons and societies appertaining to the general business of husbandry; address circulars to societies and the best practical farmers in the state and elsewhere, with the view of eliciting information upon the newest and best mode of culture of those products, vegetables, trees, etc., adapted to the soil and climate of this state; also, on all subjects connected with field culture, horticulture, stock raising, and the dairy. He shall encourage the formation of agricultural societies throughout the state, and purchase, receive and distribute such rare and valuable seeds, plants,
He keeps minutes.	
Perserves documents.	
Attend to correspondence.	
Encourage agricultural societies.	



shrubby and trees, as may be in his power to procure from the general government and other sources, as may be adapted to our climate and soils. He shall also encourage the importation of improved breeds of horses, asses, cattle, sheep, hogs and other live stock, the invention and improvement of labor-saving implements of husbandry and diffuse information in relation to the same; and the manufacture of woolen and cotton yarns and cloths, and domestic industry in weaving, spinning, knitting, sewing, and such other household arts as are calculated to promote the general thrift, wealth and resources of the state. He shall make a report in writing to the general assembly at every session thereof, and to the governor in each year when the legislature is not in session, on the first day of February, of all the transactions of his office of a public character, including a full statement of the receipts and expenditures of the college and farm and of his own office, and at such other times as the governor or legislature may require. He shall give a bond in the sum of thirty thousand dollars, with good security, for the faithful discharge of the duties of his office.

Imported breeds.

Domestic manufactures.

Annual report.

SEC. 1735. (22.) The seeds, plants, trees and shrubbery received by the secretary, shall be, as far as possible, distributed equally throughout the state, and placed only in the hands of those farmers and others who will cultivate them properly and return to the secretary's office, a reasonable proportion of the products thereof with a full statement of the mode of cultivation and such other information as may be necessary to ascertain their value for general cultivation in the state. All information in regard to agriculture, obtained by the secretary, of an important character, may be published by him from time to time in the newspapers of the state, provided it does not involve any expense to the state.

Seeds, &c, distributed.

Information published.

SEC. 1736. (23.) The secretary shall collect and file in his office the agricultural statistics of each organized county in the state.

Agricultural statistics.

SEC. 1737. (24.) That the farming interest of the state may derive immediate benefit from the duties imposed upon the secretary, the governor is hereby authorized and empowered to appoint a secretary on the passage of this act, from among the board of trustees named in this act, who shall hold his office for one year, and until his successor is elected and qualified, as provided in section twenty-one of this act.

Gov appoints secretary.

SEC. 1738. (25.) The secretary shall receive as a compensation for his services, a salary of one thousand dollars per annum, to be paid quarterly from the state treasury in the same manner as is provided by law for the payment of the salaries of other state officers, and the sum of one thousand dollars is hereby annually appropriated for that purpose; and the additional sum of one thousand dollars, or so much thereof as may be esteemed necessary by the governor, is also hereby annually appropriated to meet the expenses which may be incurred in the purchase and transportation of seeds, postage, stationery, and the other contingent expenses of the office of the secretary, to be paid out of the state treasury on the requisition of the governor through the auditor of state.

His salary.

Contingent fund.

SEC. 1739. (26.) The board of trustees shall elect a treasurer from their own number annually, at their meeting in January, who shall receive and keep all moneys arising from the sale of the products of the farm or other source, and give bonds in such sum as the board of trustees may require. He shall pay over all moneys upon the warrant of the president, countersigned by the secretary. He shall render annually in the month of January, to the board of trustees, and as often as may

Treasurer chosen.

His duties.

be required by said board, a full and true account of all moneys received and disbursed by him.

First board of trustees.

SEC. 1740. (27.) That M. W. Robinson, of Desmoine county, Timothy Day, of Van Buren county, John D. Wright, of Union county, G. W. F. Sherwin, of Woodbury county, Wm. Duane Wilson, of Polk county, Richard Gaines, of Jefferson county, Suel Foster, of Muscatine county, J. W. Henderson, of Linn county, Clermont Coffin, of Delaware county, E. H. Williams, of Clayton county, E. G. Day, of Story county, are hereby appointed and constituted the first board of trustees of the agricultural college and farm, who shall hold their office as may be determined under the provisions of the third section of this act.

#### ARTICLE 4.

An Act to amend Chapter 188 of the acts of the Sixth General Assembly, entitled an Act for the encouragement of Agriculture. Approved January 28th, A. D. 1857.

[Passed April 3, 1860, took effect July 4, 1860; Laws of Eighth Session, Chapter 152.]

Number of copies of reports.

SECTION 1741. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the number of copies of the annual reports of the Iowa state agricultural society to be published shall be limited to three thousand, all of which shall be bound in a manner and style uniform with those bound by the state for the years 1857 and 1858, provided said binding shall not cost more than thirty cents per copy.

Distribution thereof.

SEC. 1742. (2.) The secretary of state shall distribute said reports as follows:

Two hundred copies to the secretary of the state agricultural society for the purpose of making exchanges with other state societies. Five copies to the state library. Five copies to the agricultural college. One copy to each member of the eighth general assembly. The remainder to the various county societies in the state.

#### ARTICLE 5.

An Act to authorize the sale and conveyance of Lands donated or granted for the use of the Iowa State Agricultural College and Farm.

[Passed March 29, 1860, took effect July 4, 1860; Laws of Eighth Session, Chapter 67.]

Donated lands to be described in a book.

SECTION 1743. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all lands which have been or may be donated or granted to, and for the use of the Iowa state agricultural college and farm, shall be described and recorded in a book kept for that purpose in the office of the register of the state land office.

Mode of sale thereof.

SEC. 1744. (2.) The lands donated or granted as individual subscription for the purpose herein mentioned, may be sold by the trustees of said college and they are hereby authorized to sell said lands to any party or parties, in such parcels or tracts and upon such terms of payment as they may deem proper for the best interests of said institution, and to the party or parties purchasing these lands the president of the college and farm shall issue a certificate countersigned by the secretary thereof, which shall state the fact of purchase, to whom sold, the terms of such sale, give a description of the tract or tracts purchased and the amount paid for the same, on the presentation and delivering of such a certificate with the endorsement of the treasurer thereon that the amount of the purchase money has been fully paid to the register\* of the state

\* If the words "to the register" had been placed immediately after certificate, the sense would have been probably better expressed.

land office, he shall deed to the party or parties mentioned therein the piece or parcels of land therein described, and convey the title and interest of the state therein, which deed shall be signed by the governor and register as in other deeds for lands conveyed by the state.

SEC. 1745. (3.) The register of the state land office shall in his reports to the legislature, give a full statement of the aggregate amount of lands recorded in his office for the purpose herein mentioned, the quantity sold and the price paid for the same. Report of amount of.

- PRIOR LAWS. 1. An act for the encouragement of agriculture, Feb. 18, 1842; I. T., 4th sess., chap. 126, p. 119; also reprint of 1843, p. 60.  
 2. An act for the encouragement of agriculture and domestic manufactures, passed Jan. 13, took effect Feb. 13, 1843. Reprint of 1843, chap. 6, p. 63.  
 3. An act for the encouragement of agriculture, passed Feb. 5, took effect 1st July, 1851; 3d sess., chap. 70, p. 171. Repealed by chapter 188 of 6th sess.  
 4. No. 3 amended by an act of Jan. 21, which took effect July 1, 1853; 4th sess., chap. 45, p. 73. Repealed by chapter 188 of 6th sess.  
 5. "An act affording aid and patronage to the state agricultural society," passed Jan. 22, took effect July 1, 1855; 5th sess., chap. 166, p. 252. Repealed by chap. 188 of 6th sess.

## CHAPTER 68.

### INSURANCE.

#### ARTICLE 1.

An Act in relation to Insurance Companies.

[Passed January 28, 1857, took effect July 1, 1857; Laws of Sixth General Assembly, Chapter 149, page 202]

SECTION 1746. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That it shall be the duty of each and every insurance company, incorporated under the laws of this state for the purpose of insuring property against fire and marine losses, to file with the auditor of state, within sixty days from the taking effect of this act, and with the clerk of the district court of the county in which said company is located, a full and specific statement of the amount of cash paid in upon said stock; the amount of stock not paid for in cash; the amount secured by notes indorsed by third parties; the amount secured by mortgages or pledges of real estate; the names and residences of the stockholders in said company, with the amount of stock owned or held set opposite the name of each, and if not all paid up in cash, the amount unsecured and the amount secured, specifying whether by real or personal security. Also set opposite the name of each, the names of all the officers and agents of the company wherever residing; the amount of policies issued by and outstanding against the company at the date of said report; the amount of premiums received by said company during the preceding six months; the amount of cash on hand; the amount of bills payable and receivable at the date of said statement; the amount of real estate owned by said company, where held and owned, in what manner, such real estate became vested in said company, which report and statement shall be verified by the oath of the president and secretary of the company. Insurance companies.

SEC. 1747. (2.) It shall be the duty of every such insurance company now created or that may hereafter be created, under the laws of Statement filed semi-annually

this state, to file a semi annual statement of the affairs of said company, with the auditor of state, and with the clerk of the district court in the county where such company is located, on the first day of January and July in each year, which statement shall be verified by the oath of the president of the company. Such statement shall contain—

## Statement.

1. The name and locality of the company.
2. The amount of capital stock of said company.
3. The amount of its capital stock paid up.
4. The assets of the company including
  1. The amount of cash on hand.
  2. The amount of cash in hands of agents.
  3. The real estate unincumbered.
  4. The bonds and notes of the company, and how they are secured, with the rate of interest thereon, and whether given in payment of stock subscription, or for *bona fide* loans.
  5. Debts of company secured by mortgage.
  6. Debts otherwise secured.
  7. Debts for premiums.
  8. All other securities.
5. The amount of liabilities due or not due to banks or other creditors by the company.
6. Losses adjusted and due.
7. Losses adjusted and not due.
8. Losses unadjusted.
9. Losses in suspense.
10. All other claims against the company.
11. The greatest amount insured by any one risk.

## Penalty for not filing report.

SEC. 1748. (3.) A failure to comply with the provisions of the two preceding sections shall subject the president and secretary of any company, each, individually, to the penalty of one hundred dollars, to be recovered in an action at law, in the name of any citizen of the state, one-half of the same to the use of the state, and the other moiety to the use of the informer.

## Can not hold real estate.

SEC. 1749. (4.) It is declared unlawful for any insurance company in this state to purchase or hold any real estate, save what shall be necessary for the transaction of its legitimate business of insurance, and deeds and conveyances to said company for other purposes are hereby declared to be void.

## Foreign companies.

SEC. 1750. (5.) That it shall not be lawful for any agent or agents of any insurance company, incorporated by any other state than the state of Iowa, directly or indirectly to take risks, or transact any business of insurance in this state, without first procuring a certificate of authority from the auditor of state, and before obtaining such certificate, such agent or agents shall furnish the auditor with a statement, under oath, of the president or secretary of the company, from which he or they may act, which statement shall show,

## Certificate from auditor.

## Statement to auditor.

1. The name and locality of the company.
2. The amount of its capital stock.
3. The amount of its capital stock paid up.
4. The assets of the company, including,
  1. The amount of cash on hand, and in the hands of agents or other persons.
  2. The real estate unincumbered.
  3. The lands owned by the company, and how they are secured, with the rate of interest thereon.

4. Debts of the company secured by mortgage.
  5. Debts otherwise secured.
  6. Debts for premiums.
  7. All other securities.
  5. The amounts of liabilities due or not due to banks or other creditors by the company.
  6. Losses adjusted and due.
  7. Losses adjusted and not due.
  8. Losses unadjusted.
  9. Losses in suspense, waiting for further proof.
  10. All other claims against the company.
  11. The greatest amount insured by any one risk.
  12. The greatest amount allowed in the rules of the company to be insured in any one city, town or village.
  13. The greatest amount allowed to be insured in any one block.
  14. The act of incorporation of such company, which statement shall be filed in the office of said auditor, together with a written instrument, under the seal of the company, signed by the president and secretary, authorizing such agent to acknowledge service of process for and in behalf of such company, consenting that service of process upon such agent shall be taken and held to be as valid as if served upon the company, according to the laws of this state, or any other state, and waiving all claims of errors by reason of such service, and no insurance company, or agents of any insurance company, incorporated by any other state, shall transact any business of insurance in this state, unless such company is possessed of at least one hundred thousand dollars of actual capital, invested in stocks of at least par value, or in bonds, or mortgages on real estate, worth double the amount for which the same is mortgaged, and upon filing the aforesaid statement and instrument with the auditor of state, and furnishing him with satisfactory evidence of such instrument as aforesaid, it shall be the duty of said auditor to issue a certificate thereof, with authority to transact business of insurance to the agent or agents applying for the same.
    - Act of incorporation.
    - Authority of agent.
    - Amount of capital  
Character and value of stock.
    - Duty of auditor.
- SEC. 1751. (6.) It shall be unlawful for any incorporated company or association, partnership, firm or individual, or any member or agent or agents thereof, or for any agent or agents of any company incorporated by any foreign government other than a state of this union, to transact any business of insurance in this state, without procuring a certificate of authority from the auditor of state. Such company, association, partnership, firm or individual, or any agent or agents thereof, having first filed under oath in the office of said auditor, a statement setting forth the charter or act of incorporation of any and every such incorporated company; and the by-laws, copartnership, agreement, articles of association, of any and every such unincorporated company, association, partnership, or firm; and the name and residence of such individual; and the names and residences of the members of every such partnership or firm; and the matters required to be specified by the first section of this act and the written authority therein mentioned; and furnished evidence, to the satisfaction of the auditor of state, that such company has invested in stocks, in some one or more of the states of this union or of the United States, the amount of one hundred thousand dollars, and that such stocks are held by citizens of the United States, or in bonds or mortgages of real estate, situated in the United States, fully securing the amount for which the same is mortgaged or bonds of cities of the United States, the aggregate market value of the investment of
- Foreign companies.

the company, in which shall not be less than one hundred thousand dollars; and such incorporated company or unincorporated company, association, partnership, firm or individual, or any agent or agents thereof, filing said statement, and furnishing evidences of investment as aforesaid, shall be entitled to a certificate of authority for such body or individual in like manner as is provided for in the first section of this act.

SEC. (7.) [Is repealed by section 1762.]

Statement renewed.

SEC. 1752. (8.) The statement and evidences of investment required by this act, shall be renewed annually in the month of January of each year—the first statement to be made in sixty days from the taking effect of this act; and the auditor of state, on being satisfied that the capital, securities and investments remain secure, shall furnish a renewal of certificate as aforesaid; and the company, agent or agents, obtaining such certificate, shall file the same, together with the statement upon which it was obtained or renewed, in the office of the clerk of the district court of the county in which such agent resides.

Persons receiving money, &c.

SEC. 1753. (9.) Any person or firm in this state, who shall receive or receipt for any money on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall receive or receipt for money from other persons, to be transmitted to any such company or individual aforesaid, for a policy or policies of insurances, or any renewals thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, or who shall in any wise, directly or indirectly, make or cause to be made any contract or contracts of insurance for, or on account of such insurance company aforesaid, shall be deemed to all intents and purposes an agent or agents of such company, and shall be subject and liable to all the provisions, regulations and penalties of this act.

Copies shall be evidence.

SEC. 1754. (10.) That copies of all papers required by this act to be deposited in the office of auditor of state, certified under the hand of such auditor to be true and correct copies of such papers, shall be received as evidence in all courts and places, in the same manner, and have the same force and effect as the originals would have if produced.

Life insurance.

SEC. 1755. (11.) This act shall not be so construed as in any manner to apply to life insurance companies, but shall include within its provisions only the fire and fire and marine departments, of any company that may have separate departments for life insurance, and fire and fire and marine insurance.

Penalties.

SEC. 1756. (12.) Any person or persons violating the provisions of this act, shall, upon conviction thereof, in any court of competent jurisdiction, be fined in any sum not exceeding one thousand dollars, or imprisoned in the county jail not more than thirty days, and fed on bread and water only, or both, at the discretion of the court. Violations of the provisions of this act may be prosecuted by information filed by the prosecuting attorney of the proper county, or by indictment of the grand jury.\*

Company complying.

SEC. 1757. (13.) Any assurance company complying with the requirements of this act, and securing the certificate of the auditor for any of its agents, shall not be required to furnish the single statement and evidences required hereby, which being filed with the auditor of state, shall be deemed a sufficient compliance for its free transaction of business in the state.

\* See as to section 12, constitution, article 1, section 11.

SEC. 1758. (14.) All acts and parts of acts, which conflict with this law, are hereby repealed.

ARTICLE 2.

An Act to amend an Act entitled an Act in relation to Insurance Companies, approved January 28, 1857.

[Passed February 9, 1858, took effect February 17, 1858; Laws of Seventh General Assembly, Chapter 12, page 15.]

SECTION 1759. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That if any insurance company, association, firm or individual, or their agent or agents having filed its or their statements and evidences of investments as required by the act to which this is amendatory, and conformed to the requirements of that act, shall have on deposit in any other state or territory, or elsewhere than in this state, any portion of its capital or earnings as a guarantee fund for the exclusive benefit or security of persons insured in such state, territory or other place, it shall be the duty of the auditor of state to withhold from such body or individual, so alienating any such portion of their capital and resources, the certificate and authority in said act provided for, until such body or individual shall file with the auditor of state a statement duly verified by the oath or affirmation of the president or secretary of such incorporated company, or member of such incorporated company, association, partnership or firm, or by such individual, showing the amount of premiums received in this state by such company during the year ending on the first of January next, preceding the filing of said statement, and shall deposit in this state in such manner as the auditor of state shall direct, five per cent. of the amount so received in money or solvent state or United States stocks of at least par value or mortgages on real estate, situated in this state of at least double the value for which the same is mortgaged—which statements and deposits shall be so made, from year to year, at the time of each renewal or original grant of authority by said auditor, until the sum of forty thousand dollars is deposited as aforesaid; which said sum and every yearly part thereof deposited as aforesaid, shall be held under the control of such auditor of state as a guarantee fund for the benefit of such persons as may be in any manner insured in their property by such company within this state, and the same or any part of the sum so deposited shall not be drawn out by the depositors until all claims for losses or premiums, or risks unexpired, shall be fully paid and discharged, or until all deposits made in other states, territories and other places, not within this state, shall be withdrawn. And in case of the insolvency of any such company, the sums so deposited as aforesaid, shall be applied by the auditor of state, protanto, towards the payment of all claims against such body or individual, filed in his office duly liquidated and authenticated, and losses and premiums on risks unpaid, on policies issued within six months after such insolvency may occur, any such body or individual shall be deemed insolvent, upon failure to pay any undisputed loss insured against, within this state, for the space of ninety days after final judgment, for the amount of any loss so insured against, when no appeal shall have been taken from such judgment by either party, or other proceeding begun to vacate, modify, reverse or review such judgment, or to arrest the same, or to obtain a new trial. Such body or individual shall be entitled to receive the interest or dividends on such stocks so deposited from time to time as the same may become due.

When guarantee fund deposited in another state, the auditor shall withhold certificate until statement is made, a deposit of 5 per cent. with auditor.

Guarantee fund held by auditor for the benefit of parties insured within this state.

Fund how disposed of by auditor when company insolvent.

Application to  
foregoing.

This section shall not apply to any of the aforesaid bodies or individuals who have made no such deposit as in this section mentioned elsewhere, than in this state.

Auditor issue  
certificate to for-  
eign insurance  
companies.

SEC. 1760. (2.) Mutual insurance companies incorporated by any other state than the state of Iowa, upon filing in the office of the auditor the act of incorporation of said company, together with a written instrument under seal of said company signed by the president and secretary of said company, under oath certifying that said company is possessed of a capital of at least one hundred thousand dollars, secured by lien on real estate, worth at cash valuation at least five times the amount of said capital, and not encumbered to more than one half of said cash valuation, shall be entitled to a certificate from said auditor with authority to transact business of insurance in this state, and said company shall be exempt from the provisions of an act to which this is amendatory, with the exception of the publication of statement and certificate of the auditor.

Agent file state-  
ment with clerk  
of district court.

SEC. 1761. (3.) It shall be the duty of the agent or agents in either of the foregoing sections, mentioned, before taking any risks or transacting any business of insurance in this state, to file in the office of clerk of the district court of the county of which he or they may desire to establish an agency for any such company, a copy of the statement required to be filed with the auditor of state as aforesaid, together with a certificate of said auditor, which shall be carefully preserved for public inspection by said clerk, and said statement and certificate shall be published one week in three daily, and three weeks in five weekly newspapers of general circulation in the state of Iowa.

Published in  
newspaper.

Repeal.

SEC. 1762. (4.) Section seven of the act to which this is amendatory, and all other acts that conflict with the provisions of this act are hereby repealed.

DECISIONS. Where suit on policy is brought before maturity, the error may be corrected by a supplemental petition, 4 G , 229; a policy which agrees to make good to assigns loss, and that such policy shall not be assignable, is assignable after loss without the consent of the company, 1 Iowa, 404.

## CHAPTER 69.

### FIRE COMPANIES.

#### ARTICLE 1.

An Act to encourage the organization of Fire Companies.

[Passed January 28, 1857, took effect July 1, 1857; Laws of Sixth General Assembly, Chapter 156, page 230.]

Members ex-  
empted.

SECTION 1763. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That any person who is now, or shall hereafter become an active member of any fire engine, hook and ladder, hose, or other company for the extinguishment of fire or the protection of property at fires, now existing and under the control of the corporate authorities of any city or incorporated town within this state; or of any such company which shall hereafter be organized under and subject to the authorities of any city or town as aforesaid, shall, during the time he shall continue



an active member of such company, be exempted from the performance of military duty, and from serving as a juror; and any person who shall have been an active member of such company in any city or town as aforesaid, and shall have faithfully discharged his duty as such, for the term of ten years, shall be forever thereafter exempted from the performance of military duty in the time of peace, from serving as a juror, and from the performance of labor on the highways.

SEC. 1764. (2.) That any person who has served in any company for the term of ten years, as provided in the preceding section, shall be entitled to receive from the foreman of the company of which he shall have been a member, a certificate to that effect, and on the presentation of such certificate to the clerk or recorder of the proper city or town, it shall be the duty of such clerk or recorder to file the same in his office, and to give his certificate, under the corporate seal, to the person entitled thereto, setting forth the name of the company of which such person shall have been a member, and the duration of such membership; and such certificate shall be received in all courts and places as evidence that the person legally holding the same is entitled to the exemption hereinbefore mentioned: *provided*, that nothing herein contained shall be so construed as to diminish any privileges now allowed by any law of this state to any member of any fire company in this state, but it shall be considered as conferring additional privileges.

Certificate of membership.

Clerk's certificate.

ARTICLE 2.

An Act to encourage the organization of Fire Companies and for the protection of Firemen and the property of Fire Companies.

[Passed March 12, 1858, took effect July 4, 1858; *Laws of Seventh General Assembly, Chapter 48, page 53.*]

SECTION 1765. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That any person who shall either by misrepresentation or by the use of a false certificate, or the certificate of any other person, endeavor to avail himself of the benefits of chapter one hundred and fifty-six of the acts of the sixth general assembly, approved January 28, 1857, upon conviction thereof before any mayor, recorder, or magistrate of any incorporated city or town in the state of Iowa, or before any district court of said state, shall be sentenced to imprisonment in the county jail for a period of not more than six months, or less than one month, and to pay a fine of not less than ten dollars, nor more than one hundred dollars.

Any person obtaining privileges of fireman by false papers fined and imprisoned.

SEC. 1766. (2.) That any person or persons who shall willfully destroy or injure any engine, hose carriage, hose, hook and ladder carriage, or anything whatever, used for the extinguishment of fires, belonging to any fire company, on conviction thereof shall be sentenced to imprisonment in the penitentiary for a period of not less than one year, nor more than three years.

Destruction of fire apparatus punished by fine and imprisonment.

SEC. 1767. (3.) That it shall not be lawful for any person to remove any engine or other apparatus for the extinguishment of fire, from the house or other place where the same shall be kept or deposited, except in time of fire or alarm of fire, unless properly authorized so to do by the president and directors or foreman of the company to whom the same shall belong, or their duly authorized agent, and any person offending against the provisions of this section shall forfeit and pay a sum not less than five dollars, nor more than twenty dollars, to be sued for, and recovered in the name of the state, for the use of the school fund, before any

Willful removal of fire apparatus punished.

Suit brought and fine paid to school fund.

mayor, recorder, or magistrate of the city or town wherein the offense has been committed.

False alarms of fire punished.

SEC. 1768. (4.) That it shall not be lawful for any person or persons to cause false alarm of fire, either by setting fire to any combustible material or by giving an alarm of fire without cause, and any person offending against the provisions of this section shall be fined a sum of not less than five dollars nor more than twenty dollars, to be sued for and recovered as specified in the foregoing sections.

## CHAPTER 70.

### HEDGES.

An Act relating to Hedges and Hedge Growers.

[Passed January 28, 1857, took effect July 1, 1857, *Laws of Sixth General Assembly, Chapter 217, page 375*]

Contract for hedges.

SECTION 1769. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all contracts in writing, for the planting or growing of any hedge, shall run with the land which the hedge is designed to benefit, and all transfers of the ownership of land shall operate as a transfer of any hedging contract relating to the same, and the person to whom such land is transferred, no matter by what mode, may sue and be sued upon such hedging contract as though he was one of the original parties to the same.

Lien on land.

SEC. 1770. (2.) All labor or capital expended in pursuance of the contract above mentioned, by any one, in planting or growing any hedge, shall operate as a lien on the land which is to be benefited by the hedge, and the said land shall be liable for the value of the labor and capital expended in planting or growing such hedge, notwithstanding any transfer of the ownership of the land.

To perpetuate lien.

SEC. 1771. (3.) Any hedge planter or grower who desires to establish and perpetuate his lien, shall file with the recorder of deeds in the county where the hedge is situated, a memorandum in writing, having his own signature, containing the following particulars, to wit:

1. The name of the hedge planter or grower.
2. The name of the other party to the contract.
3. The numbers of the land which the hedge is designed to benefit.
4. The date of the contract or time of planting the hedge.
5. The number of rods planted.
6. The price to be paid and the time of payment for the planting or growing of the same.

Such filing shall operate as constructive notice to all persons of the existence of the hedging contract and lien.

Record.

SEC. 1772. (4.) The recorder of deeds shall keep a book for the purpose of recording such memorandums, for which he shall be entitled to the ordinary fees.

SEC. 1773. (5.) Suit may be brought upon hedging contracts, as in ordinary cases, and execution issued against the personal property of the defendant, and the land subject to the lien resorted to afterward in case the demand is not satisfied.

SEC. 1774. (6.) The certificate of the recorder indorsed on the memorandum referred to in section three, shall be evidence of the filing and recording of the same, but not evidence of the facts which it contains, which must be established by the production of the contract, or other competent proof. Recorder's certificate.

PRIOR LAWS UNDER TITLE 12. 1. An act to prevent damage by firing the prairies, passed Feb. 16, took effect March 1, 1843; reprint, chap. 121, p. 501; repealed Feb. 15, 1844; I. T., 6th sess., chap. 36, p. 57.

2. An act to encourage the destruction of wolves, passed Jan. 7, took effect Feb. 7, 1840; repealed, I. T., 6th sess., chap. 8, p. 12.

3. An act for the improvement of sheep, passed Feb. 8, 1844; I. T., 6th sess., chap. 7, p. 11.

4. An act to encourage the destruction of wolves, passed Feb. 9, 1844; I. T., 6th sess., chap. 8, p. 12.

5. An act granting licenses to peddlers, passed Feb. 15, took effect April 1, 1844; I. T., 6th sess., chap. 25, p. 46.

6. An act amending that of Feb. 9, 1844.

7. An act to prevent the firing of prairies, passed Jan. 2, 1846; I. T., 8th sess., chap. 4, p. 3.

## TITLE XIII.

### REGULATIONS PERTAINING TO TRADE.

#### CHAPTER 71.

##### WEIGHTS AND MEASURES.

[Code—Chapter 56.]

##### ARTICLE I.

SECTION 1775. (937.) The treasurer of state is hereby required to procure at the expense of the state a set of the following weights and measures: Length.

One yard of three feet, divided by marks into halves, quarters, eighths, and sixteenths;

One one-foot measure of twelve inches;

One half bushel for dry measure not heaped, containing one thousand and seventy-five and one-fifth cubic inches; Dry measure.

One peck, or a fourth of a bushel;

One half peck, or one-eighth of a bushel;

One gallon measure, containing two hundred and thirty-one cubic inches; Liquid measure.

One quart, or a fourth of a gallon;

One pint, or half of a quart;

One gill, or a fourth of a pint;

One set of avoirdupois weights consisting of a pound, a half pound, a quarter of a pound, and an ounce, and also a ten pound weight; Weights.

- Material.** All of which shall be of the most approved material for the preservation of uniformity and shall be kept in the treasurer's office and be the standard weights and measures of this state.
- Hundred weight.** SEC. 1776. (938.) The "hundred weight" is hereby declared to consist of one hundred pounds avoirdupois weight, and the ton to consist of twenty such hundreds.
- Perch.** SEC. 1777. (939.) The "perch" of mason work or stone is hereby declared to consist of twenty-five feet cubic measure.
- Contracts.** SEC. 1778. (940.) Contracts in which no other scale or standard of weight or measures is expressed shall be taken to mean the above, excepting the following in relation to the bushel.
- Except bushel.** A bushel of the respective articles hereafter mentioned will mean the amount of weight in this section specified; that is to say:
- Of wheat, sixty pounds;
  - Of shelled corn, fifty-six pounds;
  - Of corn in the cob, seventy pounds;
  - Of rye, fifty-six pounds;
  - Of oats, thirty-three\* pounds;
  - Of barley, forty-eight pounds;
  - Of potatoes, sixty pounds;
  - Of beans, sixty pounds;
  - Of bran, twenty pounds;
  - Of clover seed, sixty pounds;
  - Of timothy seed, forty-five pounds;
  - Of flax seed, fifty-six pounds;
  - Of hemp seed, forty-four pounds;
  - Of buckwheat, fifty-two pounds;
  - Of blue grass seed, fourteen pounds;
  - Of castor beans, forty-six pounds;
  - Of dried peaches, thirty-three pounds;
  - Of dried apples, twenty-four pounds;
  - Of onions, fifty-seven pounds;
  - Of salt, fifty pounds.
- County standard.** SEC. 1779. (941.) When the treasurer has so procured the above standards he shall give notice in some newspaper, and thereafter it shall be the duty of the county judge of each county to obtain a set of weights and measures accurately corresponding in weight and measure with the above standards and deposit them in the office of the county treasurer to be there kept, and these shall constitute the county standards and the county treasurer shall from time to time cause them to be tested by the state standards and made to agree therewith.
- Inspection of weights, &c.** SEC. 1780. (942.) Any person desiring his weights and measures inspected may apply to the county treasurer at his office whose duty it shall be to test them, and he may demand and receive therefor twenty-five cents for each weight and measure inspected to the number of six and fifteen cents each for all above that number, and he shall destroy all such weights and measures as can not be made to conform to the standard.

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\* Changed from five to three by laws of eighth general assembly, chapter 34, page 143 of special laws.

## \* ARTICLE 2.

An Act defining a Standard Weight per Bushel for Stone Coal.

[Passed Jan. 9, 1855, took effect July 1, 1855; *Laws of Fifth General Assembly, Chapter 5, page 4*]

SECTION 1781. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That eighty pounds avoirdupois weight shall constitute and establish a bushel of stone coal. Bushel.

## ARTICLE 3.

An Act defining the Weight of a Bushel of Sweet Potatoes.

[Passed Jan. 19, 1855, took effect July 1, 1855; *Laws of Fifth General Assembly, Chapter 34, page 48.*]

SECTION 1782. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the weight of a bushel of sweet potatoes shall after the passage of this act be forty-six pounds. Weight.

## ARTICLE 4.

An Act fixing the Weight of Lime and Sand.

[Passed Jan. 23, 1857, took effect July 1, 1857; *Laws of Sixth General Assembly, Chapter 165, page 255.*]

SECTION 1783. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the weight of a bushel of lime shall after the taking effect of this act, be eighty pounds, and the weight of a bushel of sand, one hundred and thirty pounds. Weight of lime and sand.

## ARTICLE 5.

An Act to determine the Weight per Bushel of certain Seeds named therein.

[Passed March 22, 1858, took effect July 4, 1858; *Laws of Seventh General Assembly, Chapter 110, page 211*]

SECTION 1784. (1.) *Be it enacted by the General Assembly of the State of Iowa,* The weight of a bushel of Hungarian grass seed shall be forty-five pounds; the weight of a bushel of millet seed shall be forty-five pounds; the weight of a bushel of Osage orange seed shall be thirty-two pounds, and the weight of a bushel of the seed of the sorghum saccharatum and of the broom corn shall be thirty pounds each. Seeds specified.

[For lawful shingle, see chapter 82.]

PRIOR LAWS. 1. An act to regulate weights and measures, passed April 12, 1827; M. D., 1833, p. 518.

2. An act to provide a standard for the weight of grain, passed June 10, 1828; M. D., 1833, p. 521. The above repealed, Aug. 30, 1840.

3. An act regulating weights and measures, passed Jan. 4, 1839; I. T., 1st sess., p. 470. Repealed by No. 4 hereof.

4. An act to regulate weights and measures, passed Feb. 7, 1843, took effect May 1, 1843; Reprint, chap. 160, p. 654.

## CHAPTER 72.

## MONEY OF ACCOUNT AND INTEREST.

[Code—Chapter 57.]

## ARTICLE 1.

**Public accounts, &c.** SEC. 1785. (943.) The money of account of this state is the dollar, cent, and mill, and all public accounts and the proceedings of all courts in relation to money shall be kept and expressed in money of the above denomination.

**Other denominations.** SEC. 1786. (944.) The above provisions shall not in any manner affect any demand expressed in money of another denomination but such demand in any suit or proceeding affecting the same shall be reduced to the above denomination.

[The rest of this article superseded by the next.]

## ARTICLE 2.

An Act to regulate the Interest on Money.

[Passed Jan. 20, 1853, took effect Feb. 9, 1853; Laws of Fourth General Assembly, Chapter 37, page 67.]

**Rate.** SECTION 1787. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the rate of interest shall be six cents on the hundred, by the year, on money due by express contract, unless a different rate be expressed in writing; on all moneys after the same becomes due, where there is no contract fixing the rate of interest, on judgments and decrees for the payment of money, where no other rate is expressed; on money lent without a contract fixing the rate of interest, and on money received to the use of another, and retained beyond a reasonable time, without the owner's consent, express or implied; on money due upon the settlement of matured accounts from the day the balance is ascertained; on money due upon open accounts, after six months from the date of the last item, and on all money due, or to become due, where there is contract to pay interest, and no rate stipulated.

**Contracts.** SEC. 1788. (2.) Parties may agree, in writing, for the payment of interest not exceeding ten cents on the hundred, by the year.

**Judgments.** SEC. 1789. (3.) Interest shall be allowed on all moneys due on judgments and decrees, of any competent court or tribunal, at the rate of six per cent. per annum, unless a different rate is fixed by the contract, on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract; but no judgment or decree shall draw more than ten per cent. per annum, which rate must be expressed in the judgment or decree.

**Money. Retained.** SEC. 1790. (4.) No person shall, directly or indirectly, receive in money, goods, or things in action, or in any other manner, any greater sum or value, for the loan of money, or upon contract founded upon any bargain, sale, or loan of wares, merchandize, goods, chattels, lands and tenements, than is in this act prescribed.

**Accounts.** SEC. 1791. (5.) If it shall be ascertained, in any suit brought on judgments to draw same rate as instrument. Unlawful interest. SEC. 1791. (5.) If it shall be ascertained, in any suit brought on any contract, that a rate of interest has been contracted for greater than is authorized by this act, either directly or indirectly, in money, property, or other valuable thing, the same shall work a forfeiture of ten per cent. per annum upon the amount of such contract to the school fund of the county in which the suit is brought, and the plaintiff shall have judg-

ment for the principal sum, without either interest or costs. The court in which said suit is prosecuted, shall render judgment for the amount of interest forfeited as aforesaid against the defendant, in favor of the state of Iowa, for the use of the school fund of said county, whether the said suit is contested or not, and in all cases where the unlawful interest is not apparent on the contract or writing, the person contracting to pay the unlawful interest shall be a competent witness to prove that the contract is usurious, and in no case where unlawful interest is contracted for, shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated with the principal or not.

Forfeiture.

Judgment.

Use of school fund.

Competent witness.

SEC. 1792. (6.) Nothing in this act shall be so construed as to prevent the proper *bona fide* assignee of any usurious contract recovering against the usurer the full amount of the consideration paid by him for such contract, less the amount of the principal money, but the same may be recovered of such usurer in the proper action before any court having competent jurisdiction.

Assignee.

May recover of usurer.

SEC. 1793. (7.) So much of chapter fifty-seven, title thirteen, of the code as may conflict with the provisions of this act, is hereby repealed. This act to take effect in thirty days from and after its publication in the Iowa Capital Reporter and the Iowa Republican.

Repeal.

- PRIOR LAWS. 1. An act relating to interest on contracts, passed April 20, 1833; M. D., 1833, p. 343; repealed March 1, 1839; I. T., 1st sess., p. 276.  
 2. An act regulating interest on money, passed Dec. 29, 1838, took effect March 1, 1839; I. T., 1st sess., p. 276.  
 3. An act regulating interest on money, passed Feb. 9, took effect March 9, 1843; reprint, chap. 81, p. 293.

DECISIONS. The person contracting for illegal interest may be a witness thereto, 4 Iowa, 492; the defense of usury may be made against a *bona fide* vendee of the note, as the contract is made illegal by the penalty, 4 Iowa, 494; on a penalty nothing but legal interest can be recovered, 3 Iowa, 244; 3 G., 120, 1 G. 179; case where a vendee under city tax title sues to recover his purchase money and interest, *Corbin v. City of Davenport*, Dec., 1859; see 2 G., 447; usurious contract void, 2 Iowa, 437; 2 G., 217; judgment same interest as note, M., 106; 1 G., 66; 6 Iowa, 235; how to compute, 3 G., 76; interest on an account should be averred in petition, 1 G., 336; M., 417; agreement or usage, may qualify mode of computation, 8 Iowa, 163; *Isett & Brewster, v. Ogilvie & Co.*, Dec., 1859; see M., 294, as to date from which to compute;—where interest alone is payable annually, and is unpaid, it only draws six per cent. interest, *Mann v. Cross*, Dec., 1859; a penalty not usury, M., 425; 1 G., 128; 3 Iowa, 244; usury may be pleaded when suit is brought on usurious contract in the name of indorsee, 4 Iowa, 490; voidable as to the excess over legal interest, 1 G., 128; the sworn replication of plaintiff does not disqualify the defendant as a witness in usury, 4 Iowa, 490; when the bill states an usurious contract, defendant need not plead it, 1 G., 121; a creditor seeking to recover on a usurious contract, must express a willingness to abandon the usurious part, 1 G., 121.

## CHAPTER 73.

### NOTES AND BILLS.

[Code—Chapter 58.]

#### ARTICLE 1.

SEC. 1794. (947.) Notes in writing made and signed by any person promising to pay to another person or his order or bearer, or to bearer

For money.

- only, any sum of money are negotiable by indorsement or delivery in the same manner as inland bills of exchange according to the custom of merchants.
- Action.** SEC. 1795. (948.) The person to whom such sum of money is made payable may maintain an action against the maker, and any person to whom such note is so indorsed or delivered may maintain his action in his own name against the maker or the indorser or both of them.
- For property or labor.** SEC. 1796. (949.) Bonds, due bills, and all instruments in writing by which the maker promises to pay to another without words of negotiability a sum of money, or by which he promises to pay a sum of money in property or labor, or to pay or deliver any property or labor, or acknowledges any money or labor or property to be due, are assignable by indorsement thereon or by other writing, and the assignee shall have a right of action in his own name subject to any defense or set-off legal or equitable which the maker or debtor had against any assignor thereof before notice of his assignment.
- May be made negotiable.** SEC. 1797. (950.) Instruments by which the maker promises to pay a sum of money in property or labor, or to pay or deliver property or labor, or acknowledges property or labor or money to be due to another, are negotiable instruments with all the incidents of negotiability whenever it is manifest from their terms that such was the intent of the maker, but the use of the technical words "order" or "bearer" alone will not manifest such intent.
- Assignment prohibited.** SEC. 1798. (951.) When by the terms of an instrument its assignment is prohibited, an assignment of it shall nevertheless be valid, but the maker may avail himself of any defense or set-off legal or equitable against the assignee which he may have against any assignor thereof before suit is commenced thereon.
- Open account.** SEC. 1799. (952.) An open account of sums of money due on contract may be assigned, and the assignee will have the right of action in his own name, but subject to the same defenses and set-offs as the instruments mentioned in the preceding section.
- Guarantor.** SEC. 1800. (953.) The blank indorsement of an instrument for the payment of money, property, or labor, by a person not a payee, indorsee or assignee thereof, shall be deemed a guaranty of the performance of the contract.
- How chargeable.** SEC. 1801. (954.) To charge such guarantor notice of non-payment by the principal must be given within a reasonable time, but the guarantor is chargeable without notice if the holder show affirmatively that the guarantor has received no detriment from the want of notice.
- Notice.** SEC. 1802. (955.) An indorser of a negotiable instrument, and a guarantor as contemplated in the preceding section, is liable to the action of an indorsee, assignee, or payee, *without notice*\* if the indorsee, assignee, or payee have used due diligence in the institution and prosecution of a suit against the maker or his representative.
- Notice.** SEC. 1803. (956.) The assignor of any of the above instruments not negotiable shall be liable to the action of his assignee without notice.
- Grace.** SEC. 1804. (957.) Three days of grace are allowed on bills of exchange according to the custom of merchants, but *not on any other instruments* ;† and a demand at any time during the three days of grace will be sufficient for the purpose of charging the indorser.

\* Modified so as to require notice. See section 1813.

† Modified by section 1813.



SEC. 1805. (958.) When the holder of an instrument for the pay- Holder absent.  
ment of money is absent from the state when it becomes due, and when  
the indorsee or assignee of such an instrument has not notified the  
maker of such indorsement or assignment, the maker may tender pay-  
ment at the last residence or place of business of the payee before the  
instrument became due, and if there be no person authorized to receive  
payment and give the proper credit therefor the maker may deposit the  
amount due with the clerk of the district court in the county where the  
payee resided at the time it became due (paying the clerk one per cent.  
on the amount deposited), and the maker shall be liable for no interest  
from that time.

SEC. 1806. (959.) No contract for labor or for the payment or de- Demand.  
livery of property (other than money) in which the time of performance  
is not fixed can be converted into a money demand until a demand of  
performance has been made and the maker refuses or a reasonable time  
is allowed for performance.

SEC. 1807. (960.) When a contract for labor or for the payment Place of pay-  
or delivery of property (other than money) does not fix a place of pay- ment.  
ment the maker may tender the labor or property at the place where  
the payee resided at the time of making the contract, or at the residence  
of the payee at the performance of the contract, or where the assignee  
of the contract resides when it becomes due.

SEC. 1808. (961.) But if the property in such case be too pon- Exception.  
derous to be conveniently transported, or if the payee had no known  
place of residence within the state at the making of the contract, or if  
the assignee of a written contract have no known place of residence  
within the state at the time of performance, the maker may tender the  
property at the place where he resided at the time of making the  
contract.

SEC. 1809. (962.) When the contract is contained in a written When assigned.  
instrument which is assigned before due and the maker has notice  
thereof he shall make the tender at the residence of the holder if he  
reside in the state and no farther from the maker than did the payee at  
the making thereof.

SEC. 1810. (963.) A tender of the property as above provided Effect.  
discharges the maker from the contract, and the property becomes vested  
in the payee or his assignee and he may maintain an action in relation  
thereto as in other cases.

SEC. 1811. (964.) But if the property tendered be perishable, or Lien.  
require feeding or other care, and no person be found to receive it when  
tendered it is the duty of the person making the tender to preserve,  
feed, or otherwise take care of the same, and he has a lien on the  
property for his reasonable expenses and trouble in so doing.

SEC. 1812. (965.) The rate of damage to be allowed and paid Damages on bills.  
upon the non-acceptance or non-payment of bills of exchange drawn or  
indorsed in this state, when damage is recoverable, shall be as follows :

If the bill be drawn upon a person at a place out of the United States  
or in California or the territory of Oregon, Utah, or New Mexico, ten  
per cent. upon the principal specified in the bill with interest on the  
same from the time of the protest ; if drawn upon a person at a place  
in the state of Iowa, Missouri, Illinois, Wisconsin, or Minnesota, three  
per cent. with interest ; if drawn upon a person at a place in the state  
of Arkansas, Louisiana, Mississippi, Tennessee, Kentucky, Indiana,  
Ohio, Virginia, District of Columbia, Pennsylvania, Maryland, New

Jersey, New York, Massachusetts, Rhode Island, or Connecticut, five per cent. with interest; if drawn upon a person at a place in any other state in the United States, eight per cent. with interest.

ARTICLE 2.

An Act relating to Evidence.

[Passed Jan. 24, 1853, took effect Feb. 9, 1853; *Laws of Fourth General Assembly, Chapter 108, page 187.*]

*Be it enacted by the General Assembly of the State of Iowa.*

\* \* \* \* \*

Grace.

SECTION 1813. (3.) Grace shall be allowed upon bills and notes executed or payable within this state, according to the principles of the law merchant, and notice of non-acceptance or non-payment, or both, of said instruments shall be required according to the rules and principles of the commercial law.

[The other sections of this act relate to evidence.]

ARTICLE 3.

An Act to designate Sunday, and the Holidays, to be observed in the acceptance and payment of Bills of Exchange and Promissory Notes.

[Passed March 18, 1858, took effect July 4, 1858; *Laws of Seventh General Assembly, Chapter 79, Page 113.*]

Notes falling due on Sundays and holidays payable the next day.

SECTION 1814. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the following days, viz.: the first day of the week, commonly called Sunday, the first day of January, the fourth day of July, the twenty-fifth day of December and any day appointed or recommended by the governor of this state or the president of the United States as a day of fast or thanksgiving, shall for all purposes whatsoever, as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes be treated and considered as falling due on the succeeding day.

PRIOR LAWS. 1. An act concerning promissory notes, passed March 12, 1827, repealed Aug. 30, 1840.

2. An act concerning bills of exchange, passed Jan. 24, took effect Feb. 24, 1839; I. T., 1st sess., p. 64.

3. An act relative to notes, bonds and bills, and other instruments, passed Jan. 4, took effect March 1, 1839; I. T., 1st sess., p. 381; repealed by reprint, chap. 106, p. 451.

4. An act in relation to bonds and other securities, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 70; also, reprint, 1843, p. 104.

5. An act relative to promissory notes, bonds, due bills, and other instruments of writing, passed Feb. 8, 1843; reprint, chap. 106, p. 451. This act is same as that of 1839, save 11, 12, and 13th sections are new in this.

DECISIONS. The transferee without indorsement of a note made payable to order can not sue in his own name, 4 Iowa, 360; when a party is liable to pay property, he is not liable to an action until demand, 4 Iowa, 591; assent of the maker of a note to an alteration, adopts the same as part of the note, 4 Iowa, 560; maker of a note knowing of an alteration therein, and advising endorsee to purchase same, can not set up such alteration against such endorsee, 4 Iowa, 560; county bonds given in payment for railroad stock, are negotiable instruments, 5 Iowa, 52; the burden of showing that an indorsee is bona fide holder for value, is not thrown on him without pleading his knowledge of its infirmities, 5 Iowa, 58; where a county bond was delivered by the county, induced thereto by fraud, such fraud can not affect an indorsee

for value without notice, 5 Iowa, 57; note payable to bearer, is transferable by delivery without indorsement, 4 Iowa, 565; a partner, the assignee of the co-partner, sues how? 7 Iowa, 145; *White v. Tucker*, June Term, 1859; it is presumed that the possessor of a promissory note is the owner, and that the assignee thereof, before maturity, is entitled to recover, and the onus of all defenses rests on defendant until the *bona fides* of plaintiff's possession has been successfully assailed, 4 Iowa, 140; length of force of a guaranty, M. 305; order for property converted into a money demand, how? 4 G., 66; presumption of indebtedness from—diligence in payee, &c., 3 G., 289; see letter of credit held an original undertaking, 3 G., 538; landlord's right to offset for rent against assignee of agreement to pay for improvements, *Zugg v. Turner*, June Term, 1859; payment to payee, after indorsement, *Wilkinson, Stinson & Co. v. Sargent*, December Term, 1859; release, 7 Iowa, 100; notes given for land, M., 375-179; 8 Iowa, 316; 5 Iowa, 287; rights of guarantor of a non-negotiable note, *Peddecord v. Whillam*, December Term, 1859; holder of non-negotiable note may fill blank indorsement with a waiver of demand and notice, 3 Iowa, 266; joinder of guarantor of non-negotiable note with maker, *Peddecord v. Whillam*, December Term, 1859; notes payable in property, see 2 G., 205-251, M., 396; 3 Iowa, 518-526; *Spafford v. Steetsman*, June Term, 1859; 2 G., 456; 4 G., 56-59; under 2724, a betting note void, 6 Iowa, 394; 7 Iowa, 17; 1 G., 383; even to an innocent purchaser, 7 Iowa, 17; what question left to jury, 7 Iowa, 17; if one who holds property as collateral security, sells and purchases it, he still holds as security only, *Bank of the Old Dominion v. The Dubuque and Pacific R. R. Co.*, June, 1859; certificate of deposit, 1 Iowa, 488-531; in suit on such instrument, the law of Iowa presumed applicable, 4 Iowa, 464; undated indorsement presumed made before maturity, *Wilkinson, Stelson & Co. v. Sargent*, December Term, 1859; subsequent promise by discharged indorser, 4 Iowa, 508; any one may protest inland bills, M., 87; need of seal to protest of notary, *Rindschoff & Bro. & Co. v. Malone*, December Term, 1859; demand must be made on third day of grace, 8 Iowa, 394; usage of banks as to notice, *Grinnan v. Walker*, December Term, 1859; waiver of protest, M., 305; 6 Iowa, 191; days of grace in force in Iowa, M., 94; not on due-bill, M., 490; or bill due on demand, *ibid.*, 490; nor in *Peddecord v. Whillam*, December Term, 1859; requisites of notes, M., 41; 1 Iowa, 490; 7 *ibid.*, 145-521; note of administrator, 3 Iowa, 142; of agents, 1 Iowa, 426; 4 G., 428; 7 Iowa, 509; M., 488; interest, how computed? 1 Iowa, 204; M., 294-425; 1 G., 179-205; sufficient consideration, 4 G., 106; M., 62; 4 G., 567; sale of a claim good consideration, M., 80-70-312-438; 1 Iowa, 23; signature presumed genuine, 1 Iowa, 263; 6 *ibid.*, 390-48-514; sufficient indorsement, 7 Iowa, 145; regular, even if made during the days of grace, 8 Iowa, 334; imports a consideration, 4 Iowa, 140; where the proof of fraud or notice rests, 4 Iowa, 140; blank indorsement not a guaranty, *Toogood & Co. v. Coopers & Clark*, December Term, 1859; non-negotiable note assignable, 3 Iowa, 450-92; warehouse receipt not negotiable, 3 Iowa, 93; what should be alleged in an action on coupons, 6 Iowa, 265; value of subscription paper for improvement of streets, and indorsement thereof, 3 G., 591; assignment means, what? 1 Iowa, 154; imports consideration and holder presumed owner, 4 Iowa, 140; 6 *ibid.*, 400; 3 *ibid.*, 390; writing, when necessary, 1 Iowa, 154; 7 Iowa, 435; and if not set out demurrable, 7 Iowa, 404; how shall assignee sue, 1 Iowa, 143; 8 Iowa, 65; 2 *ibid.*, 158; 3 *ibid.*, 447; assignment of part of note, M., 151; policy of insurance assignable after loss, 1 Iowa, 404; an assignment conveys rights of assignor, 3 Iowa, 169; 1 *ibid.*, 143-147; of note carries mortgage, 4 Iowa, 434; rights of garnishee as to assignee, 1 Iowa, 404 and 413; liability of assignor to suit, 3 Iowa, 450 and 266; license, not assignable, M., 199; is a tort? 2 Iowa, 158; 3 G., 17; assignment of land warrant, 4 Iowa, 222; assignment when favored, 3 G., 17; notice of, necessary, 1 G., 360; see case of claim transferred after suit commenced and continued in name of assignor, 8 Iowa, 65; *Perry v. Page & Startzman*, June Term, 1859; assignor competent witness.

## CHAPTER 74.

## TENDER.

[Code—Chapter 59.]

SECTION 1815. (966.) When a tender of money or property is Not accepted, not accepted by the party to whom it is made the party making it may

if he sees fit retain in his own possession the money or property tendered but if afterwards the party to whom the tender was made see proper to accept it and give notice thereof to the other party and the subject of tender be not delivered to him within a reasonable time the tender shall be of no effect.

**Offer in writing.** SEC. 1816. (967.) An offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property, if not accepted is equivalent to the actual tender of the money, instrument, or property, subject however to the condition contained in the preceding section, but if the party to whom the tender is made desire an inspection of the instrument or property tendered (other than money) before making his determination it shall be given him on request.

**Receipt.** SEC. 1817. (968.) The person making a tender may demand a receipt in writing duly signed for the money or article tendered as a condition precedent to the delivery thereof.

**Objection.** SEC. 1818. (969.) The person to whom a tender is made must at the time make any objection which he may have to the money, instrument, or property tendered, or he will be deemed to have waived it. And if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards. But an offer of bank notes is not a tender though not objected to.

**PRIOR LAWS.** 1. An act \* \* and concerning tender, passed March 12, 1827; M. D., 1833, p. 405.

2. An act on promissory notes, passed Jan. 4, and took effect March 1, 1839; I. T., 1st sess., p. 381; repealed by Reprint, 1843, chap. 106, being No. 3 hereof.

3. An act on notes, &c., passed Feb. 8, 1843; Reprint, chap. 106, p. 451; (this act is same as 1839, save 11, 12, 13, in this new).

**DECISIONS.** A plea of tender admits that sum to be due, 5 Iowa, 462; a tender after suit brought is not good unless it include costs then accrued, 5 Iowa, 463; if a plea of tender aver falsely that the money has been paid into court, on proper motion the defendant will not be allowed to offer proof on such plea without such payment, 5 Iowa, 462; tender saves cost and interest, if kept good, but does not satisfy the demand, 4 G., 97; it admits cause of action to its extent, 5 Iowa, 460; 4 G., 555; and entitles to judgment for so much, 4 G., 97; the money should be brought into court and a continued readiness expressed, 5 Iowa, 460; 4 G., 97; plea of tender need not be regarded unless money paid in, 5 Iowa, 460; nor can evidence of, under the plea be received, if objected, unless such be done, if the objector has notified the defendant to produce money, and he has failed, 5 Iowa, 460; if the tender was abandoned before the justice, it should not be considered on appeal, 4 G., 97; see case of qualified refusal of tender, 5 Iowa, 317; absolute refusal, 3 G., 335.

## CHAPTER 75.

### SURETIES.

[Code—Chapter 60.]

**Requiring creditor to sue.**

**SECTION 1819. (970.)** When any person bound as surety for another for the payment of money or the performance of any other contract in writing apprehends that his principal is about to become insolvent or to remove permanently from the state without discharging the contract, if a right of action has accrued on the contract he may by

writing require the creditor to sue upon the same or to permit the surety to commence suit in such creditor's name and at the surety's cost.

SEC. 1820. (971.) If the creditor refuse to bring suit, or neglect so to do for ten days after the request, and does not permit the surety so to do and furnish him with a true copy of the contract or other writing therefor and enable him to have the use of the original when requisite in such suit, the surety shall be discharged. Creditor refusing.

SEC. 1821. (972.) When the surety commences such suit, he shall file his undertaking to pay such costs as may be adjudged against the creditor, and the suit shall be brought against all the obligors, but those joining in the request to the creditor shall make no defense to the action but may be heard on the assessment of the damages. Suit by surety.

SEC. 1822. (973.) The provisions of this chapter extend to the executor of a deceased surety and to the executor, indorsee, and assignee of the creditor; but they do not extend to the official bonds of public officers, executors, or guardians. Provisions limited.

PRIOR LAWS. 1. An act concerning debtors and their securities, passed Jan. 12, 1838, Wis., 2d sess., No. 51, p. 94; repealed Aug. 30, 1840.

2. An act concerning debtors and their securities, passed Dec. 25, took effect Jan. 25, 1839, I. T., 1st sess., p. 439; also Reprint, 1843, p. 565.

3. An act for the relief of the securities of persons charged with criminal offenses, passed Jan. 3, 1839; Reprint, 1843, p. 567.

4. An act for the relief of securities of public officers in certain cases, passed Feb. 15, took effect July 4, 1843; Reprint, chap. 135, p. 568.

DECISIONS. Action by surety against a co-surety, *Wood v. Perry*, Dec., 1859; duties of surety to preserve his rights, 6 Iowa, 39; rights of security, 1 Iowa, 432; when the appeal bond is not in form and substance a recognizance, such as required by the law of appeals, it is error to render summarily judgment against the sureties on a recognizance, under Reprint, 1843, sec. 16, 3 G., 126; a surety may be released from his bonds and another substituted, 2 G., 205; see 8 Iowa, 214; the notice required under sec. 970, of code, in order to release the surety must be in writing, 6 Iowa, 538; a surety who signs a note and takes it up, may re-issue it, 1 G., 179; a co-surety who has paid the debt, may sue for contribution without first making demand therefor, *Wood v. Perry*, Dec., 1859; the statute of limitations begins to run on a surety who pays the debt from the date of such payment, 6 Iowa, 516.

## CHAPTER 76.

### PRIVATE SEALS.

[Code—Chapter 61.]

SECTION 1823. (974.) The use of private seals in written contracts (except the seals of corporations) is hereby abolished, and the addition of a private seal to an instrument of writing hereafter made shall not affect its character in any respect. Abolished.

SEC. 1824. (975.) All contracts in writing hereafter made and signed by the party to be bound or his authorized agent or attorney shall import a consideration in the same manner as sealed instruments now do. Consideration implied.

SEC. 1825. (976.) The want or the failure, in the whole or in part, of the consideration of a written contract may be shown as a defense, Failure of consideration.

total or partial as the case may be, in an action on such contract brought by one who is not an innocent and *bona fide* holder.

PRIOR LAWS. 1. An act respecting seals, passed March 12, 1827; M. D., 1833, p. 515.

2. An act respecting seals, passed June 10, 1828; M. D., 1833, p. 516. The above repealed Aug. 30, 1840.

3. An act respecting seals, passed Jan. 24, took effect Feb. 24, 1839; I. T., 1st sess., p. 435; repealed August 30, 1840; I. T., 2d sess., extra, chap. 29, p. 20.

4. An act to repeal certain acts of July and Aug. 30, 1840; I. T., 2d sess., chap. 29, p. 20.

DECISIONS. It is presumed that the possessor of a promissory note is the owner, and that the assignee thereof before maturity is entitled to recover, and the onus of all defenses rests on the defendant until the *bona fides* of plaintiff's possession has been successfully assailed, 4 Iowa, 140; what a consideration means, 7 Iowa, 46; 6 Iowa, 167; want, or failure of consideration must be averred in answer, 6 Iowa, 167; a forbearance to sell property in which we have an interest is a good consideration for our promise, 5 Iowa, 512; as to seal, see 2 G., 91-148; and M., 240; seal at common law implied a consideration, 6 Iowa, 167; consideration may be shown by parol, or inferred, 5 Iowa, 336; 3 G., 430-432; illegal consideration, 6 Iowa, 223-410, 425, 394; 7 *ibid.*, 17; 1 G., 383; *usury*, 5 Iowa, 437; sufficient consideration, 6 Iowa, 61; M., 296; 4 G., 106; 6 Iowa, 279; 4 Iowa, 222; 2 G., 553; 3 G., 116; 7 Iowa, 46; 5 Iowa, 510; 3 G., 342; 7 Iowa, 496; *ibid.*, 232; 2 *ibid.*, 111; 3 G., 17-116-182.

## CHAPTER 77.

### ASSIGNMENTS FOR CREDITORS.

[Code—Chapter 62.]

#### ARTICLE 1.

General assign-  
ment. SECTION 1826. (977.) No general assignment of property by an insolvent or in contemplation of insolvency for the benefit of creditors of the assignor shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims.

Assent. SEC. 1827. (978.) In the case of an unconditional assignment of property for the benefit of all the creditors of the assignor the assent of the creditors shall be presumed.

#### ARTICLE 2.

An Act to amend Chapter 62, Title 13, of the Code of Iowa, and to close up Assignments for benefit of Creditors.

[Passed January 29, 1857, took effect July 1, 1857; Laws of Sixth General Assembly, Chapter 254, page 430.]

Inventory. SECTION 1828. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That in any case of assignment for the benefit of creditors, the debtor or debtors, shall annex to such assignment an inventory, under oath or affirmation, of his, her or their estate, real and personal, according to the best of his, her or their knowledge, and also a list of his, her or their creditors, and the amount of their respective demands; but such inventory shall not be conclusive as to the amount of the debt-

or's estate, but such assignment shall vest in the assignee or assignees the title to any other property belonging to the debtor or debtors at the time of making the assignment, and comprehended within the general terms of the same. Every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside, or where the business in respect of which the same is made, has been carried on.

SEC. 1829. (2.) That the assignee or assignees named in such assignment shall forthwith give notice thereof by publication in some newspaper published in the county, if any, and if none, then in the nearest county thereto, which publication shall be continued at least six weeks; and shall also forthwith send a notice thereof by mail to each creditor of whom he or they shall be informed, directed to their usual place of residence, and notifying the creditors to present their claims, under oath or affirmation, to him within three months thereafter. Notice.

SEC. 1830. (3.) That the assignee or assignees shall also forthwith file with the clerk of the district court of the county where such assignment shall be recorded, a true and full inventory and valuation of said estate, under oath or affirmation, so far as the same has come to his or their knowledge, and shall then and there enter into bonds to said clerk, for the use of the creditors, in double the amount of the inventory and valuation, with one or more sufficient sureties, to be approved by said clerk, for the faithful performance of said trust, and the said clerk shall give a receipt therefor, and the assignee or assignees, may thereupon proceed to perform any duty necessary to carry into effect the intention of said assignment as respects the collection of debts, and the sale of real or personal estate. File inventory. Bond

SEC. 1831. (4.) That at the expiration of three months from the time of first publishing notice as before provided, the assignee or assignees shall report and file with the clerk of the district court as aforesaid, a true and full list, under oath or affirmation, of all such creditors of the assignor or assignors, as shall have claimed to be such, with a true statement of their respective claims, and also an affidavit of publication of notice, and a list of the creditors, with their places of residence, and the date of mailing, to whom notice has been sent by mail duly verified. Claims.

SEC. 1832. (5.) That any person interested as creditors or otherwise by himself or attorney, may appear within thirty days after filing such report, and file with said clerk any exceptions to the claim or demand of any creditor exhibit as aforesaid, and the clerk of said court shall forthwith cause notice thereof to be given to the creditor, which shall be served as in case of an original notice in the district court, and shall be returnable at the next term of the district court in said county; and the said district court shall, at the next term, proceed to hear the proofs and allegations of the parties in the premises, and shall render such judgment thereon as shall be just, and may allow a trial by jury thereon. File exceptions.

SEC. 1833. (6.) That at the first term of the said district court, after the expiration of the three months, as aforesaid, should no exception be made to the claim of any creditor, or if exceptions have been made, and the same have been adjudicated and settled by the court, the said court shall order the assignee or assignees to make from time to time fair and equal dividends, (among the creditors) of the assets in his or their hands, in proportion to their claims, and as soon as may be, and within one year thereafter, to render a final account of said trust to said Dividends.

district court, and said court may allow such commissions and allowances to said assignee or assignees, in the final settlement as may be considered by the court just and right.

Court to have  
supervision.

SEC. 1834. (7.) That the assignee or assignees, in the execution of said trusts, shall at all times be subject to the order and supervision of the district court, and said court may by citation and attachment, compel the assignee or assignees from time to time to file reports of his or their proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required by this act and the order of such court, until a final settlement and distribution is made.\*

Not void.

Citation.

SEC. 1835. (8.) That no assignment shall be declared fraudulent or void, for want of any list or inventory as provided in the first section of this act. The district court of the county may, upon application of the assignee or assignees, or any creditor, compel the appearance in person, of the debtor or debtors before such court, by citation returnable forthwith, or at the next term thereof, and by attachment to answer, under oath, such matters as may then and there be inquired of him, her or them; and such debtor or debtors may then and there be fully examined, under oath, as to the amount and situation of his, her or their estate, and the names of the creditors and amounts due to each, with their places of residence; and may compel the delivery to the assignee or assignees, of any property or estate embraced in the assignment.

Additional in-  
ventory.

SEC. 1836. (9.) That the assignee or assignees shall, from time to time, file with the clerk of the district court an additional inventory and valuation of any additional property or estate which may come into his or their hands under said assignment, after the filing of the first inventory, as above provided, in the same manner as in the case of the first inventory, and the clerk may thereupon require additional security by bond, as upon the filing a first inventory.

Debts not due.

SEC. 1837. (10.) That any creditor may claim debts to become due as well as debts due, but on debts not due a reasonable abatement shall be made when the same are not drawing interest, and all creditors who shall not exhibit his, her or their claim, within the term of three months from the publication of notice as aforesaid, shall not participate in the dividends until after the payment in full of all claims presented within said term and allowed by the district court.

Powers.

SEC. 1838. (11.) That any assignee or assignees as aforesaid shall have as full power and authority to dispose of all estate, real and personal assigned, as the debtor or debtors had at the time of the assignment, and to sue for and recover in the name of such assignee or assignees every thing belonging or appertaining to said estate, real or personal, and generally to act and do whatsoever the said debtor or debtors might have done in the premises, but no sale of any real estate belonging to said trust shall be made only on notice, published as in case of sales of real estate on execution, unless the district court shall order and direct otherwise.

Death or failure  
of assignment.

SEC. 1839. (12.) That in case any assignee shall die before the closing of his trust, or in case any assignee shall fail or neglect for the period of twenty days after the making of any assignment, to file an inventory and valuation, and give bonds as required by this act, it shall be the duty of the county judge of the county, where such assignment may be recorded, on the application of any person intrusted as creditor or otherwise, to appoint some one or more discreet and qualified person or persons to execute the trust embraced in such assignment; and such

\* This section is amended by section 1842.



person or persons, on giving bond with sureties as required above of the assignee or assignees named in such agreement, shall possess all the powers thereby and by this act conferred upon such assignee or assignees, and shall be subject to all the duties hereby imposed as fully as though he or they are named in the assignment; and in case any security shall be discovered to be insufficient, or on complaint before the district court it should be made to appear that any assignee or assignees are guilty of wasting or misapplying the trust estate, said district court may direct and require the giving additional security, and may remove such assignee or assignees, and may appoint others in their stead to fulfill the duties of said trust; and such person so appointed, on giving bond, shall have full power to execute such duties, and to demand and sue for all estate in the hands of the person or persons removed, and to demand and recover the amount and value of all moneys and property or estate so wasted and misapplied, which he or they may neglect or refuse to make satisfaction for, from such person or persons, and his or their sureties.

SEC. 1840. (13.) That in all cases of assignment heretofore made, Assignments heretofore made. which have not been closed by final settlement, it shall be the duty of any assignee or assignees having any such trust estate in his or their hands or under their control, to report to the district court of the county where such assignee may reside, the situation and amount of such trust estate, and the creditors having claims against the same, with the amounts due to each as far as the same have come to his or their knowledge, at the first term of said court after the taking effect of this act, and in case of any neglect to file such report, any creditor or person interested in such estate may, on filing a petition to that effect with the clerk of said court, obtain a citation to such assignee or assignees, to be served as in case of an original notice, requiring such assignee or assignees to appear before said court, to show cause why such report should not be filed, and on such hearing the court may order such report, and may require such assignee or assignees to give bond, with sureties, for the faithful performance of the trust, and may fully investigate the proceedings of such assignee or assignees, in the premises, and may summon such assignee or assignees, if in the judgment of the court such removal is proper, and may appoint others to execute the same; and may make all such orders in the matter as may be proper and necessary to insure a faithful performance of the trusts, and a speedy close of the same by a final distribution and settlement of the estate as in cases above provided.

SEC. 1841. (14.) This act shall take effect and be in force from and after its publication according to law.

ARTICLE 3.

An Act to amend Section 7 of Chapter 254 of the Laws of the Sixth General Assembly of the State of Iowa, Approved January 29, in relation to Assignments.

[Passed March 22, 1858, took effect March 31, 1858; Laws of Seventh General Assembly, Chapter 112, page 213.]

SECTION 1842. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the assignee or assignees, in the execution of assignments, shall at all times be subject to the order and supervision of the district court when in session, or the district judge of said court when not in session, and the said court or the said judge may, by citation and attachment, compel the assignee or assignees from time to time to file reports of his or their proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required Subject to order of dist. court. Render accounts.

by the act of which this is amendatory, and to obey the order of such court when in session or the said judge when not in session, in relation to the complete and final settlement, distribution and paying over of the proceeds derived from said trust, or any part thereof, until a final settlement and distribution is made.

**PRIOR LAWS.** 1. An act for the relief of insolvent debtors, passed March 20, 1833; M. D., 1833, p. 438.

2. An act for the relief of poor debtors imprisoned for debt, passed April 20, 1833; M. D., 1833, p. 441.

3. An act regulating prison bounds, passed April 20, 1833; M. D., 1833. All the above repealed by Aug. 30, 1840.

4. An act abolishing imprisonment for debt, passed Jan. 17; took effect Feb. 17, 1840; I. T., 2d sess., chap. 82, p. 122.

**DECISIONS.** As to bankruptcy, see 2 G., 547-372; 3 G., 293; 4 G., 299; assignment means what? 1 Iowa, 582, 460; when void, 8 Iowa, 96; must be without preference, 4 G. 287; 8 Iowa, 96; 4 G., 443; 6 Iowa, 61; common law as to right of preference changed, 1 Iowa, 582; what would not vitiate the assignment—selling on credit, M., 296; 8 Iowa, 239; 7 Iowa, 469; when county judge can appoint new trustee, 8 Iowa, 438; oath to the inventory, *ibid.*; assignment does not include sale, 1 Iowa, 582; transfer by insolvent of all his property in payment or discharge of a pre-existing debt not fraudulent, *per se*, though he have other creditors known to the transferee, 1 Iowa, 582; case of several mortgages executed at same time to certain creditors, by an insolvent, covering all his property, void, as a general assignment with preferences, 8 Iowa, 96; must be for benefit of all, 4 G., 287; it should contain no benefit for the assignor, 8 Iowa, 96; when assent of creditors will not be presumed, 4 G., 287; case where considerable discretion was given the trustee, 6 Iowa, 61; 7 Iowa, 469; employment of assignee as clerk, 8 Iowa, 239.

## CHAPTER 78.

### OATHS AND ACKNOWLEDGMENTS.

[Code—Chapter 63.]

**By whom taken.** SECTION 1843. (979.) The following officers are authorized to administer oaths and take and certify the acknowledgment of instruments in writing; each judge of the supreme court, each judge of the district court, each judge of a county court and the prosecuting attorney when acting in his stead, each clerk of the supreme court, each clerk of the district court both as clerk of the district court and as clerk of the county court, each justice of the peace within his county, and each notary public within his county.

**Affirmation.** SEC. 1844. (980.) Persons conscientiously opposed to swearing may affirm, and shall be subject to the pains and penalties of perjury as in case of swearing.

**PRIOR LAWS.** 1. An act on form of oaths, passed Sept. 17, 1821; M. D., 1833, p. 224.

2. An act amending same, passed June 26, 1824; M. D., 1833, p. 225.

3. An act concerning Quakers and affirmations, passed April 12, 1827; M. D., 1833, p. 551.

4. An act relative to oaths, &c., passed Feb. 1, 1831; M. D., 1833, p. 573; all the above repealed, August 30, 1840.

5. An act concerning oaths and affidavits, passed Feb. 10, 1842; I. T., 4th sess., chap. 48, p. 36; also, Reprint, 1843, p. 455.

DECISIONS. When arbitrators to whom an award has been re-submitted, make a new award, it need not show on its face that they were sworn in the first instance, *Tomlinson v. Fritch*, June, 1859; any one may make the oath in attachment cases, and need not state his means of knowledge, 4 G., 255; *Chittenden v. Hobbs*, December, 1859; and 8 Iowa, 318; an attorney may be disbarred for a false oath or professional statement, 3 G., 550; failure to deny under oath admits execution or assignment of note, 6 Iowa, 390, 48; 1 Iowa, 263; value of oath to answer in chancery, and right to waiver, 3 G., 433, *White v. Hampton*, June, 1859; 4 Iowa, 524; 2 Iowa, 408; 3 G., 244; 6 Iowa, 496; 3 Iowa, 158-108; 2 Iowa, 20; 4 G., 231; 3 Iowa, 563; jury oath, M., 359-417; in criminal cases, 1 G., 106; 2 G., 270; 4 G., 381; 1 Iowa, 167, 173.

## CHAPTER 79.

### MECHANICS' LIEN.

[Code—Chapter 64.\*]

#### ARTICLE 1.

SECTION 1845. (1009.) No person is entitled to a mechanic's lien who takes collateral security on the same contract. Collateral security.

#### ARTICLE 2.

An Act securing Liens to Mechanics, Laborers, and others.

[Passed April 3, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 163.]

SECTION 1846. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That every mechanic, builder, artisan, workman, laborer or other person, who shall do or perform any work or labor upon, or furnish any materials, machinery or fixtures for any building, erection or other improvement upon land, including contractors, sub-contractors, material furnishers, mechanics and laborers engaged in the construction of any railroad or other work of internal improvement, or for repairing the same under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or sub-contractor, upon complying with the provisions of this act, shall have for his work or labor done, or materials, machinery or fixtures furnished, a lien upon such building erection, or improvement, and upon the land belonging to such owner or proprietor on which the same is situated, to secure the payment of such work or labor done, or materials, machinery or fixtures furnished. Who has a right to lien.

SEC. 1847. (2.) Every sub-contractor wishing to avail himself of the benefits of this act shall give notice to the owner or proprietor, or his agent or trustee, before or at the time he furnishes any of the things aforesaid, or performs any of the labor, of his intention to furnish or perform the same, and the probable value thereof; and if afterwards the things are furnished or labor done, the sub-contractor shall settle with the contractor therefor, and having made the settlement in writing, What a sub-contractor must do to benefit by this law.

\* All chapter 64 of the code except section 1009 seem to be repealed and superseded by article 2.

the same signed by the contractor and certified by him to be just, shall be presented to the owner or proprietor, or his agent or trustee and left with him, and within thirty days from the time the things shall have been furnished, or the labor performed, the sub-contractor shall file with the clerk of the district court of the county in which the building, erection or other improvement is situated, a copy of the settlement between him and the contractor which shall be a lien, on the building, erection or other improvement, for which the things were furnished or for which the labor was performed, and shall at the time file a correct description of the property to be charged with the lien, the correctness of all which shall be verified by affidavit.

What to be done in case contractor is obstinate.

SEC. 1848. (3.) In the case the contractor shall for any reason fail or refuse to make and sign such settlement in writing with the sub-contractor when the same is demanded, then the sub-contractor shall make a just and true statement of work and labor done, or things furnished by him, giving all credits, which he shall present to the owner or proprietor, or his agent, or trustee, and shall also within said thirty days file a copy of the same, verified by affidavit, with the clerk of the district court of the county in which the building, erection or other improvement is situate, together with a correct description of the property to be charged with the lien.

Form and extent of the employer's liability to sub-contractor.

SEC. 1849. (4.) The certificate of settlement made as aforesaid, or the statement of the sub-contractor, shall be a justification to the employer in withholding from the contractor, the amount appearing thereby to be due to the sub-contractor, until he is satisfied that the same has been paid, and the employer shall become the surety of the contractor to the sub-contractor for the amount due for such work, and labor or things, not however exceeding the value thereof as notified under section second.

Mode of serving notice.

SEC. 1850. (5.) The notices mentioned in the preceding sections, may be served by the sheriff or any constable of the county in which such building, erection or other improvement is so situated, and the return thereon of such sheriff or constable shall be received in evidence without further proof.

A record of the liability to be made within ninety days.

SEC. 1851. (6.) It shall be the duty of every person, except as has been provided for sub-contractors, who wishes to avail himself of the provisions of this chapter, to file with the clerk of the district court of the county in which the building, erection, or other improvement to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished, or the work or labor done or performed, a just and true account of the demand due or owing to him after allowing all credits, and containing a correct description of the property to be charged with said lien and verified by affidavit.

What the clerk shall do with the liability when filed with him.

SEC. 1852. (7.) It shall be the duty of the clerk of the district court to indorse upon every account the date of its filing, and make an abstract thereof in a book by him to be kept for that purpose and properly indexed, containing the date of its filing, the name of the person laying or imposing the lien, the amount of said lien, the name of the person against whose property the lien is filed, and a description of the property to be charged with the same, for all of which he shall receive the sum of one dollar from the person laying or imposing the lien, which shall be taxed and collected as other costs, in case there be suit thereon.

Priorities of such liens.

SEC. 1853. (8.) The liens for work or labor done, or things furnished as specified in this act, shall have priority in the order of the filing of the accounts thereof as aforesaid, and shall be preferred to all

other liens and incumbrances, which may be attached to or upon such building, erection or other improvement, and to the land on which the same is situated, or either of them, made subsequent to the commencement of said building, erection or other improvement.

SEC. 1854. (9.) The entire land upon which any such building, erection or other improvement is situated, including as well that part of said land which is not covered with such building, erection or other improvement, as that part thereof is covered with the same shall be subject to all liens created by this act to the extent and only to the extent of all the right, title and interest, owned therein by the owner or proprietor of such building, erection or other improvement, for whose immediate use or benefit such labor was done or things were furnished, and when the interest owned in said land, by such owner or proprietor of such building, erection or other improvement is only a lease-hold interest, the forfeiture of such lease for the non-payment of rent, or for non-compliance with any of the other stipulations therein, shall not forfeit or impair such liens so far as concerns the buildings, erections and improvements thereon, put by such owner or proprietor charged with such lien, but such building, erection or improvement may be sold to satisfy said lien, and be moved within thirty days after the sale thereof by the purchaser.

All the land or improvement liable to the lien.

SEC. 1855. (10.) The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements, for which they were furnished or the work was done, in preference to any prior lien, or incumbrance, or mortgage upon the land, upon which said building erections or improvements have been erected or put, and any person enforcing such lien, may have such building, erection or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter.

Same.

SEC. 1856. (11.) Any person having a lien under or by virtue of this act may bring suit to enforce the same, and to obtain the benefits thereof, in the district court of the county wherein the property on which the lien is attached is situated, without regard to its amount.

Action thereon.

SEC. 1857. (12.) The pleadings, practice, process, and other proceedings in the several district courts, in cases arising under this act, shall be the same as in ordinary civil actions and civil proceedings in said courts, except as herein otherwise provided. The petition among other things, shall allege the facts necessary for securing a lien under this act, and a description of the property charged therewith.

Mode of procedure.

SEC. 1858. (13.) In all suits under this act, the parties to the contract shall, and all other persons interested in the matter in controversy, and in the property charged with the lien may be made parties, but such as are not made parties shall not be bound by any such proceedings.

Parties thereto.

SEC. 1859. (14.) In case of the death of any of the parties specified in the immediately preceding section, whether before or after suit brought, the executor or administrator of such deceased party shall be made plaintiff or defendant, as the case may require, and it shall not be necessary to make the heirs or devisees of such deceased persons parties to such suit, but if there is no executor or administrator of such deceased party then his heirs or devisees may be made parties to such suit, and if any of said heirs or devisees are minors under the age of twenty-one years, their guardians shall be made parties with them, but if such minors shall have no guardians, the court in which the suit is pending shall appoint guardians *ad litem* for them, in the same manner and under the same rules and regulations as guardians *ad litem* are ap-

Same in case of death of party.

	pointed in proceedings for partition of real estate, and the judgment and proceedings of such court in any such suit, shall be as binding on such minors as if they were over the age of twenty-one years.
Judgment, form of.	SEC. 1860. (15.) The court shall ascertain by a trial in the usual way, the amount of indebtedness for which such lien is established, and render judgment for the same, and for cost of suit.
Same by default.	SEC. 1861. (16.) Judgment by default shall be rendered against every defendant, who, after being summoned or notified according to law shall not appear and plead, or answer, within the time allowed in ordinary civil actions.
Judgment in case of no notice or appearance.	SEC. 1862. (17.) When the debtor has not been served with notice, according to law, and has not appeared, but has been lawfully notified by publication, the judgment if for the plaintiff shall be that he recover the amount of the indebtedness found to be due, to be levied out of the property charged with the lien therefor, which said property shall be correctly described in said judgment.
Judgment in case of notice.	SEC. 1863. (18.) When the debtor has been served with notice according to law, or appears to the action, the judgment, if for the plaintiff, shall be against such debtor as in ordinary cases, with the addition, that if no sufficient property of the debtor can be found to satisfy such judgment and costs of suit, then the residue thereof be levied as provided in the next preceding section.
Execution and sale.	SEC. 1864. (19.) The execution to be issued shall be a special <i>feri facias</i> , and shall be in conformity with the judgment, and such writ shall be returnable as ordinary executions; and the advertisement, sale and conveyance of real or personal estate under the same, shall be made as under ordinary executions.
Limitation ninety days.	SEC. 1865. (20.) All suits under this act shall be commenced within ninety days, in case of sub-contractors, and nine months in other cases, from the time of filing the account or statement as aforesaid, and not after, and be prosecuted without unnecessary delay to final judgment.
Meaning of "owner and proprietor."	SEC. 1866. (21.) Every person, including all <i>cestuis que trust</i> , for whose immediate use, enjoyment, or benefit, any building erection or improvement shall be made, shall be included by the words "owner or proprietor" thereof, under this act, not excepting such as may be minors over the age of eighteen years or married women.
Acknowledgment of satisfaction on payment.	SEC. 1867. (22.) Whenever any indebtedness, which is a lien upon any such real estate, erection, or building or other improvement shall be paid and satisfied it shall be the duty of the creditor, if required, to go before some officer authorized to take the acknowledgments of conveyances of real estate, and acknowledge satisfaction of said lien.
Duty of clerk thereupon.	SEC. 1868. (23.) Such satisfaction being acknowledged and certified, shall be filed with the clerk of the district court, who shall thereupon enter satisfaction of such lien upon the record or the margin thereof, in the same manner as the satisfaction of a mortgage is entered and shall be allowed the same fee therefor as is allowed for entering the satisfaction of a mortgage, to be paid by the creditor at the same time the service is performed.
Penalty for refusal to acknowledge satisfaction.	SEC. 1869. (24.) If any creditor fail, refuse or neglect to acknowledge satisfaction as aforesaid, within ten days after payment, and neglect as aforesaid, he shall be liable to any person injured, to the amount of such injury, and for costs of suit.
Employer may be held at any time for what he has in his hands be-	SEC. 1870. (25.) In case any sub-contractor shall not have notified the owner, proprietor, his agent or trustee, before furnishing the things aforesaid, or doing work as provided for in section two, but shall furnish

to him the account, as provided for in said section two, or the statement as provided for in section three, and in all other respects shall comply with the provisions of this act, he shall have the benefit of this act, the same as if he had given such notice, to the extent, and only to the extent, that such owner or proprietor can safely with his engagements and liabilities then existing, withhold any amount by him owing to his contractor for such sub contractor.

longing to the other.

SEC. 1871. (26.) All persons furnishing things or doing work provided for by this act, shall be considered sub-contractors, except such as have therefor contracts directly with the owner, proprietor, his agent or trustee.

Who sub-contractors.

SEC. 1872. (27.) The lien herein given shall be transferable and assignable, but when for labor alone shall be exempt from execution.

Lien transferable.

SEC. 1873. (28.) Nothing herein contained shall be so construed as to give a sub-contractor or laborer a lien for any amount greater than that originally contracted for between the employer and contractor.

Qualification of lien.

PRIOR LAWS. 1. Mechanics' lien, passed April 23, 1833; M. D., 1833, p. 406; repealed by No. 2, hereof.

2. An act relative to mechanics' liens and for other purposes, passed Dec. 17, 1838; I. T., 1st sess., p. 327; repealed by No. 4 hereof.

3. An act to amend an act relative to mechanics' lien, &c., passed Dec. 17, 1838; passed Jan. 16, 1840; I. T., 2d sess., chap. 55, p. 78; repealed by No. 4 hereof.

4. An act relative to mechanics' liens and other purposes, passed Feb. 13, took effect July 4, 1843; also Reprint, chap. 92, p. 380.

5. Code, 1851, chap. 64.

6. An act to amend chap. 64 of the Code of Iowa, passed Jan. 29, took effect July 1, 1857; 6th sess., chap. 220, p. 377.

7. An act to amend chap. 220 of the session laws of 1856-7, passed March 11, took effect March 20, 1858; 7th sess., chap. 39, p. 46.

DECISIONS. Mechanic's lien not waived by taking note, 4 G., 112-36; 5 Iowa, 546; 7 Iowa, 77; the time of payment will be presumed that recited in a note till the contrary be shown, 5 Iowa, 549; the proceedings are personal and must be based on contract, 2 Iowa, 488; and rules both of law and equity apply, 2 G., 435; statute to be strictly followed, 2 G., 510; 2 Iowa, 488; 7 *ibid.*, 77; 2 G., 508; what the petition should state, 2 G., 508; 1 G., 75; lien can not be joined with action on a contract against the vendee of the premises, *Merwin v. Sherman*, Dec., 1859; who must be made parties defendants, *ibid.*, and also 2 G., 513; lien in case where property is to be taken in payment, 4 G., 21; lien against a wife's land, 2 G., 435; sec. 981 of Code construed, 8 Iowa, 416; contract—certainty of designation therein of the edifice, *ibid.*; limitation, 5 Iowa, 546; 4 G., 115; 2 G., 513; effect of taking note as to waiver of lien, 4 G., 112; 7 Iowa, 77; 5 *ibid.*, 546; 2 G., 508-513; 4 G., 36-112; an accepted promise by the vendee to pay for the work, &c., in consideration of forbearance of pursuing lien, not a waiver of lien, *Merwin v. Sherman*, Dec., 1859.

## CHAPTER 80.

### LIMITED PARTNERSHIP.

An Act for the Formation of Limited Partnerships.

[Passed March 22, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 98, page 190.]

SECTION 1874. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That limited partnerships for the transaction of any mercantile, mechanical or manufacturing business within this state, may be

Partnerships authorized.

General partners.	formed by two or more persons, upon the terms, with the rights and powers, and subject to the conditions and liabilities herein prescribed.
Special partners.	SEC. 1875. (2.) Such partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible as general partners now are by law; and of one or more persons who shall contribute in actual cash payments, a specific sum as capital to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership, beyond the funds so contributed by him or them to the capital.
General partners transact business.	SEC. 1876. (3.) The general partners only shall be authorized to transact business and sign for the partnership, and to bind the same.
Certificate of partnership.	SEC. 1877. (4.) The persons desirous of forming such partnership, shall make and severally sign a certificate, which shall contain,
Name of firm.	1. The name or firm under which such partnership is to be conducted.
Business.	2. The general nature of the business intended to be transacted.
Names of partners.	3. The names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence.
Capital.	4. The amount of capital which each special partner shall have contributed to the common stock.
Length of partnership.	5. The period at which the partnership is to commence, and the period at which it will terminate.
Certificate acknowledged.	SEC. 1878. (5.) The certificate shall be acknowledged or proved as to the several persons signing the same, before some one authorized to administer oaths and take acknowledgments of deeds.
Certificate recorded.	SEC. 1879. (6.) The certificate so acknowledged, shall be filed in the office of the clerk of the district court, of the county in which the principal place of business of the partnership shall be situated, and shall also be recorded by him at large, in a book to be kept for that purpose, open to public inspection. If the partnership shall have places of business situated in different counties, a transcript of the certificate, and of the acknowledgment thereof duly certified by the clerk of the district court in whose office it shall be filed, under his official seal, shall be filed and recorded in like manner in the office of the clerk of the district court of every such county.
Affidavit of capital paid in.	SEC. 1880. (7.) At the time of filing the original certificate, with the evidence of the acknowledgment thereof, as before directed, an affidavit of one or more of the general partners shall also be filed in the same office, stating that the sums specific in the certificate, to have been contributed by each of the special partners to the common stock, have been actually and in good faith paid in cash.
Partnership illegal, if certificate not filed.	SEC. 1881. (8.) No such partnership shall be deemed to have been formal until a certificate shall have been made, acknowledged, filed and recorded, nor until an affidavit shall have been filed, as above directed, and if any false statement be made in such certificate or affidavit, all the persons interested in such partnership, shall be liable for all the engagements thereof as general partners.
Terms of partnership published.	SEC. 1882. (9.) The partners shall publish the terms of the partnership when registered, for at least six weeks immediately after such registry in two newspapers, to be designated by the clerk of the district court of the county in which such registry shall be made, and to be published in the senatorial district in which their business shall be carried on, and if such publication be not made the partnership shall be deemed general.



SEC. 1883. (10.) Affidavits of the publication of such notice by the printers of the newspapers in which the same shall be published, may be filed with the clerk of the district court directing the same, and shall be evidence of the facts therein contained.

Affidavit of publication filed.

SEC. 1884. (11.) Every renewal or continuance of such partnership beyond the time originally fixed for its duration, shall be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner herein required for its original formation, and every such partnership which shall be otherwise renewed or continued, shall be deemed a general partnership.

Renewals acknowledged and recorded.

SEC. 1885. (12.) Every alteration which shall be made in the names of the partners in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership, and every such partnership which shall in any manner be carried on after any such alteration shall have been made, shall be deemed a general partnership, according to the provisions of the last section.

Alterations vitiate the partnership.

SEC. 1886. (13.) The business of the partnership shall be conducted under a firm in which the names of the general partners only shall be inserted, without the addition of the word "company" or any other general term, and if the name of any special partner shall be used in such firm, with his privity, he shall be deemed a general partner.

Names of firm specified.

SEC. 1887. (14.) Suits in relation to the business of the partnership may be brought and conducted, by and against the general partners in the same manner as if there were no special partners.

Suits against the firm.

SEC. 1888. (15.) No part of the sum which any special partner shall have contributed to the capital stock, shall be withdrawn by him, or paid or transferred to him, in the shape of dividends, profits or otherwise at any time during the continuance of the partnership, but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital, and if after the payment of such interest, any profits shall remain to be divided, he may also receive his portion of such profits.

Special partner's capital not to be withdrawn.

SEC. 1889. (16.) If it shall appear, that, by the payment of interest or profits to any special partner, the original capital has been reduced, the partner receiving the same, shall be bound to restore the amount necessary to make good his share of capital, with interest.

Special partner makes capital good.

SEC. 1890. (17.) A special partner may, from time to time, examine into the state and progress of the partnership concerns, and may advise as to their management, but he shall not transact any business on account of the partnership, nor be employed for that purpose as agent, attorney, or otherwise. If he shall interfere, contrary to these provisions he shall be deemed a general partner.

Special partner's powers.

SEC. 1891. (18.) The general partners shall be liable to account to each other, and to the special partners, for their management of the concern, both in law and equity, as other partners now are by law.

General partner's duties.

SEC. 1892. (19.) Every partner who shall be guilty of any fraud in the affairs of the partnership, shall be liable civilly, to the party injured, to the extent of his damage, and shall also be liable to an indictment for a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court by which he shall be tried.

A partner's fraud punished by fine and imprisonment.

SEC. 1893. (20.) Every sale, assignment or transfer of any of the property or effects of such partnership, made by such partnership when insolvent or in contemplation of insolvency, or after, or in contemplation

Firm can not assign property or prefer creditors.

of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner, over other creditors of such partnership, and every judgment confessed, lien created, or security given by such partnership, under the like circumstances, and with the like intent, shall be void, as against the creditors of such partnership.

Partner can not assign property or prefer creditors.

SEC. 1894. (21.) Every such sale, assignment, or transfer of any of the property or effects of a general or special partner, made by such general or special partner, when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of the partnership, with the intent of giving to any creditor of his own, or of the partnership a preference over creditors of the partnership, and every judgment confessed, lien created or security given by any such partner under the like circumstances and with the like intent be void, as against the creditors of the partnership.

Special partner's liabilities.

SEC. 1895. (22.) Every special partner who shall violate any provisions of the two last preceding sections, or who shall concur in or assent to, any such violation by the partnership or by any individual partner, shall be liable as a general partner.

Special partner not allowed as creditor.

SEC. 1896. (23.) In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as a creditor, until the claims of all the other creditors of the partnership shall be satisfied.

Terms of dissolution of partnership.

SEC. 1897. (24.) No dissolution of such partnership by the acts of the parties, shall take place previous to the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of such dissolution shall have been filed and recorded in the office of the clerk of the district court in which the original certificate was recorded, and published once in each week for four weeks, in a newspaper printed in each of the counties where the partnership may have places of business.

PRIOR LAWS. 1. An act relative to limited partnerships, passed Jan. 15, 1838; Wis., 2d sess., No. 47, p. 86.

2. An act in relation to limited partnerships, passed Jan. 17, took effect Feb. 17, 1846; I. T., 8th sess., chap. 30, p. 27.

DECISIONS. What is partnership? 4 G., 23; 2 G., 429; 7 Iowa, 435; 2 G., 257; 7 Iowa, 446; *Robinson v. Chapline*, June, 1859; 2 G., 427; 3 Iowa, 171; as to proof of partnership, see 2 G., 368; 4 Iowa, 230; 7 Iowa, 435; 3 Iowa, 171; power of partner, 3 G., 190; 2 G., 427; 1 G., 25; 2 Iowa, 504; 5 Iowa, 224; necessary parties to a bill to determine property to be partnership property, 7 Iowa, 183; value of the lien of partner, 2 Iowa, 20; marshalling of the funds of firm and individuals, 8 Iowa, 1; method of procedure where the interest of a member in the firm is levied on, *ibid.*; in bill to wind up; proper parties, 3 Iowa, 171; statements of petition, 4 G., 403; right to dissolve, 1 G., 537; 8 Iowa, 150; mode of distribution, *ibid.*; and *Tomlinson v. Tritch*, June, 1859; 5 Iowa, 535; notice of dissolution, 3 G., 186; powers of surviving partner, 3 Iowa, 171; money used by the firm, though drawn by one member only in its name, 3 G., 319; see M., 372; a partner the assignee of the co-partner—sues, how? 7 Iowa, 145; *White v. Tucker*, June term, 1859.

CHAPTER 81.

UNCLAIMED GOODS.

An Act to regulate the sale of Unclaimed Goods in the possession of Forwarding and Commission Merchants, Express Companies, and other Common Carriers.  
 [Passed March 22, 1858, took effect March 31, 1858: Laws of Seventh General Assembly, Chapter 92, page 179.]

SECTION 1898. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all goods, wares, merchandise or other property which has been transported by, or stored with any forwarding and commission merchants, express companies, and other common carriers, shall be subject to a lien for the just and lawful charges for the transportation, advancing and storage of the same. Goods subject to lien for charges.

SEC. 1899. (2.) That if any goods, wares, merchandise, or other property, shall remain for six months in the possession, uncalled for or unclaimed, of any forwarding or commission merchant, express company, or other common carrier, with the just and legal charges unpaid thereon, the person or persons having the same in charge or possession shall give notice to the marshal of the city if there be a marshal, in which such person may reside, having such goods in store, charge or possession, and if there be no marshal, then such notice must be given to the sheriff of the proper county, which notice must be in writing, and must state when such goods, wares, or merchandise were received, the marks or brands by which such goods are designated if any, and if not designated by marks or brands, then by such other description or designation as may best answer the purpose of indicating what the goods are, and to whom consigned, also the charges paid upon such goods, accompanied by the original receipt for such charges, and by the bill of lading, also the other charges, if any, due and unpaid, which notice must be verified by oath or affirmation. Goods on hand six months may be sold.  
Notice given.

SEC. 1900. (3.) The marshal or sheriff, as the case may be, on receiving such notice, shall proceed to the place in which the goods, wares or merchandise contemplated in this act, shall be stored or held in possession, and shall in the presence of the person in whose store or possession such goods, wares or merchandise may be, examine such goods, wares or merchandise, examining minutely the contents of any close package, which may be necessary to be opened to ascertain the nature of its contents, and such marshal or sheriff shall then and there take and make an inventory or invoice of such goods, or separate invoices or inventories where such goods, wares or merchandise may appear to belong, or to be consigned to different persons, each separate invoice or inventory to contain a description of the goods consigned or belonging to each separate individual or firm. Goods described.  
Officer examines goods.  
Invoices made.

SEC. 1901. (4.) The marshal, sheriff or constable so taking and making these invoices or inventories shall advertise the goods described in such invoice or inventory, in some newspaper of general circulation, published in the place where such goods, wares or merchandise may be in store, or held in possession, which advertisement must state that the goods, wares or merchandise so advertised have remained for six months uncalled for and unclaimed—that they are to be sold, specifying when and where—to defray the expense incurred upon the payment of the freight and the charges due and unpaid upon said goods, including the charge of advertising and selling such goods, which notice must be pub- Goods advertised:  
Form of advertisement.

- lished in a weekly paper, if there be one in the place, if not, in the newspaper nearest to the place designated for six consecutive weeks, and one week in a daily, if there be a daily paper.
- Goods sold at auction.** SEC. 1902. (5.) The marshal or sheriff advertising such goods, wares or merchandise as aforesaid, shall at the time and place designated in the notice, put up at auction for sale to the highest bidder, such goods, wares and merchandise in such parts and parcels, as to such marshal or sheriff may appear best to effect a profitable sale.
- Perishable goods sold immediately.** SEC. 1903. (6.) Nothing contained in this act shall be so construed as to prevent the sale of perishable or damaged goods, immediately on their coming into the possession and being uncalled for, of any forwarding and commission merchant or other common carrier, but such sale must be made by a marshal or sheriff as contemplated in this act, only on the affidavit of the person having the possession thereof, that such property is perishable, and the longest possible notice must be given of such sale in a daily paper if there be one in the place, if not by such other publication as may carry out the intention and provisions of this act.
- Notice of sale.**
- Charges paid.** SEC. 1904. (7.) That said officer shall pay to the person or persons having a lien on said property the amount thereof: *provided*, the proceeds of the property sold shall, after paying the expenses of sale be sufficient for that purpose, and the excess shall be by him forthwith deposited with the county treasurer, subject to the order of the owner, said ownership being properly authenticated under oath, said officer shall also file with the county judge a schedule of the property, the sum realized from the sale of each separate package, describing the same, together with a copy of the advertisement as hereinbefore provided, and said officer shall be entitled to such fees therefor as are legal in cases of sale under execution.
- Express deposited with county treasurer.**
- No owner applying proceeds go to the school fund.** SEC. 1905. (8.) Should the owner of the property sold, not make a demand upon the county treasurer for any money that may be in the treasury to his credit according to the provisions of this act, the sum so unclaimed shall be accounted for by the county treasurer, and placed to the credit of the county in the next subsequent settlement made by the treasurer with the county, and should the sum so uncalled for or unclaimed, remain unclaimed and uncalled for during the period of one year, it shall then be paid into the school fund, to be distributed as other funds may be by law, which may be raised by a tax on the property of the county. But nothing herein contained shall be a bar to any legal claimant from presenting and proving his claim for such money at any time within ten years, and the claim being within that period presented and proved, it shall be paid out of the county treasury in which it was originally placed, without interest.
- Ten years' redemption.**

## CHAPTER 82.

### INSPECTION.

An Act to regulate the Inspection of Shingles and Lumber.

[Passed Jan. 15, 1855, took effect July 1, 1855; Laws of Fifth General Assembly, Chapter 26, page 39.]

- Inspector.** SECTION 1906. (1.) *Be it enacted by the General Assembly of the State of Iowa, That it shall be the duty of the county judge of each county*

in this state at their first, or any subsequent term of said court, (when it may be necessary,) to appoint one inspector of lumber and shingles, who shall each have the power to appoint one or more deputies to act under them. For the conduct of the deputies, the principal shall be liable.

Deputies.

SEC. 1907. (2.) That before any inspector, or deputy inspector shall enter upon the duties of his office, he shall take an oath or affirmation, that he will faithfully and impartially execute the duties required of him by law, and each inspector shall moreover, enter into a bond with sufficient security to be approved by the judge in such sum as the judge may require, made payable to the state of Iowa, which bond shall be deposited with the treasurer of the county, conditioned for the faithful and impartial performance of his duties, as required by law.

Qualification.

SEC. 1908. (3.) Any person who may think himself aggrieved, by the incapacity, neglect, or misconduct of such inspector, or his deputy, may institute a suit on a copy of the bond certified by the treasurer, for the use of the person suing: *provided*, that the treasurer shall not be liable for costs. And in case the person suing shall obtain judgment, he may have execution as in other cases: *provided further*, that suit be commenced within one year from the cause of action.

Sue on bond.

Judgment.

Limitation.

SEC. 1909. (4.) It shall be the duty of the inspector or their deputies within their respective counties, to inspect all lumber, boards, and shingles on application made to him or them, for that purpose; and when inspected stamp on the lumber, boards and shingles, with branding irons made for that purpose, the name of the state and county where inspected; also, the kind and quality of the articles inspected, which branding iron shall be made and lettered as may be directed by the county judges respectfully, and every inspector shall make in a book provided by him for that purpose, fair and distinct entries of articles inspected by him, or his deputies with the names of the persons for whom said articles were inspected.

Duties of inspector.

SEC. 1910. (5.) The county judges in their respective counties, shall have full power, and authority on complaints and sufficient cause shown, to remove from office, any inspector appointed under this act, or to fill any vacancy that may occur by death, removal, or otherwise.

Removed.

SEC. 1911. (6.) That if any person shall counterfeit the aforesaid brands, or marks, or either of them, upon conviction thereof, shall be deemed guilty of forgery, and shall be punished accordingly.

Counterfeit brands.

SEC. 1912. (7.) That a lawful shingle shall be sixteen inches in length, four inches wide, a half an inch thick at the butt end, and all lumber shall be divided into four qualities, and shall be designated clear, first common and second common and refused. And shingles shall be clear of sap, and designated as first and second quality. The shingles to be branded on each bundle with the quality and the name of the inspector.

Size of shingles.

Qualities of lumber.

Shingles

SEC. 1913. (8.) The fees for inspecting and measuring shall be fifteen cents per thousand feet board measure, and fifteen cents per thousand for shingles.

Fees.

## CHAPTER 83.

## WALLS IN COMMON.

An Act entitled an act respecting Walls in Common.

[Passed January 24, 1855, took effect July 1, 1855; Laws of Fifth General Assembly, Chapter 86, page 130.]

[This law is copied from the civil law, see article 671, Civil Code of Louisiana.]

- Walls.** SECTION 1914. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That in cities, towns, and other places, surveyed into building lots, the plats whereof are recorded, he who is about to build contiguous to the land of his neighbor, may, if no wall be on the line between, rest one-half of his wall on his neighbor's land: *provided,* he build of brick or stone, at least as high as the first story: *and provided,* the whole thickness of such wall, above the cellar wall, do not exceed eighteen inches, not including the plastering, which, for the purposes of this act, is not to be considered as part of the wall: *and provided also,* that his neighbor shall not be compelled to contribute to the expense of said wall.
- On line.**
- Brick or stone.**
- Size of walls.**
- Partnership.** SEC. 1915. (2.) If his neighbor be willing, and does contribute one-half of the expense of building such wall, then it is a wall in common between them; and if he even refuses to contribute to the building of such wall, he shall yet retain the right of making it a wall in common, by paying to the person who built it, one-half of the appraised value of said wall, at the time of using it.
- Refusal.**
- Presumption.** SEC. 1916. (3.) Every wall being a separation between buildings, shall, as high as the upper part of the first story, be presumed to be a wall in common, if there be no titles, proof, or mark to the contrary.
- Repairs, &c.** SEC. 1917. (4.) The repairs, and rebuilding of walls in common, are to be made at the expense of all who have a right to the same, and in proportion to the interest of each therein: nevertheless, every co-proprietor of a wall in common, may be exonerated from contributing to the repairs or building, by giving up his right in common: *provided,* no building belonging to him be actually supported by the wall thus held in common.
- Co-proprietors.** SEC. 1918. (5.) Every co-proprietor may build against a wall held in common, and cause beams or joists to be placed therein, and any person building such a wall, shall, on being requested by his co-proprietor, make the necessary flues, and leave the necessary bearings for the joists or beams, at such height, and distance apart, as shall be specified by his co-proprietor.
- Mode of building.**
- Height.** SEC. 1919. (6.) Every co-proprietor is at liberty to increase the height of the wall held in common; but he alone is to be at the expense of raising it, and of repairing, and keeping in repair, that part of the wall, above the part so held in common.
- Re-build.** SEC. 1920. (7.) If the wall so held in common, can not support the wall to be raised upon it, he who wishes to have it made higher, is bound to re-build it anew entirely, and at his own expense, and the additional thickness of the wall must be placed entirely on his own land.
- Person paying half.** SEC. 1921. (8.) The person who did not contribute to the heightening of the wall held in common, may cause the raised part to become common, by paying one-half of the appraised value of such raising, and
- Wall in common.**

half of the value of the grounds occupied by the additional thickness of the wall, if any ground was so occupied.

SEC. 1922. (9.) Every proprietor joining a wall, has, in like manner, the right of making it a wall in common, in whole or in part, by repaying to the owner of the wall one-half of its value, or the one-half of the part which he wishes to hold in common, and one-half of the value of the ground on which it is built, if the person who has built the wall, has laid the foundation entirely upon his own ground. Same.

SEC. 1923. (10.) Neither of two neighbors can make any cavity within the body of the wall held by them in common; nor can either affix to it any work, without the consent of the other, or without having, on his refusal, caused the necessary precautions to be used, so that the new work be not an injury to the rights of the other, to be ascertained by persons skilled in building. No cavities.

SEC. 1924. (11.) No dispute between neighbors, as to the amount to be paid by one or the other, by reason of any of the matters treated of in this act, shall delay the execution of the provisions of the same: provided, that the party on whom the claim is made, shall enter into bonds, with security, to the satisfaction of the clerk of the district court of the proper county, conditioned that he shall pay to the claimant whatsoever may be found to be his due, on the settlement of the matter between them, either in a court of justice, or elsewhere; and the said clerk of the district court is hereby required to indorse his approval on said bond, when the same is approved by him, and retain the same in his custody, until demanded by the opposite party. No delay. Bond.

SEC. 1925. (12.) This act is not to prevent adjoining proprietors from entering into special agreement about walls on the lines between them; but no evidence of such agreement shall be competent, unless it be in writing, signed by the parties thereto, or their lawfully authorized agents, and whenever such proprietor is a minor, the guardian of his estate shall have full authority to act for, and bind him, in all matters relating to walls in common. Agreements.

PRIOR LAWS UNDER TITLE 13. 1. An act to provide for the inspection of certain articles, passed April 22, 1833; M. D., 1833, p. 505.

2. An act to provide for the inspection of staves and heading, passed May 31, 1833; M. D., 1833, p. 512.

3. An act to provide for the inspection of leather, passed June 14, 1832; M. D., 1833, p. 514.

4. An act on auctioneers, passed April 23, 1833; M. D., 1833, p. 538, modified June 22, 1838; Wis. special sess., No. 12, p. 343.

5. An act relative to limited partnerships, passed Jan. 15, 1838; Wis., 2d sess., No. 47, p. 86.

6. An act as to auctioneers, passed Jan. 22, 1838; Wis. special sess., No. 12, p. 343. All the above repealed Aug. 30, 1840.

7. An act relative to limited partnerships, passed Jan. 25, 1839, took effect Feb. 25, 1839; I. T., 1st sess., p. 361; also Reprint, 1843, p. 478.

8. An act for the relief of certain carriers, passed Jan. 13, 1840; I. T., 2d sess., chap. 42, p. 42; also Reprint, 1843, p. 201.

9. An act relating to auctioneers and auction sales, passed Jan. 17, took effect Feb. 17, 1840, I. T., 2d sess., chap. 83, p. 123; repealed by No. 10 hereof.

10. An act repealing the above, passed Jan. 23, took effect Feb. 23, 1843; Reprint, chap. 19, p. 89.

DECISIONS. This act is but declaratory of the common law, 3 Iowa, 391; rights of party to build over his line, *Wickersham v. Orr*, Dec. 1859.

# TITLE XIV.

## OF EDUCATION.

### CHAPTER 84.

#### THE STATE UNIVERSITY.

[Code—Chapter 65 ]

#### ARTICLE 1.

An Act for the Government and Regulation of the State University of Iowa.

[Passed Dec. 25, 1858; Laws of Board of Education.]

- Object of state university.** SECTION 1926. (1.) *Be it enacted by the Board of Education of the State of Iowa,* That the object of the state university of Iowa, established by the constitution at Iowa City, shall be to provide the best and most efficient means of imparting to the youth of the state, of both sexes, upon equal terms, a thorough education and a perfect knowledge of the different branches of literature, the arts and sciences, with their various applications.
- Collegiate department.** SEC. 1927. (2.) There shall be attached to the university a collegiate department, in which, as soon as may be deemed expedient by the board of trustees hereinafter provided, regular college classes shall be formed or provided for, and a president and the necessary professors and tutors elected. There shall also be a normal department to the university, in which shall be taught the theory and practice of teaching, and everything which enters into it as an art, including all the most approved methods and processes now in use in all the varieties of teaching.
- Normal department**
- Board of trustees.** SEC. 1928. (3.) The university shall be governed and managed by a board of trustees consisting of seven persons, to be elected at the first meeting of the board of education, three of whom shall hold their offices for one year, and four for three years, and whenever the terms of any trustees expire, their places shall be supplied by new elections.
- Term of office.**
- Per diem and mileage** SEC. 1929. (4.) The members of the board of trustees shall each receive the same per diem during the time of their session, and mileage going to and returning therefrom, as members of the general assembly.
- Control.** SEC. 1930. (5.) The university shall never be under the exclusive control of any religious denomination whatever.
- Specimens, property of state university.** SEC. 1931. (6.) In all cases where specimens of natural history, and geological and mineralogical specimens which are or may be hereafter collected by the state geologist of Iowa, or by any others appointed by the state to investigate its natural history and physical resources, are found, they shall belong to and be the property of the state university, and shall form a part of its cabinet of natural history.
- Officers to be appointed by board of trustees** SEC. 1932. (7.) The board of trustees shall appoint a secretary, a treasurer and librarian, and a curator of the cabinet of natural history, who shall hold their respective offices during the pleasure of the board



of trustees. It shall be the duty of the secretary to record all the proceedings of the board, and carefully to preserve all its books and papers. It shall be the duty of the treasurer to keep a true and faithful account of all moneys received and paid out by him, and before entering upon the duties of his office, he shall take and subscribe an oath that he will faithfully perform the duties of treasurer, and he shall also give a bond in the penalty of twenty-five thousand dollars, conditioned for the faithful discharge of his duties as treasurer, and that he will at all times keep and render a true account of all moneys received by him as such treasurer, and of the disposition he has made of the same, and that he will at all times be ready to discharge himself of the trust, and to pay over when required; which bond shall have two good sureties, and shall be approved as to its form and the sufficiency of its sureties, by the board of trustees, and also the auditor and secretary of state, and shall be filed in the office of the latter. The librarian and curator shall have charge of the library and cabinet of natural history.

Duty of secretary.

Of treasurer.

Bond

SEC. 1933. (8.) The university shall consist of such departments as the board of trustees shall determine, subject to the provisions of this act, and the same may be altered or changed as they may prescribe. The immediate government of the several departments shall be intrusted to the faculty. The method and course of instruction in each department shall be prescribed by the board of trustees, who shall also confer such degrees, and grant such diplomas, as are usually conferred and granted by other universities, or such others as they may think proper.

Departments.

Government.

Diplomas.

SEC. 1934. (9.) The board of trustees shall have power, and it shall be their duty to enact laws for the government of the university, to elect a president and the requisite number of professors and tutors, also such other officers as they may deem expedient, and to determine the amount of their respective salaries, also the compensation of the officers mentioned in section seven of this act. They shall have power to remove any officer connected with the institution, when in their judgment the good of the institution requires, and to determine the amount of fees to be paid for tuition.

Board of trustees.

Their powers defined.

SEC. 1935. (10.) The board of trustees are authorized to expend such portion of the income of the university fund as it may deem expedient, in the purchase of apparatus, library and cabinets of natural history, in providing suitable means to keep and preserve the same, and in the procurement of all other means and facilities for giving instruction.

Same

SEC. 1936. (11.) The first meeting of the board of trustees shall be held on the first Wednesday of February, in the year one thousand eight hundred and fifty-nine, at Iowa City; the annual meetings of the board shall be held on the last Tuesday of June of each year. The president of the board of education may call special meetings when he deems it expedient. The board of trustees shall have power to fill all vacancies occurring therein, except when the board of education is in session; and the person so appointed shall hold his office until the next session of the board of education.

First meeting of board of trustees at Iowa City.

Annual meeting.

Power to fill vacancies.

SEC. 1937. (12.) The treasurer of the university shall have a set of books in which he shall keep an accurate account of all transactions relative to the sale and disposition of the university lands, and the management of the fund arising therefrom; which books shall exhibit what parts and portions of land have been sold, at what prices, and to whom, and how the proceeds have been invested, and on what securities; and

Books of treasurer.

Land sold, at what prices and to whom.

- what land still remains unsold, where situated and of what value respectively.
- SEC. 1938. (13.)** No sales of lands belonging to the university shall hereafter take place, unless the same shall be decided upon at a regular meeting of the board of trustees, or at one called for that particular purpose, and then only in the manner, upon the notice, and on the terms which the board shall prescribe, and no member of the board shall be either directly or indirectly interested in any purchase of such lands upon sale, and it shall be lawful for the board to invest any such surplus income which is not immediately required for the purposes of instruction, in the United States or in other interest-paying state stocks, and to hold the same for the university, either as a perpetual fund or as an income to defray current expenses, as said board of trustees may deem expedient.
- SEC. 1939. (14.)** The board of trustees shall make a report to the general assembly and to the board of education at each of their respective sessions, which shall exhibit the state, condition and progress of the university in its several departments, the different courses of study pursued therein, the branches taught, the means and methods of instruction adopted, the number of professors, with the compensation of each, and the number of students, with their names, ages, studies, sex and residence, the situation and condition of the university fund, the income derived therefrom, the amount of expenditures, and such other matters as said board of trustees may deem proper to communicate.
- No sales of lands belonging to the university unless by direction of board of trustees.**
- May invest surplus.**
- Perpetual fund.**
- Report to general assembly and board of education.**
- What it shall contain.**

## ARTICLE 2.

An Act to amend a part of Chapter 65 of the Code of Iowa, and to provide for the Sale of Saline, School\* and University† Lands.

[Passed Jan. 25, 1855, took effect Jan. 31, 1855; Laws of Fifth General Assembly, Chapter 136, page 200.]

- Public sale only.** **SECTION 1940. (1.)** *Be it enacted by the General Assembly of the State of Iowa,* That from and after the taking effect of this act, all the school, saline, and university lands which then remain unsold, shall be sold only at public sale, except as hereinafter provided.
- Notice.** **SEC. 1941. (2.)** It shall be the duty of the person or persons, having charge, by law, of the saline, school, and university lands, to offer the same at public sale, after having given notice of the same, as provided for in the law regulating the sale of the sixteenth section.
- Again offered.** **SEC. 1942. (3.)** All lands so offered, and which are not sold at said public sale, shall be offered for sale again at the expiration of six months, or as soon thereafter as the person or persons, so having charge thereof, may think best for the interest of said fund, and all lands so offered and remaining unsold at said second sale, shall be offered again at public sale at the expiration of six months, or as soon thereafter as the person or persons, having charge thereof, may deem proper for the interest of said fund.
- Third sale.** **SEC. 1943. (4.)** All sales made under and by authority of this act, shall be conducted in the same manner, and the same notice of such sales shall be given, as is now‡ required by law to be given for the sale of the sixteenth section.
- Manner of selling.**

\* See chapter 86.

† See section 1938.

‡ Does it mean section 1048 of Code of 1851, or section 1971 of this revision?

SEC. 1944. (5.) So much of said lands as shall have been offered for sale three times, as provided for in this act, and remain unsold, shall be subject to be entered at private entry, at such time, and at such price as the person or persons, having charge thereof may designate : *provided, however*, that in no case, either in public sale or by private entry, shall the land be sold for less than the appraised value.

Private entry.

Minimum.

ARTICLE 3.

An Act authorizing the Register of the State Land Office to close the Saline Grant. [Passed July 12, 1856, took effect July 31, 1856; Laws of the Fifth General Assembly, Extra, Chapter 27, page 74.]

SECTION 1945. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That the register of the state land office be, and is hereby authorized and required, under the direction of the governor of the state of Iowa, to obtain the approval, close the grant, and obtain patents for all the saline lands selected in and for the state of Iowa, and all necessary expenses incurred thereby, to be paid by order of the governor on the state treasurer.

Register's duty.

ARTICLE 4.

An Act to authorize the County Judge and County Treasurer to sell the Saline Lands.

[Passed March 26, 1860, took effect April 7, 1860; Laws of Eighth Session, Chapter 55.]

WHEREAS by act of the general assembly approved 22d March, 1858, the office of school fund commissioner was abolished; and whereas by act of the general assembly approved January 25, 1855, in relation to saline lands, it was made the duty of said commissioner to sell said lands in a manner in said act prescribed; now therefore,

SECTION 1946. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That all the powers conferred in said act\* approved January 25, 1855, on said school fund commissioner, in relation to the sale of said saline lands shall be vested in and be exercised by the county judge and the county treasurer.

Powers of commissioner vested in county judge and treasurer.

SEC. 1947. (2.) Any person who had a *bona fide* settlement and residence on any of said lands on the 4th day of July, 1858, which shall be established by at least two witnesses, shall be entitled to purchase his claim at private sale, not exceeding one hundred and sixty acres at a price not less than the appraised value.

How bona fide settlers may purchase their claims.

SEC. 1948. (3.) Any person an actual settler and resident on the 4th day of July, 1858, on lands of his own or on saline lands as provided in section two of this act, who may have a good claim which shall be established by at least two witnesses, on timber or improvement on said lands, shall be entitled to purchase the said claim, not exceeding eighty acres at a price not less than the appraised value: *provided*, that no person who now owns eighty acres of timber shall be deemed entitled to the benefits of this section.

Claims on improved or timber land, how secured.

Proviso.

SEC. 1949. (4.) The lands mentioned in this act shall be appraised in the manner, and by the officers mentioned in chapter 158 of the acts of the seventh general assembly, entitled an act providing for the management of the school fund and sale of school lands, approved March

Lands to be appraised.

\* See article 2 of this chapter.

Proviso.	23, 1858 :* <i>provided, however</i> , that none of the lands mentioned herein shall be appraised or sell at a less price than one dollar and twenty-five cents per acre, neither shall the appraisers in fixing a value upon said lands, include or take into consideration the improvements that may be on said lands.
Terms of sale	SEC. 1950. (5.) The county judge shall sell said lands for one-third of the purchase money in advance, and the remaining two-thirds on a credit not exceeding ten years, at an annual interest paid in advance of ten per cent.
Rights guaranteed.	SEC. 1951. (6.) All rights guaranteed by this act to original claimants shall apply to <i>bona fide</i> assignees.
After expiration of six months, lands sold.	SEC. 1952. (7.) All lands not purchased by claimants within six months from the time of taking effect of this act shall be considered unclaimed and sold according to the provisions of this act.
Repeal.	SEC. 1953. (8.) All acts and parts of acts conflicting with this act are hereby repealed.

## ARTICLE 5.

[The following sections of chapter 158 of the seventh session seem of force as a mode of assessing value of saline lands. See section 4 of last article.]

Sixteenth section allotted and appraised.	SEC. 1954. (9.) It shall be the duty of the trustees of the several townships in this state, at as early a day as may be convenient, after township election next succeeding the passage of this act, or after the organization of new townships, and within the period of at most three months thereafter, to proceed to make an examination of the sixteenth section in their respective townships, or lands granted in lieu thereof, and to lay out or cause the same to be laid out and allotted into such parcels as in their judgment may be best to advance the interests of the school fund; and in such allotments conforming as far as may be consistent with the interest of the said fund to the legal sub-divisions of the United States survey, and they shall place a true value upon each parcel, which value shall not be less than at the rate of two dollars and fifty cents per acre.
Allotment approved by county judge.	SEC. 1955. (10.) Within thirty days after allotment valuation by said township trustees, they shall certify to the county judge of the proper county, the allotment they have made, together with their valuation of the different parcels respectively; and it shall be the duty of the county judge, to examine the same, and in case of his approval, to make a record thereof in his office, and in case he disapproves, he shall, within thirty days after the receipt thereof, direct a new allotment or valuation, either or both as the case may seem to require, and on a return of the same to make a record thereof.

## ARTICLE 6.

An Act appropriating the Saline Lands and Funds to the State University of Iowa. [Passed April 2, 1860, took effect May 9, 1860; Laws of Eighth General Assembly, Chapter 105.]

Saline lands and funds appropriated to the state university.	SECTION 1956. (1.) <i>Be it enacted by the General Assembly of the State of Iowa</i> , That the saline lands and funds are hereby appropriated to the state university to become a part of the permanent fund of said
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\* See sections 1954 and 1955.

institution: *provided*, that the board of trustees of said university be, and they are hereby authorized to expend out of the proceeds of said lands, a sum not exceeding five thousand dollars in completing and furnishing for use, the building erected for a "boarding hall," under the provisions of chapter 41 of the acts of the seventh general assembly; and a further sum not exceeding five thousand dollars in repairing and refitting the main building of said university, and in the purchase of the necessary apparatus for instruction in said institution.

SEC. 1957. (2.) That it is hereby made the duty of any officer who may now or hereafter have charge of any funds heretofore or hereafter arising from the sale of the saline lands, to pay the same over from time to time without delay, to the treasurer of said university, who shall invest the same in the manner prescribed for the investment of the university fund.

Treasurer to receive funds arising from sale of saline lands, and to invest the same.

SEC. 1958. (3.) This act to take effect and be in force from and after its publication in the Iowa State Register and Iowa State Journal.

Take effect.

PRIOR LAWS. 1. An act to locate and establish a state university, passed Feb. 25, 1847; 1st sess., chap. 125, p. 188; also Code.

2. An act to establish at Fairfield a branch of the state university, passed Jan. 15, 1849? 2d sess., chap. 114, p. 142; also Code.

3. An act supplemental to the same, passed Jan. 15, 1849; 2d sess., chap. 115, p. 143.

4. An act further supplemental, Jan. 15, 1849? 2d sess., chap. 116, p. 144.

5. An act to establish a branch of the state university at Dubuque, passed Jan. 16, 1849? 2d sess., chap. 117, p. 145.

6. Act of congress of March 3, 1845, granted saline lands conditionally.

7. "An act in relation to the salt springs granted to this state," passed Feb. 24, 1847, took effect May 5, 1847; laws of 1st sess., chap. 98, p. 126, is now obsolete.

8. "An act to dispose of the saline lands belonging to the state and to appropriate the proceeds thereof," passed Feb. 5, took effect Feb. 26, 1851; laws of 3d sess., chap. 96, p. 227; superseded mainly by No. 10.

9. Act of congress, May 27, 1852, removed the condition.

10. "An act to dispose of the saline lands," passed Jan. 22, 1853, took effect Feb. 1853; laws of 4th sess., chap. 71, p. 126; superseded by the next act.

11. An act to amend chapter 65 of the Code of Iowa and to provide for the sale of saline school and university lands, passed Jan. 25, 1855, took effect Jan. 31, 1855; laws of 5th sess., chap. 136, p. 200.

12. An act authorizing the register of the state land office to close the saline grant, passed July 14, 1856, took effect July 30, 1856; laws of 5th sess., extra, chap. 27, p. 74.

13. "An act for a further appropriation for the state insane asylum," passed July 14, 1856, took effect July 28, 1856; laws of 5th sess., extra, chap. 47, p. 90. *Repealed* by chap. 139 of the laws of the 7th sess., p. 263.

## CHAPTER 85.

### APPROPRIATION FOR STATE UNIVERSITY.

An Act to provide for an annual appropriation for the benefit of a State Historical Society.

[Passed January 28, 1857, took effect July 4, 1857; Laws of Sixth General Assembly, Chapter 203, page 337.]

SECTION 1959. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That there is hereby annually appropriated until the legislature shall by law otherwise direct, to a state historical society, formed or to be formed in connection with, and under the auspices of

Appropriation.

- How expended. the state university, the sum of five hundred dollars,\* to be expended by said society in collecting, embodying, arranging and preserving in authentic form, a library of books, pamphlets, maps, charts, manuscripts, papers, paintings, statuary, and other materials illustrative of the state of the history of Iowa, to rescue from oblivion the memory of its early pioneers, to obtain and preserve varieties of their exploits, perils and hardy adventures; to secure facts and statements relative to the history, genius and progress or decay of our Indian tribes; to exhibit faithfully the antiquities, past and present resources of Iowa; also to aid in the publication of such of the collections of the society as the society shall from time to time deem of value and interest, to aid in binding its books, pamphlets, manuscripts and papers, and in paying other necessary incidental expenses of the society, but no part of such annual appropriation shall ever be paid for services rendered by the officers to the society.
- Keep account and present to the governor. SEC. 1960. (2.) It shall be the duty of the executive committee of the said state historical society of Iowa to keep an accurate account of the manner of expenditure of the said sum of money hereby appropriated, and furnish the same, together with the vouchers thereof, to the governor of this state, in the month of December of the year the legislature shall meet, to be by him laid before the legislature.
- Books and documents. SEC. 1961. (3.) There shall be delivered to said society thirty bound copies of all documents published by order of the state, for the purpose of effecting exchanges with similar societies in other states, and also fifty bound copies of all such documents, to be transmitted through the medium of the secretary of said society, to M. Vattermere, at Paris, in furtherance of his system of international literary exchange.

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## CHAPTER 86.

### SCHOOL LANDS AND FUND

[Code—Chap. 66.]

#### ARTICLE 1.

An Act providing for the management of the School Fund and the sale of the School Lands.

[Passed April 3, 1860, took effect first Monday of January 1861; Laws of Eighth General Assembly, Chapter 162.]

- Perpetual funds. SECTION 1962. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That the following are hereby declared to be and remain perpetual funds for common school purposes, the interest of which only, can be appropriated.
- Five per cent. 1. The five per cent. upon the net proceeds of the public lands in the state of Iowa.
- Proceeds of sales of land granted by act of congress to state of Iowa. 2. The proceeds of the sales of the five hundred thousand acres of land, which were granted to the state of Iowa, under the eighth section of the act of congress, passed September the 4th, A. D., 1841, entitled

\* Section 1959 is thus amended by section first of laws of eighth general assembly, chapter 58, passed March 26, and took effect April 7, 1860. See special laws of eighth session, page 146.

“an act to appropriate the proceeds of all sales of public lands, and to grant pre-emption rights.”

3. The proceeds of all sales of intestate estates which escheat to the state by reason of their being no heir. Of escheated estates.

The proceeds of the sales of the sixteenth section in each township of the state, or lands selected in lieu thereof. Of sixteenth section.

SEC. 1963. (2.) The following are declared to be and remain temporary funds for common school purposes, to be received and appropriated annually in the same manner as the annual interest of the perpetual fund. Temporary funds.

1. All forfeitures of ten per cent. which by the laws of this state, are authorized to be made for the benefit of the school fund. Ten per cent. forfeitures.

2. The proceeds of all fines collected in the state for violations of the penal laws. Fines.

3. The proceeds of all fines collected for the non-performance of military duty. Military fines.

4. The proceeds of the sales of lost goods and estrays. Lost goods, &c.

SEC. 1964. (3.) The five per centum of the net proceeds of all sales of the public lands in the state, is hereby made payable to the state treasurer, whose duty it shall be to apportion the same among the several organized counties in this state, taking into consideration the amount of the permanent school fund already in possession of said counties, so that each county may hold an amount of school fund proportionate to its population. The five per cent. payable to state treasurer, his duty.

SEC. 1965. (4.) Those portions of the permanent school fund enumerated in the second and fourth sub-divisions of section one of this act, are hereby made payable to the county treasurer of the county in which the lands sold are situated, and the proceeds of sub-division third of section one of this act are made payable to the treasurer of the county where said escheated estates are. Permanent school fund payable to county treasurer.

Proceeds of escheated estates.

SEC. 1966. (5.) The temporary funds enumerated in section two of this act are hereby made payable to the county treasurer of the several counties in which they are incurred or arise respectively, which shall be accounted for to the board of supervisors of said county who shall apportion the same among the several school districts of said county, as provided by law. Temporary funds payable to county treasurer.

SEC. 1967. (6.) On the first Monday of March annually, the state auditor shall apportion the interest of the permanent school fund among the several organized counties of this state, in proportion to the number of persons between five and twenty-one years of age in each, and in order to enable him to make such apportionment, it is hereby made the duty of the secretary of the board of education to report to said auditor on the first Monday of February, annually, the number of such persons in each organized county as shown by the reports from the several county superintendents. Auditor to apportion interest of permanent school fund.

Duty of secretary board of education.

SEC. 1968. (7.) The clerk of the district shall annually, on the first Monday of February make out and transmit to the state auditor, a report of the amount of interest then in the hands of the treasurer of said county, and also the amount remaining unpaid, if any. Duty of clerk of district court.

SEC. 1969. (8.) The state auditor shall keep the school fund accounts in books provided for that purpose, separate and distinct from the revenue books, and immediately after making the apportionment required by section six of this act, shall notify the clerk of the district court of each county of the sum to which his county is entitled by said apportionment, and in those cases where the counties have less of such Duty of state auditor.

interest than they are entitled to by the apportionment, he shall by such notice authorize the treasurer of each of such counties to transfer the amount of such deficiency from the state revenue in his hands to such interest fund, and said notice shall be filed by the treasurer, and be his proper voucher to the state for the amount of state revenue so transferred. And in those cases where the counties have an excess of such interest over the amount apportioned to each, and such notice shall authorize the county treasurer to transfer such excess from the interest fund to the state revenue, and such notice shall be filed and be his proper voucher for such amount of the interest fund, and such excess so transferred shall be paid into the state treasury as revenue.

Board of supervisors, their duty.

SEC. 1970. (9.) The board of supervisors may, at such time as they deem best, authorize the township trustees of any organized township, where the sixteenth section, or land selected in lieu thereof, has not been sold, to lay out the same, or cause it to be done, in such tracts as in their judgment will be for the best interests of the school fund, conforming as far as the interests of said fund will permit, to the legal subdivisions of the United States surveys, and they shall appraise each tract at what they believe to be its true value, and certify to the said board of supervisors the divisions and appraisements made by them; said division and appraisement shall be approved or disapproved by said board at their first meeting after such report, and in case they disapprove the same, they may at once order another division and appraisement should they deem it best. In all cases where the board of supervisors approve of any division and appraisement of school lands, it shall be the duty of the clerk of the district court to make and keep a record of such division, appraisement and approval.

Clerk of district court to give forty days' notice of sale of sixteenth section lands, or of the 500,000 acre grant.

SEC. 1971. (10.) Whenever the board of supervisors shall deem it best to offer for sale the sixteenth section, or lands selected in lieu thereof, or any portion of the same, or any part of the 500,000 acre grant, it shall be the duty of the clerk of the district court to give at least forty days notice by written or printed notices posted in five public places in the county, two of which shall be in the township in which the land to be sold is situated; and shall also publish a notice of said sale for four weeks preceding the same in a newspaper, should one be published in the county; if there is none published in said county, then in some newspaper authorized by the board of supervisors; and shall describe the land to be sold, and state the time and place of sale, then at such time and place, or at such other time and place as the sale may be adjourned to, he shall offer to the highest bidder, subject to the provisions of this act, and shall sell upon the following terms, viz.: either for cash, or one-third of the purchase money to be paid at the time of purchase, and the balance on a credit not exceeding ten years, with interest on the same at the rate of ten per cent. per annum; said interest to be paid at the office of the county treasurer of said county, on the first day of January in each and every year; but in no case shall the land so offered be sold for less than its appraised value—nor shall any member of the board of supervisors, the clerk of the district court, any township trustee or any person who was engaged in the division and appraisement of said land be directly or indirectly interested in the purchase thereof, and any sale made, where such parties or any of them are so interested, shall be void and of no effect.

Terms of sale.

Parties not allowed to purchase.

Patent to be issued when purchase money all paid down.

SEC. 1972. (11) If any purchaser shall pay the whole amount of the purchase money at the time of the purchase, the clerk of the district court shall forthwith issue a certificate of purchase, setting forth that



fact which shall be transmitted to the state land office, and entitle the purchaser to a patent which shall be issued by the governor.

SEC. 1973. (12.) In case the lands are purchased upon a partial credit, as hereinbefore provided, the contract shall at once be reduced to writing, signed by the parties, and recorded in the office of the recorder, after which it shall be filed in the office of the clerk of the district court, and during the continuance of such contract, it shall be lawful for such purchaser, his heir or assignee, at any time to pay the principal and interest due upon such contract, and receive a certificate of purchase, as mentioned in the preceding section.

When lands sold on credit.

SEC. 1974. (13.) When in the judgment of the board of supervisors, any school lands which they are about to offer for sale, are of such a character that a sale upon partial credit would be unsafe or incompatible with the interest of the school fund, and especially in the case of timbered lands, the board of supervisors may, in their discretion, exact the whole of the purchase money in advance; or if they sell such land upon a partial credit, as hereinbefore prescribed, it shall be their duty to require good collateral security for the payment of the purchase money upon which credit is given.

Board of supervisors may require collateral security for sale of valuable lands.

SEC. 1975. (14.) Whenever any purchaser of any school lands sold under the provisions of this act, upon a partial credit, or any person to whom a portion of the school fund has been loaned, fails to pay the interest upon the amount due the school fund from him on the first day of January, and such payment is not made within six months thereafter, then, and in that case, the entire amount both of principal and interest owing to the school fund from such person, shall be deemed to have become due, and the clerk of the district court shall report the name of the delinquent, together with the sum total due from such delinquent to the district attorney of his judicial district, who shall immediately commence suit for the collection of the amount thus reported. The provisions of this section, in so far as they provide for the principal owing for the purchase of school lands, or for money borrowed from the school fund, becoming due and being collected at an earlier day than that stipulated in the contract, upon failure to pay the interest, are hereby declared to be a part of every contract made under and by virtue of this act, whether expressed in such contract or not.

Consequences of failure to pay interest on school fund, or for lands sold on credit.

Name of delinquent reported and suit commenced.

Provisions of this section applicable to all contracts for school lands or money.

SEC. 1976. (15.) All school lands, the sale of which are provided for under this act, shall be subject to taxation from and after the execution and delivery of the contract to the purchaser.

School lands after sale, taxable.

SEC. 1977. (16.) All contracts relative to the sale of school lands provided for in this act, shall be subject to such laws as now are, or may hereafter be in force in this state, relative to the prevention or punishment of waste.

Waste on school lands, how punished.

SEC. 1978. (17.) It is hereby made the duty of the township trustees in each township, to see that no waste be committed upon any school lands lying in their township, and in case any such waste be attempted, it shall be their duty to apply by petition to the district court, or to any judge thereof, for an injunction to stay waste, and the same if granted, shall be without bond and shall stand for trial first in order upon the court docket; the same shall be tried in a summary way, and upon such trial the said township trustees shall be competent witnesses. The court may make such order in the premises as shall be equitable and calculated to secure the school lands from waste or destruction, and may adjudge damages to the township trustees, against the party for injuries done in such cases; the costs shall abide the event of the suit,

Duty of township trustees.

Injunction issued without bond

Costs and damages.

	and the damages shall be paid to the county treasurer, and constitute a part of the permanent school fund.
Provisions of sec. 14 applicable to university fund.	SEC. 1979. (18.) The provisions of section fourteen of this act shall be of force as far as applicable to all cases where land is purchased, or money borrowed from the university fund, and in case of delinquency as provided for in said section, the treasurer of the state university shall make the report therein required to the district attorney of the district where the party so purchasing or borrowing resides, or where the real estate given as security for said purchase or loan is situated.
Board of supervisors may employ county surveyor.	SEC. 1980. (19.) When, in the opinion of the board of supervisors, it may be necessary to have a portion of the school lands stated in this act within their county surveyed, they may employ the county surveyor for the purpose, who shall be paid out of the county treasury upon proof made of the request and performance of the service.
How paid.	
Permanent school fund loaned.	SEC. 1981. (20.) The permanent school fund shall be loaned out, as hereinafter provided, as the same may come into the hands of the county treasurer, but no loan to any one person or company shall exceed the sum of five hundred dollars, nor shall any loan of the school fund be made to the clerk of the district court, treasurer, or to any member of the board of supervisors. Said loans shall not be made for a shorter time than one year nor for more than five years.
Terms of loan.	
Rate of interest, 10 per cent. per annum.	SEC. 1982. (21.) The payment of the money thus borrowed, together with the interest thereon, at the rate of ten per cent. per annum, shall be secured by promissory notes executed by the party borrowing together with two good sureties, and by mortgage on unincumbered real estate, which, exclusive of any buildings, is appraised by the appraisers hereinafter provided for, at double the value of the amount of money loaned; which real estate must be situated in the county where such loan is made.
How secured.	
Real estate, as security, to be appraised.	SEC. 1983. (22.) The value of real estate offered as security for money loaned as herein provided, shall be fixed by three appraisers under oath, who shall be selected by the clerk of the district court, and in making the valuation provided for, the appraisers shall not take into consideration any buildings that may be on the land; said appraisers shall be allowed for their services the sum of fifty cents each, to be paid by the party borrowing, and party borrowing shall pay for recording the mortgage given to secure such loan.
Appraisers' fees.	
Permanent school fund, how loaned.	SEC. 1984. (23.) When any person or persons desire to borrow from the permanent school fund, he or they shall apply to the clerk of the district court of the county, and if in the opinion of the said clerk of the district court, it would be to the interest of the school fund to grant such application, he shall order the necessary papers to be made out to secure the amount thus to be borrowed as required by section twenty-one and twenty-two of this act. When the same are made out, they shall be presented to the said clerk of the district court, who shall, if he approve the same, indorse thereon accepted, and sign his name below the same, and the clerk shall examine the title to any real estate offered as security, and make and preserve an abstract of such title, which shall be certified by him and submitted to the board of supervisors at their first meeting thereafter; the clerk may charge a fee not to exceed two dollars for his services in making said abstract of title, to be paid by the party borrowing. He shall then give to the party borrowing a copy of the promissory note, certifying over his hand and official seal that it is a correct copy of the same, which, together with a mortgage securing it has been filed in his office, and upon the parties
Papers made out.	
Indorsed by clerk.	
Clerk to make abstract.	
Clerk's fee, by whom paid.	

presenting said certificate to the treasurer, said treasurer shall pay the amount specified in said copy of note out of the permanent school fund in his possession, and retain the said certified copy as his voucher. The said clerk of the district court shall file the original note in his office, and also the mortgage after having it recorded.

Clerk to file note and mortgage.

SEC. 1985. (24.) At each meeting of the board of supervisors, the clerk of the district court shall make a full statement of all money received for and loaned out of the school fund under his control, and shall also submit for their examination all notes, mortgages, and abstracts of title connected with the school fund which have come into his possession since their last meeting. Said board of supervisors at the first meeting after such report and papers are submitted to them, shall either approve or disapprove of each and every loan made by said clerk of the district court. Should they disapprove of any loan or security thus reported, they may require the party borrowing to give additional security within thirty days; and in case of failure so to do, the entire amount both of principal and interest owing to the school fund shall be deemed to have become due, and the district attorney shall be directed immediately to collect the same; and if such case should it be found impossible to collect the entire amount due, and the security prove insufficient, then the clerk of the district court and his bondsmen shall be liable for the deficiency. The provision herein contained with regard to principal and interest becoming due on the failure to give additional security when required, for money borrowed from the school fund, is hereby declared to be a part of every contract made under and by virtue of this act whether expressed in such contract or not.

Clerk to make statement to board of supervisors, of all moneys received and loaned out of school fund.

Additional security required.

Clerk liable for deficiency.

SEC. 1986. (25.) When any person desires to pay either principal or interest due the school fund, he shall obtain a certificate from the clerk of the district court specifying the amount due from such person to the school fund, stating whether it is principal or interest, or both, and setting forth distinctly the amount of each. Upon the presentation of which certificate to the county treasurer, and not until then, the treasurer shall receive the amount so specified from the person presenting the certificate, and shall indorse on said certificate the date, and his name, and upon the return to the clerk of the district court of such certificate, so indorsed, the party returning it shall have a receipt from said clerk for the amount so paid.

Who may receive, and when, money due the school fund.

Clerk to give receipt.

SEC. 1987. (26.) On the first Monday of January A. D. 1861, the county judge shall transfer all accounts, books, notes and mortgages, which have come into his hands as the officer having charge of the school fund, to the clerk of the district court, and shall make out and deliver to said clerk, to be by him presented to the board of supervisors, at their first meeting, a full and complete settlement sheet, in which shall be specified each loan made from the school fund in his county, the amount of each loan, when made, to whom made, when due, the amount of interest due, and remaining unpaid, with the name of the party so delinquent, the amount of school fund in the hands of the treasurer—also a full and accurate list of all books, papers, bonds, mortgages, and assets of every kind and description connected with the management of the school fund, delivered by him to the clerk of the district court, and also a statement of any facts within his knowledge, material to the safety or interest of the school fund. The clerk of the district court shall at once forward a copy of the settlement sheet herein provided to the auditor of state.

Duty of co. judge and clerk of district court.

SEC. 1988. (27.) On the first Monday of January, A. D. 1861, the

Duties of county treasurers.

county treasurer of each county of this state, shall deliver all notes in his possession given for money borrowed from the school fund or school land purchased, to the clerk of the district court and shall at the same time furnish said clerk, to be by him submitted to the board of supervisors at their first meeting, a full and complete list of all such notes delivered to said clerk.

County judge and treasurer to account for papers, &c., not in their possession

SEC. 1989. (28.) When any books, papers, notes, bonds, mortgages, or assets of any kind or description connected with the management of the school fund, are not in possession of the county judge or county treasurer, at the time of the transfers provided for in section twenty-six and twenty-seven of this act, they shall furnish a full description of the same with the reasons why they are not in their possession, and where and how they can be obtained.

County treasurer to keep correct accounts of school funds.

SEC. 1990. (29.) Each county treasurer, shall immediately upon receiving or paying out any moneys belonging to the school fund, enter a correct account thereof on proper books kept by him for the purpose, in all cases where money is received, distinguishing between principal and interest, and shall keep an account showing all money due the school fund, whether principal or interest, and designating the amount of each and from whom due, and his books shall at all times present a clear and intelligible statement of the school fund in his hands. Said books shall at all times be open to the inspection and examination of any householder or tax-payer in the county.

Books open to inspection.

Clerks of district courts to keep school fund account books.

SEC. 1991. (30.) Each clerk of the district court shall keep in his office in books provided for that purpose, an account to be known as the school fund account, in which he shall enter all notes, mortgages, bonds, and assets of every kind and description delivered to him by the county judge, and which may hereafter come into his hands, and he shall open accounts with the county treasurer in which he shall charge him with all money in his hands at the time such account is opened, and also with all money which may thereafter be paid to him as shown by the certificates duly indorsed as hereinbefore provided for, distinguishing between principal and interest, which shall be kept in distinct accounts; and shall on the third Monday of May, the first Monday of October, and the third Monday of December in each and every year, make a complete settlement of the school fund account with the county treasurer, from the time of the last settlement, and at each regular meeting of the board of supervisors, the clerk of the district court shall submit a full report of his last settlement with the county treasurer, and also of all notes, mortgages, bonds assets of every kind and description which have come into his hands since the last meeting of the board.

Clerk to make three yearly settlements with county treasurer.

Report to board of supervisors.

Liability of county officers for neglect of duty.

SEC. 1992. (31.) Any county judge, county treasurer, or clerk of the district court, failing or neglecting to perform any of the duties which are required of him by the provisions of this act, he shall be liable to a fine of not less than one hundred dollars nor more than five hundred dollars, to be recovered in an action brought in the district court by the board of supervisors, the judgment to be entered against the party and his bondsmen, and the proceeds to go to the school fund.

Penalty.

Time allowed.

SEC. 1993. (32.) Whenever it shall be evident to the board of supervisors that the interest of the school fund will be endangered by immediate prosecution of any mortgage or the sale of mortgaged premises, they may give such reasonable time as they may deem for the best interest of the school fund.

Duty of chairman of board of supervisors.

SEC. 1994. (33.) At every sale of lands mortgaged to the school fund it shall be the duty of the chairman of the board of supervisors to

attend such sale and to bid on behalf of the state the amount of the principal, interest and costs due to the school fund if in his opinion the interests of the said fund require it.

SEC. 1995. (34.) All acts and parts of acts in conflict with this act <sup>Repeal.</sup> are hereby repealed so far as they conflict with this act.

SEC. 1996. (35.) This act shall be in force from and after the first <sup>Take effect.</sup> Monday in January, 1861.

## ARTICLE 2.

## An Act in relation to Debtors to the School Fund.

[Passed March 31, 1860, took effect May 9, 1860; Laws of Eighth General Assembly, Chapter 85.]

SECTION 1997. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That hereafter no greater sum shall be charged or <sup>Interest collect-</sup> collected, either as interest or as a penalty for non-payment of interest on any money due, or to become due to any of the school fund of this state than ten per cent. per annum, and all sums due as a penalty for non-payment to any such school fund, by virtue of section 16 of chapter 158 of the acts of the seventh general assembly, whether for lands sold, money loaned or otherwise, are hereby relinquished and released to the persons so liable to pay the same.

SEC. 1998. (2.) Whenever, in the opinion of the persons having <sup>Extension of</sup> custody and control of any of the school funds of this state, any debt due the school fund, whether for lands sold, money loaned or otherwise is amply secured, and all the securities of each respective debt shall give their consent thereto in writing, such persons so having such control thereof shall, upon application therefor, by such debtor, extend the time of payment thereof until the fourth day of July, 1862.

SEC. 1999. (3.) Section 16 of chapter one hundred and fifty-eight, <sup>Repeal.</sup> of the acts of the seventh general assembly is hereby repealed.

- PRIOR LAWS. 1. An act to protect school lands, passed July 3, 1828; M. D., 1833, p. 128.
2. An act to prevent trespass on school lands, passed Dec. 9, 1836; Wis., 1st sess., No. 29, p. 63. The above repealed Aug. 30, 1840.
3. An act confirming grants of land made to encourage education, passed Jan. 15, took effect Feb. 15, 1839; I. T., 1st sess., p. 184.
4. An act to punish trespass on school and other lands, passed Jan. 17, 1840; I. T., 2d sess., chap. 78, p. 113; also Reprint, 1843, p. 595.
5. An act concerning the distribution of school moneys, passed Jan. 19, took effect Jan. 27, 1847; 1st sess., chap. 6, p. 21.
6. An act to provide for the management and distribution of the school fund, passed Feb. 25, 1847; 1st sess., chap. 111, p. 160.
7. An act amending same, passed Jan. 24, took effect March 15, 1848; 1st sess., extra, chap. 57, p. 59.
8. An act amending that of Feb. 25, 1847, passed Jan. 25, 1848; 1st sess., extra, chap. 62, p. 62.
9. An act to legalize the sale of school lands, passed Jan. 25, took effect Feb. 9, 1848; 1st sess., extra, chap. 66, p. 75.
10. An act to authorize a district school tax, passed Jan. 25, took effect Feb. 16, 1848; 1st sess., extra, chap. 68, p. 76.
11. An act providing for a loan to the state by the school fund, passed Jan. 12, took effect Feb. 12, 1849; 2d sess., chap. 58, p. 72.
12. An act amending that of Feb. 25, 1847, passed Jan. 15, took effect Feb. 15, 1849; 2d sess., chap. 123, p. 149.
13. Code of 1851, chap. 66.
14. An act to restrict the duties of superintendent of public instruction, passed Dec. 5, took effect Dec. 9, 1856; 6th sess., chap. 1, p. 1.
15. "An act to amend chapter 66 of Code," passed Dec. 13, took effect Dec. 15, 1856; 6th sess., chap. 5, p. 5.

16. An act relating to the school fund of the state, passed Dec. 22, took effect (?) 6th sess., chap. 10, p. 8.

17. An act providing for the distribution of the five per cent. fund, passed Jan. 28, took effect Feb. 12, 1857; 6th sess., chap. 201, p. 324.

18. An act providing for the management of the school fund and sale of the school lands, passed March 23, took effect April 7, 1858; 7th sess., chap. 158, p. 391.

As to pre-emption of school lands, see chapter 156 of 7th session, and chapter 16 of 8th session.

## CHAPTER 87.

### SECRETARY OF BOARD OF EDUCATION.

An Act to provide for the Election and to define the Duties of the Secretary of the Board of Education.

[Passed Dec. 24, 1858; *Laws of Board of Education.*]

- SECTION 2000.** (1.) *Be it enacted by the Board of Education of the State of Iowa,* That at each regular meeting of the board, there shall be elected a secretary of said board, who shall hold his office until his successor is elected and qualified.
- SECRETARY OF BOARD OF EDUCATION.** Most give bond. **SEC. 2001.** (2.) He shall, before entering upon the duties of his office, and as soon as may be after his election, give bond for the use of the state of Iowa, in the penal sum of one thousand dollars, with sufficient sureties to be approved by the secretary of state, conditioned for the faithful and impartial performance of the duties of his office, as secretary of the board of education.
- Take oath.** **SEC. 2002.** (3.) He shall also, at the time of giving bond, take and subscribe an oath, or make affirmation to the effect that he will support the constitution of the United States and of the state of Iowa, and to the best of his ability, faithfully and impartially perform the duties of secretary, which oath shall be indorsed upon the back of said bond, which shall be filed with, and preserved by the secretary of state.
- His duties.** **SEC. 2003.** (4.) It shall be the duty of the secretary to keep an accurate journal of the proceedings of the board, and to perform all other duties required of him by the board, or by the laws of this state.
- Must furnish printer with acts and resolutions of board of education.** **SEC. 2004.** (5.) Immediately after the adjournment of the board of education, he shall furnish the printer authorized to print the laws, with copies of the acts and resolutions passed at the session, and cause them to be printed in a plain manner in the form of a pamphlet.
- Certificate.** **SEC. 2005.** (6.) He shall make his certificate that the acts and resolutions therein contained are truly copied from the original rolls, and cause the same to be printed at the end of each volume, which shall be *prima facie* evidence of their correctness.
- Have journals printed.** **SEC. 2006.** (7.) He shall, as near as may be, in the same manner as provided in the two preceding sections of this act, have the journals printed.
- When printed must distribute the laws to school officers.** **SEC. 2007.** (8.) He shall, on or before the first day of March, after the acts, resolutions and journals, and such documents as may be required by law, are printed, after the adjournment of any session of the board, transmit to each superintendent of common schools in each organized county in this state, one copy of the laws for every school officer in the county.
- Copies to be preserved.** **SEC. 2008.** (9.) He shall preserve in his office one hundred copies

of the acts and resolutions, and twenty-five copies each of the journals, and distribute ten copies to each member of the board of education, and such other documents as may have been published by order of the board of education, and shall hold the same subject to the order of the board.

SEC. 2009. (10.) He shall transmit one copy of the journals to each superintendent of common schools and county judge, in every organized county in this state, within the time fixed for the distribution of the acts of the board of education. To whom transmitted.

SEC. 2010. (11.) After the distribution of the acts and resolutions and journals, as provided in the two preceding sections, should there be any number of the same remaining undistributed, he shall distribute the same in every organized county in this state, *pro rata*, in proportion to the population of each county. Surplus copies to be distributed *pro rata*

SEC. 2011. (12.) An office shall be provided for him at the seat of government, in which he shall file all papers, reports, and public documents transmitted to him by the county superintendents of the several counties, each year separately, and hold the same in readiness to be exhibited to the governor, or to a committee from either house of the general assembly, or to the state board of education, at any time when required, and shall keep a fair record of all matters pertaining to his office. Office at seat of government

SEC. 2012. (13.) The secretary of the board of education shall be charged with the general supervision of all the county superintendents, and all the common schools of the state, and he shall see that the school system is as early as practicable, carried into effect, and put in uniform operation. Duties.

SEC. 2013. (14.) With a general view to these special duties, he shall meet the county superintendents of each judicial district, at least once in each year, at such time and place as he may appoint, giving due notice of such meeting; and it is hereby made the duty of the said county superintendents to attend each meeting, the object of which shall be to accumulate valuable facts relative to common schools, to compare views, discuss principles, and in general to listen to all communications and suggestions, and enter into all discussions relative to the compensation of teachers, their qualifications, branches taught, method of instruction, text-books, district libraries, apparatus, and of all other matters embraced in the common school system. Same.

SEC. 2014. (15.) He shall visit such schools as he may have it in his power to do, and witness the manner in which they are conducted. Duty of county superintendents

SEC. 2015. (16.) It shall be his duty to recommend, from time to time, to county superintendents, such books as he shall think advisable for text-books and for district school libraries, a list of which the county superintendents shall immediately transmit to the several presidents of the district boards of directors in their respective counties. Secretary must visit schools.

SEC. 2016. (17.) The secretary of the board of education shall cause as many copies of this act and all other school acts in force, with the forms, regulations and instructions herein contemplated, thereto annexed, to be from time to time printed and distributed among the county superintendents, as he shall deem expedient, directing the latter to distribute the same among the several school districts of the state. He shall also prepare and cause to be distributed to the several county superintendents, a form of certificate in blank to be granted to teachers, also all other blank forms necessary to be used in carrying out this act and all other acts. Further duties of secretary.

SEC. 2017. (18.) He shall annually on the first day of January, Copies of school acts, &c. to be distributed among the county superintendents. Report to auditor. Certificate.

report to the auditor of state the number of persons in each county of the state between the ages of five and twenty-one years.

Report to general assembly and board of education.

SEC. 2018. (19.) He shall make a report to the general assembly and the board of education, at each session thereof, which shall embrace,

1. A statement of the condition of the common schools of the state, and shall contain the number of common school districts therein, the number of schools in the state, the number of scholars between five and twenty-one years of age, and also the number in each county who have attended school the previous year, as returned by the several county superintendents, the number of books in the district libraries, and the value of all apparatus in the schools.

2. Such plans as he may have matured for the management and improvement of the common school fund, and for the better and more perfect organization and efficiency of common schools.

3. All such matters and things relating to his office and to the common schools, as he shall deem expedient to communicate.

4. He shall cause his report to be printed, and shall present five hundred copies thereof to each body, on or before the second day of their session, for distribution.

Salary

SEC. 2019. (20.) He shall receive annually, the sum of one thousand five hundred dollars, as compensation for the duties required under this act, and also all necessary contingent expenses for traveling, and clerk hire, pertaining to his office to be audited and paid as the salaries and contingent expenses of other state officers: *provided*, that his contingent expenses for these purposes shall not exceed the sum of seven hundred and fifty dollars in any one year.\* And he shall, within twenty days after his election take possession of the books, papers, and effects belonging to the department of the superintendent of public instruction, which office is hereby abolished.

Proviso.

Teachers' institute.

SEC. 2020. (21.) Whenever reasonable assurance shall be given by the county superintendent of any county, to the secretary of the board of education, that a number of not less than thirty teachers desire to assemble for the purpose of holding a teachers' institute in said county, to remain in session for a period of not less than six working days, he shall appoint such time and place for said meeting, and such lectures as the said teachers shall suggest, and shall give due notice thereof, and for the purpose of defraying the expenses of said institutes there is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, a sum not exceeding fifty dollars annually for one such institute in each county held as aforesaid, which the said secretary shall immediately transmit to the county superintendent in whose county the institute shall be held, who shall pay out the same as the institute shall direct.

Appropriation.

[The matter of this section was passed, March 28, 1860; laws of eighth general assembly, chapter 66, see Part 15th of Educational laws.]

Vacancy.

SEC. 2021. (22.) Should any vacancy occur at any time in the office of the secretary of the board of education while the board is not in session, the governor shall, by appointment, fill such vacancy until the next session of the board.

**PRIOR LAWS.** 1. An act to create the office of superintendent of public instruction, passed Jan. 13, took effect Feb. 13, 1841; I. T., 3d sess., chap. 46, p. 37. Repealed by No. 2 hereof.

2. An act to repeal same, passed Feb. 17, took effect March 17, 1842; I. T., 4th sess., chap. 108, p. 93; also Reprint, 1843, p. 601.

3. An act on common schools, Jan. 24, 1847? 1st sess., chap. 99, p. 127.

\* See section 7 of chapter 135 of 8th sess. on p. 102 of special laws of 8th sess.



CHAPTER 88.

COMMON SCHOOLS.

ARTICLE 1.

An Act to amend an Act, entitled "An Act to provide a system of Common Schools."

[Passed Dec. 24, 1859, took effect March 1, 1869; Laws of Board of Education of the Second Session.]

SECTION 2022. (1.) *Be it enacted by the Board of Education of the State of Iowa,* That the act of the board of education, passed December, 1858, entitled "an act to provide a system of common schools," be amended, so as to read as follows :

Act of 1853 amended.

Each civil township that is now or may be hereafter organized in the several counties of this state, is hereby declared a school district for all the purposes of this act, and each sub-district, as now organized under an act entitled "an act for the public instruction of the state of Iowa," approved March 12th, 1858, shall continue such, subject to the provisions hereinafter made :

Civil townships made school districts.

SEC. 2023. (2.) In each sub-district there shall be taught one or more schools for the instruction of youth between the ages of five and twenty-one years for at least twenty-four weeks, of five school days each, in each year, unless the county superintendent shall be satisfied that there is good and sufficient cause for failure so to do.

Sub-districts.

SEC. 2024. (3.) Scholars residing in one district may attend school in another, in the same or adjoining county, with the concurrence of the directors of both districts, and in such case, their proportion of the school money of the district to which they belong shall be paid to the treasurer of the district in which they attend school; and scholars may attend school in any sub-district of the township in which they reside, with the consent of the district board.

Scholars living in one county may attend school in adjoining county by consent of directors.

SEC. 2025. (4.) Any township in an unorganized county shall be for the purposes of this act regarded as a portion of the county to which its county is attached for revenue purposes.

Township in unorganized county, how regarded.

SEC. 2026. (5.) Every school district which is now, or may hereafter be organized in this state, is hereby made a body corporate, by the name of the "district township of \_\_\_\_\_, in the county of \_\_\_\_\_, and state of Iowa," and in that name, may hold property, become a party to suits and contracts, and do other corporate acts.

School district a body corporate.

May hold property, &c.

*District Township Meetings.*

SEC. 2027. (6.) 1. Each township district shall hold regular meetings annually, on the second Monday in March.

Meetings.

2. When a new township has been organized, or a district left without officers, the trustees of the township shall post written notices specifying the time and place of the aforesaid meeting, in five conspicuous places in the township: *provided*, that when any district township shall be divided into two or more entire townships for civil purposes, the existing board of directors shall continue to act for both or all the new districts, till the time of the next election of officers.

Notice to be given of time of meeting.

Proviso.

SEC. 2028. (7.) The electors of a district, when legally assembled at a district school meeting, shall have the following powers, viz.:

Powers of electors.

1. To appoint a chairman and secretary, in the absence of the regular officers.
2. To adjourn from time to time as occasion may require.
3. To levy such tax, not exceeding one per cent. in any one year, on the taxable property of the district, as the meeting shall deem sufficient to purchase or lease a suitable site for a school-house or school-houses, and to build, rent, or purchase a school-house or school-houses, and to keep in repair and furnish the same with the necessary fuel and appendages, and for compensation of teachers, and for procuring district libraries and apparatus for the schools, books and stationery for the board and district meetings, and defray all other contingent expenses of the district: *provided*, that no tax shall be levied for building school-houses excepting at the regular meeting in March: *and provided further*, that no more than five mills on the dollar shall be levied in any one year for school-house purposes.
4. To direct the sale or other disposition to be made of any school-house or the site thereof, and of such other property, personal and real, as may belong to the district, and to direct the manner in which the proceeds arising therefrom shall be applied.
5. To provide for the payment of any debts contracted for school-houses or school purposes.
6. To delegate all the powers contained in the foregoing specifications to the district board of directors.
7. To determine the branches to be taught and the text-books to be used in the schools of their district, which power they may also delegate to the district board of directors. [This 7th subdivision was passed April 2, 1860; laws of eighth general assembly, chapter 139.]
- SEC. 2029. (8.) At the meeting of the township districts, the chairman shall submit the questions coming before the electors, in the following order: 1. The levy of a tax for the payment of debts for school-house purposes. 2. For payment of officers and miscellaneous contingent expenses. 3. For paying amounts asked for by the several sub-districts, for each purpose separately. 4. For payment of teachers. 5. For purchase of libraries, fuel, apparatus, &c. 6. For the delegation of power to the board of directors. 7. Other matters necessary or proper to be acted upon.
- SEC. 2030. (9.) The several sub-districts shall annually, on the first Monday in March, hold a meeting for the election of a director, five days' notice of which meeting shall be given by the then resident director, or if there is none, by the district secretary posting a written notice in three public places therein.
- SEC. 2031. (10.) At the meeting of the sub-districts, a chairman and secretary shall be appointed, who shall act as judges of the election, and give a certificate of election to the director elect.
- SEC. 2032. (11.) Each director shall, within ten days after his election, appear before some officer qualified to administer oaths, and take an oath to support the constitution of the United States, and that of the state of Iowa, and that he will faithfully discharge the duties of his office, and in case of failure so to qualify, he shall forfeit ten dollars, to be recovered against him for the use of the district.
- SEC. 2033. (12.) The electors of said sub-district shall also, at the regular meeting in March, determine whether they desire any funds raised by tax to erect, repair, lease or furnish a school-house in said sub-district, or for the lease or purchase of grounds for the same, and the amount for each purpose.

May levy tax for purchase or lease of site for school-house, &c.

Proviso.

May direct the sale of property belonging to the district, &c.

Payment of debts provided for.

Delegate powers to district board of directors.

Further power which may also be delegated.

Order of submission of questions to electors.

Tax, and for what purpose.

Director of sub-district elected annually.

Five days' notice of meeting.

Certificate of election.

Take oath.

Penalty for failure to qualify.

Tax.

SEC. 2034. (13.) Whenever any sub-district, at a regular meeting, shall determine that they desire a tax levied for any of the purposes mentioned in the foregoing section, the director for said sub-district shall, within five days thereafter, certify the same to the township clerk, stating the amount of money desired for each purpose separately. Tax how levied.

SEC. 2035. (14.) The directors of the several sub-districts shall constitute a board of directors for the township district, of which board the township clerk shall be secretary, but shall have no vote therein. Township clerk secretary of board of directors.

SEC. 2036. (15.) The district board shall hold their regular meetings on the first Saturday after the first Monday in April and October in each year and may hold such special and adjourned meetings as occasion may require. They shall organize by electing from their own number, a president and treasurer. In the absence of the president the secretary shall preside. Meetings of district board.

SEC. 2037. (16.) The duties of the district board of directors shall be as follows: Its duties.

1. To make all contracts, purchases, payments and sales, necessary to carry out any vote of the district: *provided*, that before erecting any school-house, they shall consult with the county superintendent as to the most approved plan for such building. To make contracts, &c.

2. To admit pupils not belonging to the district, and not provided for in section three of this act, to their schools, on such terms as they may agree upon. To admit pupils.

3. To determine the number of schools which shall be established, and the length of time each shall be taught, subject to the provisions of section two of this act. Number of schools and length of time to be taught.

4. To fix the site for each school-house, taking into consideration the wants and necessities of the people of each portion of the district. Site for school-house.

5. To establish graded or union schools wherever they may be necessary, and they may, as occasion requires, select a person who shall have the general supervision of the schools in their district, subject to rules and regulations of the board. Graded or union schools.

6. To determine what branches shall be taught in the schools of their district. What branches shall be taught.

7. To require the secretary and treasurer each to give bond to the district in such penalty and with such sureties as they may determine upon; conditioned for the faithful performance of their duties under this act. The bond shall be filed with the president of the board, and in case of breach of condition thereof, he shall bring suit thereon in the name of the district. Secretary and treasurer to give bond.

8. To fill any vacancy, that may occur in the board, until the next regular sub-district meeting. Vacancy.

9. They shall, from time to time, examine the accounts of the treasurer and make settlement with him, and present at each regular meeting of the electors a full statement of the receipts and expenditures of the district, and all matters delegated to them to perform, and all such other matters as may be deemed important. Accounts of treasurer to be examined, &c.

10. To audit and allow all just claims against the district, and to fix the compensation of the secretary and treasurer. Compensation of secretary and treasurer.

11. To visit the schools in their district, and aid the teachers in establishing and enforcing rules for the government of the schools, and see that they keep a correct list of the pupils, embracing the periods of time during which they attend school, the branches taught, and such other matters as may be required by the county superintendent. Visit schools in district, &c.

12. They shall at their first regular meeting after the taking effect Division of districts.

- of this act, divide their district into sub-districts, such as justice, equity and the interests of the people require, and shall designate said sub-districts plainly upon a plat of the district provided for that purpose, and record the same in the district records, and they may at any regular meeting, or at any meeting called for that purpose, change the boundaries of sub-districts as circumstances may require, notice of the same having been given at any previous meeting. They shall cause all such changes to be marked on said map or plat and recorded in the proper book, and in the office of the *county judge*,\* and they shall cause new maps to be made from time to time: *provided*, that the boundaries of sub-districts shall conform to the lines of congressional divisions of land.
- Proviso.** 13. They shall apportion any tax for school-house purposes, in such manner that the rate per cent. levied upon any sub-district which has built a school-house unaided by other portions of the district, shall be so much less than the per cent. levied in other sub-districts, as justice may require, but the per cent. of tax shall be equal on all sub-districts owning no school-house property: *provided*, that the rate shall not exceed five mills on the dollar in any sub-district; and the board may lessen the amount voted, if necessary, sufficiently to reduce it to that rate.
- How tax to be apportioned.** 14. They shall, at their regular meeting in April of each year, estimate the per centum of tax on the taxable property of the district, necessary to raise a fund which, with the teachers' fund from the county treasury, as shown by notice from the *county judge*,\* shall be sufficient to support the several schools of the district, for at least the time required by this act, for the current year, which per centum they shall certify to the *county judge*,\* who shall at the time of levying the taxes for county purposes, levy the per centum of tax thus certified upon the property of the district, which shall be collected and paid over as other school district taxes are.
- Proviso.** SEC. 2038. (17.) A majority of the board shall be a quorum to transact business, but a less number may adjourn from time to time, and no tax for school-house purposes shall be levied by the board unless by a vote of a majority of all the members, nor after the *1st Monday in June*,\* nor shall the boundaries of sub-districts be changed except by a vote of a majority of the board.
- Per centum tax to be estimated in April of each year.**
- What constitutes a quorum**
- Duties of District Officers.*
- Who to preside.** SEC. 2039. (18.) The president, or in his absence, the secretary shall preside in all meetings of the board and of the district, shall draw all drafts on the county treasurer, for money apportioned to his district, sign all orders on the district treasury, specifying in the orders the fund on which they are drawn, and the use for which the money is assigned; and he shall sign all contracts.
- President; his duty.** SEC. 2040. (19.) The president shall appear in behalf of his district in all suits brought by or against the same, but when he is individually a party, this duty shall be performed by the secretary; and in all cases where suits may be instituted by or against any of the school officers, to enforce any of the provisions herein contained, counsel may be employed by the board of directors.
- When to be performed by secretary.**
- Secretary; his duties.** SEC. 2041. (20.) The secretary shall record all the proceedings of the board and district meetings, in separate books, kept for that purpose, shall preserve copies of all reports made to the county superintendent, shall file all papers transmitted to him pertaining to the business of the

\* See section 2094.

district, and shall countersign all drafts, warrants and orders drawn by the president.

SEC. 2042. (21.) He shall keep an accurate account of all the ex- Same. penses incurred by the district, and shall present the same to the board of directors, to be audited and paid as herein provided.

SEC. 2043. (22.) He shall give ten days' previous notice of all regu- Same. lar and special meetings of the district, by posting a written notice in five different conspicuous places therein, one of which shall be at or near the last place of meeting, and shall furnish a copy of the same to the teacher of the school, (if in session,) of each sub-district, to be read in the presence of the pupils thereof, and such notice shall in all cases, state the hour of meeting.

SEC. 2044. (23.) Whenever a tax has been voted by any district for purposes in this act specified, the secretary shall immediately certify the per centum to the county judge,\* who shall, at the time of levying the tax for county purposes, levy a tax of the amount thus certified to him upon the assessed value of all the real and personal property in the district, which shall be collected by the county collector at the same time and in the same manner as state and county taxes are collected: *provided*, it shall be receivable only in cash. After tax voted secretary to certify per centum to county judge

SEC. 2045. (24.) The collector shall, on the 1st Monday of April and September in each year, pay over to the treasurer of the district the amount of said tax which shall have been collected, and shall render him a statement of the amount uncollected; and the amount unpaid shall be collected at any subsequent time as delinquent county taxes are collected, and shall be paid over when collected, to the treasurer aforesaid. County collector to pay over amount of tax collected to treasurer of district.

SEC. 2046. (25.) On or before the 20th day of September in each year, the secretary of each school district shall file with the county superintendent a report of the affairs of the district, which shall contain the following items, viz: Secretary of school district to make annual report to county superintendent.

1. The number of persons, male and female, each, in his district, between the ages of five and twenty-one years.
2. The number of schools and the branches taught.
3. The number of pupils and the average attendance of the same in each school.
4. The number of teachers employed, and the average compensation paid per week, distinguishing males from females.
5. The length of school in days, and the average cost of tuition per week for each scholar.
6. The aggregate amount paid teachers during the year, and the balance of teachers' fund in the treasury.
7. The text-books used, and the number of volumes in the district library, and the value of apparatus belonging to the district.
8. The number of school-houses and their estimated value.
9. The amount raised within the year by tax for the erection of school-houses, the amount for teachers' fund and for other purposes of this act, stating separately the amount for each.
10. The amount of public fund received from the county treasury, and if any, from other sources, stating what, and how much from each, and such other information as he may deem useful.

SEC. 2047. (26.) Should the secretary fail to file his report as above directed, he shall forfeit the sum of twenty-five dollars, and shall make good all losses resulting from such failure, and suit shall be brought, in both cases, by the district, on his official bond. Penalty for failure to report.

\* See section 2094.

Treasurer; his duties.	SEC. 2048. (27.) The treasurer shall hold all moneys belonging to the district, and pay out the same on the order of the president, countersigned by the secretary, and shall keep a correct account of all expenses and receipts, in a book provided for the purpose.
"School house fund."	SEC. 2049. (28.) The money collected by district tax for school-house purposes, and all contingent expenses, shall be called the "school-house fund," and that received for the support of teachers, shall be called the "teachers' fund," and the treasurer shall keep with each fund a separate account, and shall pay no order which does not specify the fund on which it is drawn, and the specific use to which it is applied. If he have not sufficient funds in his hands to pay in full the warrant drawn on the fund specified, he shall make partial payment thereon, paying as near as may be, an equal proportion of each warrant.
"Teachers' fund" Order to specify fund on which it is drawn.	
Partial payment	
Money to be received by treasurer.	SEC. 2050. (29.) He shall receive all money apportioned to the district by the <i>county judge</i> ,* and also all money in the county treasury collected on the district tax, for his district.
Statement.	SEC. 2051. (30.) He shall render a statement of the finances of the district from time to time, as may be required by the board, and his books shall always be open for inspection.
Duties of director of sub-district.	SEC. 2052. (31.) It shall be the duty of the director in each sub-district, between the first day of August and the fifteenth day of September of each year, to make and keep on record a list of the names of all heads of families in the sub-district, and the number of children in each family between the ages of five and twenty-one years, distinguishing males from females, and to report the same to the secretary of the township district, on or before the said fifteenth day of September, in each year. He shall further report the number of schools in his sub-district, and the branches taught, the number of pupils and average attendance of the same in each school, the number of teachers and the compensation of each, the text-books used, the number of school-houses, and the estimated value of each.
Same.	SEC. 2053. (32.) He shall, under such rules and restrictions as the township board may prescribe, negotiate and make in his sub-district all necessary contracts for providing fuel for schools, employing teachers, repairing, building and furnishing school-houses, and making all other provisions necessary for the convenience and prosperity of the schools within his sub-district. All contracts made in conformity with the provisions of this section, shall be reported to the township board of directors; and said board, in their corporate capacity, shall be responsible for the performance thereof on the part of the district.
Same.	SEC. 2054. (33.) He shall have power to dismiss any pupils from the schools in his district for gross immorality, or for persistent violation of the regulations of the school, and to re-admit them if he deems it proper so to do, and shall visit the schools in his sub-district at least twice during each term of said school.
Contracts with teachers to be in writing, &c.	SEC. 2055. (34.) All contracts with teachers shall be in writing, specifying the length of time the school is to be taught, in weeks, the compensation per week, or per month of four weeks, and such other matters as may be agreed upon, and shall be signed by the sub-director and teacher, and be approved by and filed with the president before any teacher shall be entitled to a warrant for services.
Further duties of director.	SEC. 2056. (35.) He shall collect all taxes and debts due his sub-district, and settle any other business remaining unfinished at the time

\* See section 2094.

of organizing under the act entitled "An act for the Public Instruction of the State of Iowa," approved March 12th, 1858, and shall apply all funds that may thus come into his hands, to the specific purpose for which they were designed; but before entering upon the said duties, he shall file with the president of the board of directors, a bond such as is required of the secretary and treasurer under this act; but the district treasurer shall settle with the county treasurer, and receive from him all moneys due and unpaid, to any sub-district of his district, applying said funds as in this section provided.

Bond.

SEC. 2057. (36.) When any tax heretofore levied is still unpaid, the director may, at his option, report the amount due from any individual, or upon any tract of land, to the *county judge*,\* who shall cause the amounts so due, to be added to the amount standing on the tax-list against such individual or tract of land, for the current year. These taxes shall then be collected in the same manner as is pursued in the collection of other county taxes.

May report unpaid taxes to county judge, &c.

SEC. 2058. (37.) The sub-district may act independent of the district board in the expenditure of any funds belonging to such sub-district, derived from any debts due or tax levied by it previous to its organization under the "Act for the Public Instruction of the State of Iowa," approved March 12th, 1858.

Sub district independent of district board.

SEC. 2059. (38.) The *county judge*\* of each county shall, at the time of levying the tax for county purposes, levy a tax for the support of schools within the county, of not less than one mill, nor more than two and a half mills on the dollar, on the assessed value of all real and personal property within the county, which shall be collected by the county collector at the time and in the same manner as state and county taxes are collected, except that it shall be receivable only in cash.

County judge to levy tax for school purposes, to be collected by county collector.

SEC. 2060. (39.) On the first Monday of April annually, the *county judge*\* of each county shall apportion said tax, together with the interest of the permanent school fund to which his county is entitled, and all other money in the hands of the county treasurer belonging in common to the schools of his county, among the several school districts therein, in proportion to the number of persons between five and twenty-one years of age, subject to the provisions of section two of this act. And in order to enable him to make such apportionment, it is hereby made the duty of the several county superintendents to report to their respective county judges, on the fifth day of October, annually, the number of such persons in each school district in his county.

County judge to apportion school tax and interest of permanent school fund, annually.

Duty of county superintendents.

SEC. 2061. (40.) The *county judge*\* shall immediately notify the president of each school district of the sum to which his district is entitled by said apportionment, and shall issue his warrant for the same to accompany said notice, which warrant shall be also signed by the president and countersigned by the secretary of the district in whose favor the same is drawn, and shall authorize the district treasurer to draw the amount due said district from the county treasurer, and the secretary shall charge the treasurer of the district with all warrants drawn in his favor, and credit him with all warrants drawn on the funds in his hands, keeping separate accounts with each fund.

County judge to issue his warrant to the president of each district for the sum his district is entitled to receive.

*Qualifications and Duties of Teachers.*

SEC. 2062. (41.) 1. No person shall be employed to teach a common school which is to receive its distributive share of the school fund, unless he shall have a certificate of qualification signed by the county superintendent of the county in which the school is situated; and no

No person to be employed as teacher without certificate signed by county superintendent.

\* See section 2094.

certificate shall be valid more than one year from the date thereof; and any teacher who commences teaching without such certificate, shall forfeit all claim to compensation for the time during which he teaches without such certificate.

**Duties of teacher.** 2. The teacher shall keep a correct register of the school, which shall exhibit the sub-district, township, county and state in which the school is kept, the day of the week, the month and year; the name and age, and attendance of each scholar, and the branches taught, the register to be as near as practicable after the form appended to this act.

3. When scholars reside in different districts, a register shall be kept for each district.

4. The teacher shall, immediately after the close of his school, file in the office of the secretary of the board a certified copy of the register aforesaid.

*Of the County Superintendent.*

**County superintendent.** SEC. 2063. (42.) A county superintendent of common schools shall be elected in each organized county of this state, whose term of service shall be two years.

**When elected.** SEC. 2064. (43.) The first election of that officer shall take place on the second Tuesday of October, 1859, at the time and several places of electing the township boards, and at the general election on every two years thereafter; and the election returns to be made in the same manner as for other county officers. The present incumbents who have been elected under the act of March 12th, 1858, shall serve in that capacity until their successors are elected and qualified; but the rate of their compensation after the taking effect of this act, shall be as hereinafter provided.

**Take oath.** SEC. 2065. (44.) Within twenty days after his election, he shall take and subscribe his oath of office. On his failure to do so, or if for any other cause there be a vacancy in said office, the *county judge*\* shall appoint a person to fill such vacancy, who shall qualify in like manner, and who shall hold his office till the first general election thereafter.

**County superintendent to examine applicants.** SEC. 2066. (45.) The county superintendent shall examine all persons who shall present themselves at the proper time and place, as to their competency and ability to teach orthography, reading, writing, arithmetic, geography and English grammar, and such other branches as may be required hereafter. In making this examination he may, at his option, call to his aid one or more assistants.

**Applicant to receive certificate.** SEC. 2067. (46.) If the examination is satisfactory, and if the applicant is shown to be of good moral character, he shall receive a certificate accordingly. The names of all those receiving such certificates, and of all those rejected, shall be entered on a register kept by the county superintendent at the date at which they were given.

**Register.** SEC. 2068. (47.) The county superintendent shall, on the last Saturday of every month, meet all those who are desirous of passing an examination, and for the transaction of all other business within his jurisdiction, in some suitable room at the seat of justice of the county, or at any other place, as occasion may require, and shall notify the *county judge*\* of the place of meeting. If an applicant desire an examination at any other time, he shall be required to pay the superintendent one dollar, before the examination is commenced, unless he presented himself at the regular day fixed in this section, and was unable, from no

**Fee to county superintendent from applicant.**

\* See section 2094.



fault of his own, to obtain an examination, in which case no fee shall be required of him.

SEC. 2069. (48.) If for any cause the county superintendent can not be present at the regular day thus fixed, he shall appoint one or more deputies to make the examination in his stead. He shall afterwards issue certificates to those who receive the recommendation of his deputies as aforesaid. May appoint deputies to examine applicants.

SEC. 2070. (49.) The superintendent may revoke the certificate of any teacher in the county, which was given by the superintendent thereof, for any reasons which would have justified the withholding thereof when the same was given. And the board of directors upon sufficient cause shown, may expel any teacher from school in the district. May revoke certificate of any teacher in county, &c.

SEC. 2071. (50.) On or before the 5th day of October in each year, he shall make a report to the secretary of the board of education containing a digest of the reports made to him by the secretaries of the several township boards, and such other matters as he shall be directed to report by the said secretary, and such as he himself may think pertinent and material, and especially such as will show the condition of the schools under his charge. He shall also suggest such improvements in the system as he may think judicious. He shall also, by the fifth day of October in each year, file with the *county judge*\* an abstract of the number of youths between the ages of five and twenty-one years residing in each township and school district within his county. Report of county superintendent. Abstract.

SEC. 2072. (51.) Should he fail to make either of the reports required in the last section, he shall forfeit to the school fund of his county the sum of fifty dollars, and shall besides, be liable for all damages caused by such neglect. Penalty for failure to report.

SEC. 2073. (52.) He shall at all times conform to the instructions of the secretary of the board of education, as to matters within the jurisdiction of the said secretary. He shall serve as the organ of communication between the secretary and township or district authorities. He shall transmit to the townships, districts or teachers, all blanks, circulars and other communications which are to them directed, and he shall entertain and decide all appeals taken from decisions of district boards. Further duties of county superintendent.

SEC. 2074. (53.) The county superintendent shall receive from the county treasury the sum of two dollars for every day necessarily engaged in official services; but before he shall be entitled to receive such compensation, he shall file in the office of the *county judge*\* a sworn statement of the correctness of his account together with the account itself: *provided*, that he shall not receive a greater compensation than one-half the salary, fixed by law, of the clerk of the district court of the county in which the superintendent resides. Compensation. Proviso.

*General Provisions.*

SEC. 2075. (54.) In townships comprising but one sub-district, three members of the district board of directors shall be elected in manner as provided in section nine of this act for the election of one member. The persons elected, together with the township clerk, shall constitute the township board, with like powers and duties as herein provided for the board of other townships. Manner of election in townships comprising but one sub-district

SEC. 2076. (55.) If at any time the office of secretary becomes vacant by resignation or otherwise, the board shall appoint one of their own number to fill such vacancy. Vacancy to be filled by board.

SEC. 2077. (56.) A school month shall consist of four weeks, of five school days each. School month.

\* See section 2094.

Provision.	SEC. 2078. (57.) Any officer whose term of office is prescribed by this act, shall continue in office until his successor is elected and qualified.
Persons elected, &c., to take oath.	SEC. 2079. (58.) Every person elected or appointed to any office, pursuant to the provisions of this act, shall, before entering upon the discharge of the duties thereof, take an oath to support the constitution of the United States, and of this state, and faithfully to discharge the duties of his office according to the best of his abilities. In case such officer has a written appointment or commission, his oath shall be indorsed thereon. In other cases it may be taken orally. In either case it may be sworn to before any officer authorized to administer oaths.
Oath to be indorsed.	
Books, &c., to be delivered to successor in office.	SEC. 2080. (59.) When any officer is superseded by election, or otherwise, he shall immediately deliver to his successor in office, all books, papers, and moneys pertaining to his office, taking a receipt therefor; and every such officer who shall refuse to do so, or who shall willfully mutilate or destroy any such books or papers, or any part thereof, shall be liable to a fine of not less than fifty, nor more than two hundred and fifty dollars, at the discretion of the court.
Penalty.	
Fines and penalties, how appropriated.	SEC. 2081. (60.) All fines and penalties collected from a district officer, by virtue of any of the provisions of this act, shall enure to the benefit of that particular district. Those collected from any member of the township board, shall belong to the township, and those collected from county officers, to the county. In the two former cases, suit shall be brought in the name of the township board; in the latter, in the name of the county, and by the district prosecutor. The amount in each case, shall be added to the fund next to be applied by the recipient, for the use of common schools.
Counties not organized, how regarded.	SEC. 2082. (61.) Unorganized counties shall be regarded for the purposes of this act, the same as though they formed a part of the organized counties to which they are respectively attached.
Defects in laws of board of education, when not in session, to be remedied by regulation of secretary of board.	SEC. 2083. (62.) The secretary of the board of education may make all needful rules and regulations to give efficiency to this law. And should any defect be discovered therein while this board is not in session, which is evidently the result of oversight, and which in his opinion is detrimental to the efficiency of the law, he may supply such defect by a regulation having the force of law, until the matter can be acted on by this board. In such cases he must report the fact and the reasons thereof to the board at its next meeting. He may also make regulations fixing the powers and duties of any subordinate officer or board, when those duties are not sufficiently defined herein, making a like report thereof as is above required.
Further discretionary power.	
School district with school-house, before passage of act of March 12, 1858, to form a part of the township district in which such school-house is situated.	SEC. 2084. (63.) In all cases where a school district, as constituted at the time of the taking effect of an act entitled "An act for the public instruction of the state of Iowa," approved March 12, 1858, and formed of a part of two or more civil townships in the same or adjoining counties, had a school-house erected, which said house had not been destroyed, removed or abandoned, said district, as at that time constituted, shall be and remain a sub-district in, and form a part of the township district in which such school-house is situated, for voting, taxation, enumeration of children, distribution of money, and all other school purposes, as fully as though said sub-district were all included within the township in which the school-house is situated, and the boundaries of such sub-district shall not be changed except with the concurrence of the boards of directors of the townships interested: <i>provided</i> , that the
Proviso.	

provisions of this section shall not apply to incorporated cities and villages containing one thousand inhabitants, or more; and the board of directors shall, at their regular meeting in April next after the passage of this act, divide their districts in accordance with the provisions of this section, and should a vacancy be caused thereby in the office of director in any such sub-district, the secretary shall, as soon as practicable, call a special meeting of the electors therein, to fill such vacancy.

SEC. 2085. (64.) Nothing in this act shall be so construed as to give the township board of directors jurisdiction over any territory included within the limits of any city or incorporated village, with the territory annexed thereto for school purposes, which has organized separately as a school district under any other act of this board.

This act, how construed.

SEC. 2086. (65.) If adequate provision has not been made by the township district for school-house purposes, or the payment of debts in any sub-district, the sub-director may, and shall, at the written request of one-fourth of the electors in his sub-district, call a meeting of the electors of his sub-district: said meeting to be held on *the second Monday in July*,\* and to be organized as at the regular meeting in March.

Sub-director, at request of directors, to call meeting.

SEC. 2087. (66.) He shall give at least ten days' notice of any meeting so called, by causing said notice to be read in the presence of each school taught in his sub-district, if during term time, or if no school be in operation, then by posting written notices of said meeting in at least three conspicuous public places in his sub-district.

Notice, and how given.

SEC. 2088. (67.) The electors of such sub-district, when assembled at such called meeting, may determine whether they desire a tax levied upon the property of said sub-district.

Tax levied determined by electors.

1. For the payment of debts against said sub-district contracted before the organization under an act "for the public instruction of the state of Iowa," approved March 12, 1858, or,

2. For the erection, completion, repairing or furnishing a school-house or houses in said sub-district, or for purchasing, leasing, enclosing or improving grounds for the same: *provided*, that no tax shall be voted of more than one per cent. on the taxable property of the district in any one year, nor shall any tax for school-house purposes be voted, unless the electors and board of directors of the township district have refused or neglected to vote a tax for said purpose, after being requested by the sub-district at its regular meeting in March so to do, as provided in section thirteen of this act. Nor shall any tax be voted except by a vote of two-thirds of the electors present, or a majority of all the electors of the sub-district.

SEC. 2089. (68.) Whenever any tax has been voted by a sub-district, as provided for in the preceding section of this act, the sub-director shall, within ten days thereafter, certify the same to the secretary of the township district, together with a list of all property owners, residents of his sub-district, and the secretary shall, within twenty days thereafter, estimate the tax upon the taxable property of said sub-district, as shown by the last assessment previous to that time, and shall make a list of such tax and certify the same to the proper authority for levying county taxes; and for such services he shall receive the sum of two dollars per day, which shall be paid out of the proceeds of said tax.†

Secretary of township district to be notified of tax levied by sub-director within ten days thereafter.

Secretary to estimate tax within twenty days thereafter.

Compensation.

SEC. 2090. (69.) No action shall be obligatory under the provisions

\* See section 2094.

† See section 2092.

of sections sixty-five, sixty-six, sixty-seven and sixty-eight of this act, until the general assembly shall provide for and authorize the collection of the taxes therein mentioned.\*

How moneys arising from taxes to be disposed of.

SEC. 2091. (70.) All money arising from taxes voted by a sub-district, shall, when collected, be paid over to the treasurer of the township district on the order of the sub-director of the district voting the same, and shall be paid out only on the order of the president, countersigned by the secretary and sub-director of said district.

#### ARTICLE 2.

An Act to amend an Act passed by the Board of Education, Dec. 24, 1859, entitled "An Act to amend an Act entitled an Act to provide a System of Common Schools."

[Passed April 2, 1860, took effect April 21, 1860; Laws of Eighth General Assembly, Chapter 112.]

After tax voted, secretary of township district, within ten days, to notify county judge.

SECTION 2092. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That whenever any tax has been voted by a sub-district, and certified to the secretary of the township district, as contemplated in sections sixty-seven and sixty-eight of the act of which this is amendatory, the said secretary shall within ten days thereafter certify the same to the county judge,† who shall, at the time of levying a tax for county purposes, levy a tax of the amount thus certified upon the assessed value of all real and personal property in the sub-district by which it was voted, and the same shall be collected and paid over in the manner provided in sections twenty-four and seventy of the act of which this is amendatory.

County judge to levy tax.

How collected.

Board of directors may appoint a secretary.

SEC. 2093. (2.) In any case where it may be incompatible with the provisions of the act of which this is amendatory, for the township clerk to perform the duties of secretary, the board of directors may appoint a secretary from the district at large, but the person so appointed shall have no vote in the proceedings of said board, except as herein provided. He shall qualify within ten days after his appointment, and a failure to do so shall create a vacancy. In all township districts where there are but two sub-districts, the secretary shall give the casting vote in all questions upon which the two sub-directors can not agree.

Vacancy.

Substitution.

SEC. 2094. (3.) From and after the first day of January, one thousand eight hundred and sixty-one, the words "board of supervisors" shall be substituted for the words "county judge" in the latter part of the fourteenth specification of section sixteen; and also in sections twenty-three, thirty-six, thirty-eight and forty-four of the act of which this is amendatory, and in section one of this act, and the words "clerk of the board of supervisors" shall be substituted for the words "county judge" in the twelfth and first part of the fourteenth specification of section sixteen, and also in sections twenty-nine, thirty-nine, forty, forty-seven, fifty and fifty-three of the act of which this is amendatory, and the words "first Monday in May" shall be substituted for the words "first Monday in June," in section seventeen, and for the words "second Monday in July" in section sixty-five of the act of which this is amendatory.

Same.

Same.

\* See section 2092.

† See section 2094.

ARTICLE 3.

An Act to amend an act passed by the Board of Education, December 24, 1859, entitled "An act to amend an act entitled an act to provide a System of Common Schools."

[Passed April 3, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 149.]

SECTION 2095. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That when a judgment has been obtained against a school district, it shall be the duty of the board of directors to pay off and satisfy the same from the proper fund by an order on the treasurer of the district; and it shall be the duty of the district meeting at the time for voting a tax for the payment of other liabilities of the district, to provide for the payment of such order or orders.

Judgment to be paid off by board of directors by order on treasurer of the district.

SEC. 2096. (2.) In case a district has borrowed money of the school fund as contemplated in section eight of "an act to establish a system of common schools," passed by the board of education December 24th, 1858, it shall be the duty of the board of supervisors to levy such tax not exceeding five mills on the dollar in any one year on the taxable property of the district as constituted at the time of making such loan, as may be necessary to pay the annual interest on said loan, and the principal when the same falls due, unless the board of supervisors shall see proper to extend the time of said loan.\*

Money borrowed of school fund by district, how annual interest is to be paid.

ARTICLE 4.

An Act to confer certain powers on Towns and Cities for School Purposes.

[Passed December 24, 1858; Laws of Board of Education.]

SECTION 2097. (1.) *Be it enacted by the Board of Education of the State of Iowa,* That any city or incorporated town in this state, including the territory annexed thereto for school purposes, may constitute a separate school district.†

Separate school district.

SEC. 2098. (2.) At the written request of any ten voters of such city or town, the municipal authorities thereof shall provide for taking the sense of the people residing within the limits of the contemplated district, by means of a public vote by ballot.

By request, vote to be taken.

SEC. 2099. (3.) Should the majority of the votes cast at any such election be in favor of a separate organization, an early day shall be fixed for electing by ballot, a president, vice president, secretary, treasurer and three directors, all of whom shall constitute a district board, having the same general powers, duties and obligations as attach to the like board in the township districts, except as herein provided. The said president, vice president, secretary and treasurer, shall hold their offices for the same time, and after the first election their successors shall be elected upon the same day and shall conform in other respects to the same rules and requirements as are provided by law for the same officers in the township districts.

Officers to constitute a district board to be elected by ballot.

Term of office the same.

How successors to be elected.

SEC. 2100. (4.) After the first election, the directors shall, by lot, determine the length of their respective terms of office; one shall serve till the second Monday in March next after his election; another till one year after the said second Monday in March; and a third till two

After first election terms of office to be decided by lot.

\* The word "loan" of this section is "law" in the archives.

† See section 2105.

- How successors to be elected. years thereafter. At the end of each such term, a successor shall be elected who shall hold his office for three years, and until his successor is elected and qualified. Should a vacancy occur in respect to either of said directors, it may be filled by the remainder of the board until the day of the next election, when a successor shall be elected to fill out the remainder of his term.
- Vacancy, how filled. SEC. 2101. (5.) The said district may have as many school-houses, and their schools may be regulated in such a manner as the said board may direct, subject to the general laws of the state. They may distribute the executive duties of their board among the three directors in such manner as they shall think expedient.
- School-houses and schools to be regulated by board. SEC. 2102. (6.) Should any portion of said city or town lie in a different township from that in which the principal portion thereof is situated, the inhabitants of such fraction may organize with the remaining portion of their own township at any time that they may think proper so to do; or should their population exceed five hundred in number, they may organize in the same manner as is provided for the main portion of the city or town as herein before provided.
- How fractional township in city, may organize. SEC. 2103. (7.) At the written request of any ten voters residing within such fractional portion of any town or city, the municipal authorities thereof shall provide for taking a vote by ballot to determine whether they will remain attached to the main body of the city or town. And should their number exceed five hundred inhabitants, there shall be provision made at the same time or afterwards for ascertaining whether the fraction so cut off will organize by itself, or will unite with the remaining portion of its own township.
- If population exceeds five hundred. SEC. 2104. (8.) Where a town or city is carved out of a civil township as contemplated in this act, the remainder of such township shall constitute a separate school district, the boundaries between which and the said city or town district may at any time be changed with the consent of both their respective boards of directors.
- Vote by ballot.
- Separate school district.

## ARTICLE 5.

An Act to amend an act to confer certain Powers on Towns and Cities for School Purposes.

[Passed February 26, 1860, took effect March 7, 1860; Laws of Eighth General Assembly, Chapter 20.]

- Provisions of act, Dec. 24 1858, extended to unincorporated towns and villages. SECTION 2105. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the provisions of an act to confer certain powers on towns and cities for school purposes, passed by the board of education, December 24th, 1858, be and hereby are extended to unincorporated towns and villages containing not less than three hundred inhabitants, and the duties required of municipal authorities of cities and incorporated towns by said act, shall, in the case of an unincorporated town or village as aforesaid, and upon the written request of ten legal voters thereof, be performed by the trustees of the civil township in which such unincorporated town or village may be situated; and in case such unincorporated town or village shall embrace parts of two or more adjoining civil townships or counties, then the aforesaid duties shall devolve on the trustees of the civil township in which a majority of the legal voters of the contemplated school district reside.
- Regular meetings of school districts to be held on second SEC. 2106. (2.) The regular meeting of all school districts heretofore or hereafter organized under the act to which this is amendatory, shall be held on the second Monday in March of each year, at which

time the qualified electors shall elect a president, vice president, secretary and treasurer of the district, who shall hold their offices for one year and until their successors are elected and qualified, and also one director in the manner prescribed in section four of said act; and the president, vice president and secretary of the district then in office shall act as judges of the election, and shall issue certificates of election to the persons elected for the ensuing term. Should a vacancy occur in the district board, they may fill the same by appointment until the next regular district election thereafter, or may call a special meeting of the district for that purpose.

Monday of March, each year, and officers of district school board to be elected.

Vacancy, how filled.

## CHAPTER 89.

### MISCELLANEOUS SCHOOL LAWS.

#### ARTICLE 1.

An Act providing for the Election of the Members of the Board of Education, and fixing the times of Meeting of said Board.

[*Passed March 23, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 155, page 340.*]

SECTION 2107. (1.) *Be it enacted by the General Assembly of the State of Iowa,* The members of the board of education shall be elected, one from each judicial district in the state, in accordance with the provisions of the constitution, upon the second Tuesday of October, A. D. 1858, and the votes for said members shall be canvassed as provided for the election of district judges.

Election of members.

SEC. 2108. (2.) The board of education shall hold a session at the capitol of the state on the first Monday of December, A. D. 1859, and every second year thereafter.

Sessions held.

#### ARTICLE 2.

An Act to legalize Elections, Acts and Contracts under an Act of the General Assembly, entitled "an Act for the Public Instruction of the State of Iowa.

[*Passed March 12, 1858; Laws of Board of Education* ]

WHEREAS, Elections have been held, contracts made, acts done and taxes levied, schools taught, and teachers employed, in many, if not all, the school districts in this state, in consequence and by reason of an act of the last general assembly of this state, commonly called the act for the public instruction of the state of Iowa; and

WHEREAS, The supreme court of the state have recently decided said act to be unconstitutional and void in many of its provisions; and as great confusion is about to result in consequence of such a state of facts, unless a curative act be passed; therefore,

Decision of supreme court.

SECTION 2109. (1.) *Be it enacted by the Board of Education of the State of Iowa,* That all elections which have been held, or have taken place, all acts done, and contracts made, and any tax which may have been levied by any person, school district or corporation, and any rights which any person, school district, or corporation may have acquired under and in pursuance of an act of the general assembly, entitled "an act for the public instruction of the state of Iowa," approved March 12th,

All elections held and contracts, &c., made under the provisions of the act of the general assembly of March 12th, 1858, "legalized and confirmed."

1858, be and the same are hereby legalized and confirmed as fully and effectually as though the same had taken place in pursuance of legal enactment: *provided*, that nothing in this act shall be construed to impair the right of the board of education to fix the term of office of any officer elected under said act, or to abolish any office created by said act.

Proviso.

#### ARTICLE 3.

##### An Act legalizing the Election and Acts of certain School Officers.

[Passed Dec. 21, 1858; Laws of Board of Education.]

Elections of school officers provided for in the act of March 12th, 1858, "legalized and made valid."

SECTION 2110. (1.) *Be it enacted by the Board of Education of the State of Iowa*, That whenever any township in this state has been organized since the first Monday in May, one thousand eight hundred and fifty-eight, and has since elected the school district officers provided for in the act of March 12th, 1858, entitled "an act for the public instruction of the state of Iowa," such election is hereby legalized and made valid; and all said officers so elected, are hereby continued in office until their successors shall be elected and qualified according to law; and all acts done by, or contracts made by or with said officers, and all rights accruing to said officers, under, by virtue, or in pursuance of said act of the general assembly, are hereby ratified and confirmed, as fully as though said elections had been held in pursuance of legal enactment.

#### ARTICLE 4.

##### An Act providing for the publication of the Laws of the Board of Education in the several Counties of the State.

[Passed Dec. 21, 1858; Laws of Board of Education.]

Secretary to forward copies of laws to county judges.

SECTION 2111. (1.) *Be it enacted by the Board of Education of the State of Iowa*, That the secretary of the board of education shall, as soon as possible after the adjournment of *any* session of this board, and within thirty days forward to each county judge in the state a copy of all the laws passed at said session. It shall be a sufficient compliance with the provisions of this section, if the secretary of the board of education shall forward to each county judge duplicate copies of newspapers, or slips containing said laws.\*

Laws to be published in newspapers.

SEC. 2112. (2.) It shall be the duty of the county judge of each county, to cause said laws to be published in two weekly newspapers of his county, if as many are published therein; and if but one weekly newspaper be published in his county, then the said laws shall be published in such newspaper: *provided*, that not more than thirty-five cents per thousand ems shall, in any case, be allowed for publishing the said laws.

Proviso.

Accounts to be audited.

SEC. 2113. (3.) The accounts for such printing shall be audited and allowed the same as other accounts against the county, after having first been sworn to by some one acquainted with the correctness thereof.

County judge to preserve one copy of each newspaper.

SEC. 2114. (4.) It shall be the duty of the county judge of such county to keep and preserve at least one number of each newspaper of his county in which the laws of the board of education may be published under the provisions of this act, and place the same in his office, where it shall remain for future reference.

\* In this section, "*the present*" was struck out and "*any*" inserted; and "*from date*" struck out, by an act of Dec. 24, 1859, laws of board of education.



ARTICLE 5.

An Act to provide for the authentication and taking effect of the Laws passed by the Board of Education.

[Passed December 15, 1858, took effect March 1, 1859; Laws of Board of Education.]

SECTION 2115. (1.) *Be it enacted by the Board of Education of the State of Iowa,* That all acts passed by this board shall before they become laws, be correctly enrolled and signed by the presiding officer of this body. Acts of board to be enrolled and signed by the president.

SEC. 2116. (2.) That a printed certificate of the secretary of this board shall be appended to the pamphlet containing a copy of the laws of any session, stating that the acts therein contained have been by him compared with the original statutes as passed by this board, and such certificate shall be sufficient evidence of the correctness of those laws to render them receivable as genuine in all cases whatever. Secretary's certificate.

SEC. 2117. (3.) That when not otherwise expressly provided, the laws passed at any general session of this board shall take effect on the first day of March next after the date of their enactment. Take effect

ARTICLE 6.

An Act providing for the Boundaries of Districts in certain cases.

[Passed December 24, 1859; Laws of Board of Education.]

SECTION 2118. (1.) *Be it enacted by the Board of Education of the State of Iowa,* That in all cases where that portion of any sub-district lying in a different civil township from the one in which the school-house of such sub-district is situated shall be entirely uninhabited, then and in that case said uninhabited portion of such sub-district shall make and constitute a part of the school district of the civil township in which it is situated. Uninhabited part of such district to make a part of school district in which school-house is situated

ARTICLE 7.

An Act prohibiting the exclusion of the Bible from the Schools of the State.

[Passed December 22, 1858; Laws of the Board of Education]

SECTION 2119. (1.) *Be it enacted by the Board of Education of the State of Iowa,* That the Bible shall not be excluded from any school or institution in this state, under the control of the board, nor shall any pupil be required to read it contrary to the wishes of his parent or guardian. Bible not to be excluded.

ARTICLE 8.

An Act to provide for the purchase of School District Libraries.

[Passed December 18, 1858; Laws of Board of Education]

SECTION 2120. (1.) *Be it enacted by the Board of Education of the State of Iowa,* That the temporary school funds belonging to each county in this state shall be apportioned separately by the county judge at the time of apportioning other school funds among the several districts in each county, in proportion to the number of persons residing in such district between the ages of five and twenty-one years. School funds, how apportioned

SEC. 2121. (2.) The board of directors shall, at their regular meet- How appropriated.

ing in April of each year, determine whether the amount so received shall be appropriated to the purchase of a district library, and if not so appropriated, the same shall form a part of the teacher's fund of said district.

Secretary *ex officio* librarian.

SEC. 2122. (3.) The secretary of each district shall be *ex officio* librarian, and shall purchase books and perform all other duties pertaining to that office, under the direction of the township board.

ARTICLE 9.

An Act relative to the introduction of Webster's Dictionary into the Common Schools of this State.

*Passed December 24, 1858, took effect March 1, 1859; Laws of Board of Education.]\**

Webster's unabridged dictionary

SECTION 2123. (1.) *Be it enacted by the Board of Education of the State of Iowa,* That the board of directors of each school district in this state may, at any regular or special meeting of said board, determine whether they will purchase for the use of the schools in their district, copies of Webster's unabridged dictionary.

Same.

SEC. 2124. (2.) Whenever the sub-director of any sub-district shall determine to purchase a copy of said dictionary for said sub-district, the secretary of the district shall immediately certify the same, specifying the number of copies determined upon, to the county superintendent, who shall certify the same to the auditor of state and to the county judge.

Cost of dictionaries to be deducted from county tax apportioned to each district.

SEC. 2125. (3.) At the time of each annual apportionment by the county judge, of school funds among the several districts, he shall deduct from the amount of funds derived from county tax apportioned to each district \* \* \* the cost of all such dictionaries ordered by said district that \* \* \* year, and the amount so deducted shall be returned to the state treasury as provided for surplus interest in section eight, chapter one hundred and fifty-eight, laws of 1858.

Auditor of state to purchase dictionaries for counties.

SEC. 2126. (4.) The auditor of state is hereby authorized and directed to purchase of the publishers, from time to time, as they are ordered for the several counties, the number of such books necessary to supply all orders so received, provided that they shall be purchased at a cost not exceeding four dollars per copy, on such terms of payment as are specified in section three of this act, and shall be the latest edition of Webster's quarto unabridged, printed on superior paper, well bound in leather, perfect in all respects, and shall be delivered free of charges at any points in this state \* \* \* which may be designated by the auditor, and the auditor shall notify the state treasurer of the number of books so purchased for each county.

Cost not to exceed \$4.

Secretary to receipt for books.

SEC. 2127. (5.) The secretary of the board of education shall receipt to the publishers for such books on their arrival in good order at the place or places designated by the auditor, and shall immediately distribute them to the several county superintendents by whom they were ordered, in the same manner as laws of the general assembly are distributed.

Books to be distributed.

SEC. 2128. (6.) The county superintendents shall, on receipt of such books, at once distribute them to the proper districts.

Dictionaries under control of teachers.

SEC. 2129. (7.) Such dictionaries shall be kept in the schools

\* The erasures and additions of this act were made by the act of the board of education, of December 24, 1859, an act to amend an act entitled an act relative to the introduction of Webster's dictionary into the common schools of this state, which took effect March 1, 1860.

during the term time, and under the control of the teacher thereof, and when not in school, shall be placed in the district library, subject to the rules established for the government of district libraries.

SEC. 2130. (8.) The auditor of state, or any other officer, shall not receive any compensation for the services which they may render under this act. No compensation.

ARTICLE 10.

An Act to amend an act entitled "an Act relative to the introduction of Webster's Dictionary into the Common Schools of this State."  
 [Passed December 24, 1859, took effect March 1, 1860.]

SECTION 2131. (1.) [This section directs the alterations made in sections (3) three and (4) four, of the act relative to the introduction of Webster's dictionary into the common schools of this state.]

SEC. 2132. (2.) All contracts made under the provisions of the act to which this is amendatory, shall be performed as provided in said act.

ARTICLE 11.

An Act to provide for Appeals.  
 [Passed Dec. 24, 1859; Laws of Board of Education.]

SECTION 2133. (1.) *Be it enacted by the Board of Education of the State of Iowa,* That any person aggrieved by any decision or order of the district board of directors, in matter of law or of fact, may within thirty days after the rendition of such decision, or the making of such order, appeal therefrom to the county superintendent of the proper county. May appeal from decision of board of directors to county superintendent.

SEC. 2134. (2.) The basis of the proceeding shall be an affidavit, filed by the party aggrieved with the county superintendent, within the time allowed for taking the appeal. By affidavit.

SEC. 2135. (3.) The affidavit shall set forth the errors complained of in a plain and concise manner. What it shall contain.

SEC. 2136. (4.) The county superintendent shall, within five days after the filing of such affidavit in his office, notify the secretary of the proper district in writing, of the taking of such appeal. And the latter shall, within ten days after being thus notified, file in the office of the county superintendent a complete transcript of the record and proceedings relating to the decision complained of, which transcript shall be certified to be correct by the secretary. County superintendent to notify secretary of appeal.

SEC. 2137. (5.) After the filing of the transcript aforesaid in his office, he shall notify in writing all persons adversely interested, of the time and place where the matter of the appeal will be heard by him. Must file transcript.

SEC. 2138. (6.) At the time thus fixed for hearing, he shall hear testimony for either party, and for that purpose may administer oaths if necessary, and he shall make such decision as may be just and equitable, which shall be final, unless appealed from as hereinafter provided. Parties to be notified.

SEC. 2139. (7.) An appeal may be taken from the decision of the county superintendent to the secretary of the board of education, in the same manner as provided in this act for taking appeals from the decision of the district board to the county superintendent, as nearly as applicable, except that he shall give thirty days' notice of the appeal to the May hear testimony and administer oaths.

SEC. 2139. (7.) An appeal may be taken from the decision of the county superintendent to the secretary of the board of education, in the same manner as provided in this act for taking appeals from the decision of the district board to the county superintendent, as nearly as applicable, except that he shall give thirty days' notice of the appeal to the Appeal, how taken.

county superintendent, and the like notice shall be given the adverse party. And the decision, when made, shall be final.

Not allowed to render a judgment for money.

SEC. 2140. (8.) Nothing in this act shall be so construed as to authorize either the county superintendent or secretary of the board of education to render a judgment for money, neither shall they be allowed any other compensation than is now allowed by law: *provided*, that all necessary postage must first be paid by the party aggrieved.

Compensation allowed by law.

## CHAPTER 90.

### DEAF, DUMB, AND BLIND.

[Code—Chapter 73. Repealed as to Blind by the following.]

#### ARTICLE 1.

“An Act to establish an Asylum for the Blind.”

[Passed Jan. 18, 1853, took effect Feb. 2, 1853; Laws of Fourth General Assembly, Chapter 26, p. 47.]

Asylum for blind.

SECTION 2141. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That there be and hereby is established at the capital of this state (then Iowa City) an institution for the instruction of the blind, which shall be known as the asylum of the blind.

[Sections (2) to (13) inclusive are superseded by the following article.]

Repeal.

SEC. 2142. (14.) All that part of chapter 73 of the code of the state which relates to the blind is hereby repealed.

#### ARTICLE 2.

An Act to amend an act, entitled, an act to establish an Asylum for the Blind, approved January 18, 1853.

[Passed Jan. 22, 1855, took effect Jan. 31, 1855; Laws of Fifth General Assembly, Chapter 56, page 81.]

Act repealed.

SECTION 2143. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That so much of an act entitled “an act to establish an asylum for the blind,” approved January 18, 1853, as conflicts with the provisions of this act is hereby repealed.

Trustees.

SEC. 2144. (2.) Said institution shall be under the supervision of a board consisting of seven persons, of whom the governor, superintendent of public instruction, and secretary of state shall be *ex-officio* members, and who shall be called the board of trustees. The other members of the board shall be appointed by the governor and be approved by the senate, and shall hold their offices for one, two, three and four years respectively, in the order in which they are recommended, and at the expiration of their respective terms of office, one trustee shall be appointed by the governor, with the consent of the senate, for the term of four years.

*Ex-officio* appointed.

Term.

Supervision.

SEC. 2145. (3.) The trustees shall have the general supervision of the institution, adopt rules for the government thereof, provide teachers,

servants and necessaries for the institution, and perform all other acts necessary to render the institution efficient, and to carry out the purpose of its establishment.

SEC. 2146. (4.) Three of said trustees shall constitute a quorum **Quorum.** for the transaction of business.

SEC. 2147. (5.) All blind persons residents of this state, of suitable **Admission.** age and capacity, shall be entitled to an education in this institution at the expense of the state.

SEC. 2148. (6.) Persons not resident of the state shall be entitled **Non-residents.** to the benefits of this institution on paying to the treasurer thereof the said sum of thirty-five dollars a quarter in advance.

SEC. 2149. (7.) The board of trustees shall make a biennial report **Report.** to the general assembly, of the condition of the institution, the number, name, residence, age, sex, place of their nativity, and also the cause of blindness of each pupil; they shall also make report of the studies pursued, and the trades taught in the institution, and the receipts and disbursements of money made on account thereof.

SEC. 2150. (8.) The board of trustees shall elect one of their num- **President and** ber president and another treasurer of the institution, and the treasurer **treasurer.** shall enter into bonds with security in such sum as the board shall direct, conditioned for the faithful paying over of all money belonging **Bond.** to the institution upon the order of the board, which bond shall be filed with the secretary of state.

SEC. 2151. (9.) The board of trustees shall not create any indebt- **Board not to ex-** edness against the institution exceeding the amount appropriated by the **ceed.** general assembly for the support thereof.

[Section (10) obsolete.]

SEC. 2152. (11.) No remuneration shall be made to the trustees **No pay** for their services.

(12.) The trustees shall have power to allow pupils of **Exhibitions.** the institution to travel under proper care, for the purpose of exhibiting to the people of the state, by public meetings and otherwise, the progress made by them, and to extend a knowledge of the institution.

ARTICLE 3.

“An Act providing for the Education of the Blind.”

[Passed January 21, 1857, took effect January 23, 1857; Laws of Sixth General Assembly, Chapter 51, page 63.]

SECTION 2153. (1.) *Be it enacted by the General Assembly of the* **Appropriation.** *State of Iowa,* That to meet the ordinary expense of said institution, including rents and furniture, there is hereby appropriated from the state treasury the sum of twenty-five dollars per quarter for each pupil therein, and the further sum of three thousand five hundred dollars per annum out of any money in the treasury, not otherwise appropriated.

SEC. 2154. (2.) The principal of the institution shall be *ex-officio* **Principal and** a member of the board, and the assistant officers shall receive their ap- **assistants.** pointment from the board, upon the nomination of the principal, who shall be responsible to the principal for the faithful performance of their duties, and the principal shall be held responsible to the board for the performance of his duties.

"An Act to locate and provide for the erection of an Institution for the Education of the Blind of the State of Iowa."

[Passed March 22, 1858, took effect April 7, 1858; Laws of Seventh General Assembly, Chapter 125, page 246.]

[This act is temporary, being for the erection of the edifice.]

*Deaf and Dumb and Blind.*

[Code—Chapter 73. Repealed as to Deaf and Dumb by the following:]

ARTICLE 4.

"An Act to establish a State Institution for the Deaf and Dumb."

[Passed January 24, 1855, took effect January 31, 1855; Laws of Fifth General Assembly, Chapter 87, page 133.]

Established at the capitol.

SECTION 2155. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That there shall be established at the capital of the state, an institution to be called an institution of the deaf and dumb.

All deaf and dumb educated at expense of state.

SEC. 2156. (2.) Every deaf and dumb citizen of the state, of suitable age and capacity, shall be entitled to receive an education in said institution at the expense of this state.

Trustees.

SEC. 2157. (3.) Said institution shall be under the supervision of a board consisting of seven persons, of whom the governor, the secretary of state, and the superintendent of public instruction, shall be *ex-officio* members, and who shall be called the board of trustees, and the other members of said board shall be appointed by the governor and approved by the senate, and shall hold their offices for one, two, three and four years respectively, in the order in which they are recommended, and at the expiration of their respective terms of office, one trustee shall be appointed by the governor with the consent of the senate for four years.

Appointed. Terms.

Supervision

SEC. 2158. (4.) The trustees shall have the general supervision of the institution, adopt rules for the government thereof, provide teachers, servants, and necessaries for the institution, and perform all other acts necessary to render it efficient and to carry out the purpose of its establishment.

Quorum.

SEC. 2159. (5.) Three of said trustees shall constitute a quorum for the transaction of business, and their proceeding at each meeting shall be recorded in a minute book, which shall be signed by those present, and form a record of their proceedings.

Record.

Non-residents. Pay.

SEC. 2160. (6.) Persons not residents of the state, of suitable age and capacity, shall be entitled to an education in said institution, on paying to the trustees thereof the sum of thirty-five dollars a quarter in advance.

Report.

SEC. 2161. (7.) The board of trustees shall make a biennial report to the general assembly of the condition of the institution, the number, name, residence, age, sex and place of nativity of each pupil; they shall also make a report of the studies pursued, of the trades taught in the institution, and of the receipts and disbursements made on account thereof.

Treasurer.

Bond.

SEC. 2162. (8.) The board of trustees shall select one of their number as treasurer of the institution, and he shall enter into bonds, with security, in such sum as the board shall direct, conditioned for the faithfully paying over of all money belonging to the institution, upon the order of the board, which bond shall be filed with the secretary of state.

Filed.

SEC. 2163. (9.) The board shall not create any indebtedness against the institution exceeding the amount appropriated by the general assembly for the use thereof. Limitation

SECS. (10) and (11) [were of temporary effect.]

SEC. 2164. (12.) The trustees are hereby authorized to allow the pupils of the institution to travel in the state, under proper care, for the purpose of exhibiting to the citizens thereof, by public meetings and otherwise, the progress made by them, and to extend a knowledge of the institution. Exhibitions.

SEC. 2165. (13.) No remuneration shall be made to the trustees for their services. Trustees to get no pay.

SEC. 2166. (14.) Chapter seventy-three of the code, is hereby repealed. Repeal.

#### ARTICLE 5.

“An Act providing for the Institution of the Deaf and Dumb Asylum.”

[Passed January 21, 1857, took effect January 23, 1857; Laws of Sixth General Assembly, Chapter 52, page 64.]

[This act was only an appropriation, and is obsolete except]

SEC. 2167. (1.) \* \* \* \* and the principal of the institution shall be, *ex officio*, a member of the board.

#### An Act making further Appropriation.

Laws of Seventh General Assembly, Chapter 137, page 260. Passed March 23, 1858.

PRIOR LAWS UNDER TITLE 14. 1. An act to regulate common schools, passed April 13, 1833; M. D., 1833, p. 129; repealed by No. 3, hereof.

2. An act providing further establishment of common schools, passed Jan. 1, took effect Feb. 1, 1839; I. T., 1st sess., p. 180; repealed by No. 3, hereof.

3. An act to establish a system of common schools, passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 73, p. 101; also Reprint, 1843, p. 583; repealed by No. 6 hereof.

4. An act to amend same, passed Jan. 15, 1846; I. T., 8th sess., chap. 11, p. 9; repealed 1st sess., chap. 99, p. 127.

5. An act modifying same, passed Dec. 14, took effect Dec. 30, 1846; 1st sess., chap. 1, p. 19; repealed 1st sess., chap. 99, p. 127.

6. An act further amending act of Jan. 16, 1840, passed Jan. 24, 1847? 1st sess., chap. 99, p. 127; repealed by No. 8 hereof.

7. An act amending same, passed Jan. 12, took effect Jan. 17, 1849; 2d sess., chap. 59, p. 73; repealed by No. 8 hereof.

8. An act to establish a system of common schools, passed Jan. 15, took effect Jan. 31, 1849; 2d sess., chap. 80, p. 95.

9. Code of 1851, chap. 69.

10. Amended 3d sess., chap. 77, p. 177, 1851.

11. An act to extend the power of school districts, passed Jan. 24, took effect Feb. 12, 1853; 4th sess., chap. 101, p. 157.

12. An act for the better regulation of public schools, in cities, towns and densely populated school districts, passed Jan. 28, took effect July 1, 1857; 6th sess., chap. 158, p. 234.

13. “An act for the public instruction of the state of Iowa,” passed March 12, took effect March 20, 1858; 7th sess., chap. 52, p. 57.

14. An act supplementary thereto, &c., passed March 19, took effect April 24, 1858; 7th sess., chap. 81, p. 115.

15. An act requiring school fund commissioner to file list of school lands sold, in the register’s office, passed Jan. 23, took effect Feb. 3, 1857; 6th sess., chap. 92, p. 101.

16. An act to establish normal schools, passed Jan. 25, 1849? 2d sess., chap. 78, p. 93; amended 3d sess., chap. 74, p. 175-1851.

17. An act to provide for the instruction of the deaf, dumb and blind, passed Jan. 15, 1849? 2d sess., chap. 121, p. 148.

DECISIONS. Compensation of school fund commissioners, 4 G., 40; form of school fund commissioner's bond; warrant for collection of school tax, 8 Iowa, 298; right of taxation, 4 G., 448; 3 G., 255; proceeds of fines to school fund, 3 G., 287; see M., 214-218.

## TITLE XV.

### CHAPTER 91.

#### MISCELLANEOUS ACTS.

##### ARTICLE 1.

General Provisions relative to the first part of this Statute, Code, Chapter 74.

[This only concerns that part of the Code of 1851, which is comprehended in "Part First."]

SECTION 2168. (1190.) Whenever it is found that any of the provisions of the first part of this statute can not be carried into full effect on account of the absence of some necessary regulation or on account of a conflict of existing regulations, the census board is authorized to establish any rules that may be necessary to supply the defect or reconcile the discrepancy in order to carry out the spirit and intent of the statute, which rules must be published in two or more newspapers of the state, and shall have the force of law until changed by the general assembly.

##### ARTICLE 2.

##### STATIONERY.

An Act to amend the several acts in relation to a State Printer.

[Passed January 24, 1853, took effect February 9, 1853; Laws of Fourth General Assembly, Chapter 102, page 159.]

[SECTION (1.) [Belongs to printing, and is found under section 147.]

Stationery. SEC. 2169. (2.) The auditor, secretary, and treasurer of state shall make an estimate or estimates of all the paper needed for the public printing, and of all the paper, pens, ink, and other articles of stationery necessary for the general assembly, the public officers and the supreme court and the auditor shall advertise for sealed proposals of the quantity, quality and kinds thereof, which may be needed for the public use in two newspapers at the capital, and in one newspaper printed at St. Louis, Chicago, and New York, for the period of sixty days, requiring a delivery of the articles at least ninety days before the same will be wanted for public use, and bids for the same shall be opened by said auditor, treasurer and secretary, at such time as may be fixed by said advertisement; and they shall award the contract or contracts for furnishing said stationery, paper, etc., to the lowest responsible bidder or bidders therefor who shall give security, to be approved by them, for the performance of his or their contract; and upon the delivery of the articles contracted for at the office of the secretary of state, at the capitol, in compliance with the terms of said contract or contracts, and presenting a receipt or receipts therefor, signed by the secretary to the auditor of state, he shall

Proposals.

Contract.

Delivery.

Payment.



issue to the contractor or contractors, his warrant on the treasurer for the amount due, which shall be paid out of any money in the treasury not otherwise appropriated.

SEC. 2170. (3.) It shall be the duty of the secretary of state, to take charge of said articles, and furnish the public printer elected to serve after the expiration of the term of the public printer elected at the last session of the general assembly, all the paper needed for the various kinds of public printing, in such quantities as may be needed for the prompt discharge of his duties, and he shall supply the governor, secretary of state, auditor, treasurer, attorney general, clerk of the supreme court, superintendent of public instruction, and general assembly, all the stationery required for public use, taking receipts of the proper officers therefor.

Secretary to furnish printer.

Officers S. court.

SEC. 2171. (4.) All acts and parts of acts conflicting with the provisions of this act, are hereby repealed; and this act shall be in force from and after its publication in the Reporter and Republican newspapers published at Iowa City.

Repeal.

Take effect.

ARTICLE 3.

DISBURSING OFFICERS.

An Act in relation to Disbursing Officers and Agents.

[Passed January 25, 1855, took effect July 1, 1855; Laws of Fifth General Assembly, Chapter 163, page 247.]

SECTION 2172. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That in all cases where any appropriation has heretofore been made, or shall hereafter be made, as a contingent fund for any office, or officer, it shall be the duty of the person, or persons, disbursing said contingent fund, to open, and keep an account with said fund, showing when, to whom, and for what, said contingent fund has been expended, and to take and preserve receipts, for all funds, or amounts expended by him or them, as aforesaid.

Contingent fund.

SEC. 2173. (2.) In all appropriations heretofore made, or hereafter to be made, for any purpose, and to be expended for said state, under the direction or supervision of any person, or persons, charged therewith, it shall be the duty of said person, or persons, to open an account with said fund, showing when, to whom, and for what, the same, or any part thereof, has been expended, and take and preserve receipts for all services, thus paid out by them.

Appropriations.

Disbursed.

SEC. 2174. (3.) The person, or persons, mentioned in the preceding sections, shall make report to each session of the legislature, of the manner, to whom, and when, said moneys were by them paid out or expended.

Report.

SEC. 2175. (4.) No person above mentioned shall be credited with any expenditure as aforesaid, unless expended in the manner contemplated by the law making such appropriations, not unless he preserves proper receipts, or vouchers for each sum paid, as above mentioned.

Liquidation.

SEC. 2176. (5.) All such sums, not accounted for, as above mentioned, may be recovered by the state from the person, or persons, charged therewith, together with fifty per cent. damages on the same.

Recovered.

Damages.

## ARTICLE 4.

## REPORTS.

An Act relating to the Reports of State Officers and Printing the same.

[Passed January 29, 1857, took effect July 1, 1857; Laws of Sixth General Assembly, Chapter 223, page 386.]

When prepared. SECTION 2177. (1.) *Be it enacted by the General Assembly of the State of Iowa,* It shall be the duty of the several state officers to have their reports prepared and placed in the hands of the state printer at least two months before the assembling of the legislature.

Printer's duty. SEC. 2178. (2.) It shall be the duty of the state printer to have one thousand of each the aforesaid reports printed and laid upon the desks of the members of the general assembly on the first day of the session.

SEC. 2179. (3.) This act to take effect from and after its publication according to law.

## ARTICLE 5.

## PUBLIC MANAGERS.

An Act requiring Trustees, Managers, Commissioners and Inspectors of Public Buildings, Improvements and Institutions to take and subscribe an oath, and punishing violation of the same.

[Passed April 2, 1860, took effect May 2, 1860; Laws of Eighth General Assembly, Chapter 106.]

Officers appointed or elected to take oath.

SECTION 2180. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That every person, appointed by the governor, or elected by the legislature, or otherwise appointed or elected a trustee, manager, commissioner or inspector, or a member of any board of trustees, managers, commissioners or inspectors, now or hereafter created or provided by law for the government, control, management or inspection of any public building, improvement or institution whatsoever, owned, controlled or managed, in whole or in part, by or under the authority or direction of this state, shall, before entering upon the discharge of his duties, as such trustee, manager, commissioner or inspector, take and subscribe an oath, in substance and form as follows: "I (here assert affiant's name) do solemnly swear that I will support the constitution of the United States, and of the state of Iowa; that I will honestly and faithfully discharge the duties of (here describe the nature of the office, trust or position as trustee, manager or inspector, as the case may be) according to the laws that now are or that may hereafter be in force, regulating said institution, and prescribing the duties of trustees, managers, commissioners or inspectors thereof, (as the case may be); that I will, in all things, conform to the directions contained in said law or laws, and that I will not, directly or indirectly, as such trustee, manager, commissioner or inspector, (as the case may be,) make, or enter into, or consent to any contract or agreement, expressed or implied, whereby any greater sum of money shall be expended or agreed to be expended than is expressly authorized by law, at the date of such contract or agreement."

Form of oath.

When prohibited from making contract.

SEC. 2181. (2.) Any such officer who shall be empowered to expend any public moneys, or to direct such expenditures, is hereby prohibited from making any contract for the erection of any building, or any other purpose which shall contemplate any excess of expenditures beyond the terms of the law under which said officer was appointed.

Officers elected or appointed to take oath.

SEC. 2182. (3.) Any such officer already elected or appointed, who has not already taken such oath, shall forthwith do so, and shall be subject to the provisions of this act.

SEC. 2183. (4.) All the oaths required by this act shall be filed in the office of the auditor of state, and the state auditor shall not draw any warrant upon the state treasury for the purposes for which any of said officers are appointed until said oaths are so filed. Oaths to be filed.

SEC. 2184. (5.) Any person, willfully violating the provisions of this act, shall, upon conviction thereof, be liable to a fine not exceeding five thousand dollars, or imprisonment in the penitentiary not exceeding five years, or both, at the discretion of the court. Penalty for violation of this act.

SEC. 2185. (6.) All acts and parts of acts inconsistent with this act are hereby repealed. Repeal.

ARTICLE 6.

PROHIBITION.

An Act prohibiting the Officers of Counties and other Municipal Corporations from dealing in the indebtedness of their Counties or Corporations.

[Passed March 9, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 27.]

SECTION 2186. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That no officer of any county or other municipal corporation, or any deputy or employee of such officer, shall either directly or indirectly be permitted to take, purchase, or receive in payment, exchange, or in any way whatever, any warrant, scrip, or other evidence of the indebtedness of any county, or other municipal corporation, or any demand against the county, or other municipal corporation, for a less amount than that expressed on the face of the warrant, scrip, or other evidence of indebtedness or demand. Co. officers not allowed to speculate in co indebtedness.

SEC. 2187. (2.) It shall be the duty of the treasurer of every county, or other municipal corporation, when he shall receive any warrant, or scrip, or other evidence of indebtedness of any county, or other municipal corporation, to indorse thereon the date of its receipt, from whom received and what amount. Duty of co. treasurer and others.

SEC. 2188. (3.) Any officer of any county, or other municipal corporation, or any deputy or employee of such officer, who violates any of the provisions of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars and not more than five hundred dollars for each offense. Penalty for violation of this act.

SEC. 2189. (4.) This act to take effect and be in force from and after its publication according to law. Take effect

ARTICLE 7.

TOWN SITES.

An Act regulating the disposal of Lands purchased, in trust for Town Sites.

[Passed Jan. 22, 1853, took effect Feb. 9, 1853; Laws of Fourth General Assembly, Chapter 88, page 145.]

SECTION 2190. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That whenever any portion of the surveyed public lands of the United States within any organized county in the state of Iowa, has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under existing pre-emption laws, it may be lawful and shall be the duty (if required by the occupants of such land) of the corporate authorities of said town, if incorporated, and if not, of the county judge of the county in which said town is situated, if furnished Town sites.

Enter in trust.	by said occupants with money sufficient to enter at the proper land office the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests.
Deeds.	SEC. 2191. (2.) After purchasing as above prescribed such land, it shall be the duty of said corporate authorities, or county judge, as the case may be, to make out, execute, and deliver to each person who, as an occupant, may be entitled to the same, a deed in fee simple for such part or parcels, lot or lots of said lands as he or they may lawfully be entitled to, on the payment by said occupant of his proper and due proportion of the purchase money of said land, together with his proportion of such sum as may be necessary to pay for so much of said land as may be occupied as streets, alleys, and public grounds, and also his proportion of the expense incurred in laying off said town, together with the sum of one dollar for each deed, which last named sum shall be the only compensation of said corporate authorities or county judge for their or his services in performing the duties herein prescribed.
Payment.	
Proportion of expense.	
Laying off towns.	SEC. 2192. (3.) Should any portion of the lands purchased in pursuance of this act, not be claimed or laid off by actual <i>bona fide</i> occupants or claimants, it shall be the duty of said corporate authorities, or county judges, as the case may be, to lay off into lots such lands, making such streets, alleys, and public grounds, as may be required for said town, such unclaimed lots to be, by said authorities or county judge, sold to the highest bidder at a public sale after giving four weeks' public notice thereof, and the proceeds of the sale of said lots to be appropriated to building school houses in such town.
Sale.	

## ARTICLE 8.

## BOUNTY.

## An Act allowing Bounty upon the Scalps of certain Animals.

[Passed Feb. 11, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 14.]

Bounty allowed on certain scalps.	SECTION 2193. (1.) <i>Be it enacted by the General Assembly of the State of Iowa</i> , That the county judge of any county in this state, shall hereafter allow the following bounty upon the scalps of wolves, lynx, swift and wild cat: one dollar on each scalp. Said bounty in each case above named, to be paid out of the county treasury of the county in which said wolf, lynx, swift or wild cat were taken.
Scalps with ears on must be produced.	SEC. 2194. (2.) The person claiming the bounty shall produce the scalp or scalps, with the ears thereon, to the county judge, or a justice of the peace of the county wherein such wolf, lynx, swift or wild cat may have been taken and killed; and it shall be the duty of the officer before whom such scalps are produced, to deface or destroy the scalps when so produced, so as to prevent the use of the same, to obtain for a second time the bounty herein provided.
Duty of officer to deface or destroy scalps.	
Applicant for bounty must swear.	SEC. 2195. (3.) No person shall receive any of the sums aforesaid until he shall have sworn or affirmed to a statement of facts showing him entitled to such bounty.
Repeal.	SEC. 2196. (4.) Chapter sixty-two of the laws of the seventh general assembly of the state of Iowa, is hereby repealed.

## ARTICLE 9.

## EXEMPTION.

An Act giving the United States Jurisdiction and Exemption from Taxation over and upon all Lands purchased, as Sites for Public Buildings in Iowa.

[Passed Jan. 28, 1857, took effect Feb. 26, 1857, Laws of Sixth General Assembly, Chapter 218, page 376

SECTION 2197. (1.) *Be it enacted by the General Assembly of the State of Iowa,* The exclusive jurisdiction over the lands of the state of Iowa, as the United States has already purchased, or may hereafter purchase within the limits of state of Iowa, is hereby ceded to the United States of America: *provided,* said United States shall purchase said lands of the purchasers thereof and shall erect thereon buildings for public uses: *and provided further,* that nothing in this act shall be so construed as to prevent, on such lands, the service of judicial process issued by any court of this state, or to prevent the courts of this state from exercising jurisdiction of crimes committed thereon. U.S. jurisdiction.

SEC. 2198. (2.) All the lands over which jurisdiction is hereby ceded, and the buildings and property which may be placed thereon by said United States, shall be exempt from taxation so long as the same are owned by said United States. Exempt from taxation.

PART SECOND.  
OF THE RIGHTS OF PERSONS.

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TITLE XVI.

OF PROPERTY.

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CHAPTER 92.

GENERAL PROVISIONS.

[Code—Chapter 75.]

**What dispositions void.**

SECTION 2199. (1191.) Every disposition of property is void which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being and for twenty-one years thereafter.

**Married women.**

SEC. 2200. (1192.) Married women may receive grants or gifts of property from their husbands without the intervention of trustees, but this provision applies only to form and manner and leaves the substantial rights of all parties unchanged.

DECISIONS. Executory devise ; estate in futuro ; contingencies ; capacity to take ; charities, &c., 4 Iowa, 252 ; dedication for a church, 4 Iowa, 252 ; 2 Iowa, 315.

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CHAPTER 93.

THE TRANSFER OF PERSONAL PROPERTY.

[Code—Chapter 76.]

**Mortgages, &c., to be recorded.**

SECTION 2201. (1193.) No sale or mortgage of personal property where the vendor or mortgagor retains actual possession thereof is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of deeds of the county where the holder of the property resides.

SEC. 2202. (1194.) The recorder of deeds must keep an entry book or index for instruments of the above description, having the pages thereof ruled so as to show in parallel columns, to be alphabetically arranged in double entry in the manner hereinafter provided in case of deeds for real property: Book and index.

1. The mortgagors or vendors;
2. The mortgagees or vendees;
3. The date of the filing of the instrument;
4. The date of the instrument itself;
5. Its nature;
6. The page and book where the record is to be found.

SEC. 2203. (1195.) Whenever any written instrument of the character above contemplated is filed for record as aforesaid the recorder shall note thereon the day and hour of filing the same, and forthwith enter in his entry book all the particulars required in the preceding section except the sixth item therein, and from the time of said entry and not before shall the sale or mortgage be deemed complete as to third persons and shall have the same effect as though it had been accompanied by the actual delivery of the property so sold or mortgaged. Recorder's note.

SEC. 2204. (1196.) The recorder shall as soon as practicable record such instrument and enter in his entry book in its proper place the page and book where the record may be found. Deed recorded.

DECISIONS. Bill of sale resembles conveyance of real estate, 6 Iowa, 476; 3 *ibid.*, 58; must be recorded, 3 Iowa, 58; it need not provide for retention of possession, *Kuhn v. Graves*, Dec. term, 1859; though unrecorded yet good between the parties and those having actual notice, *McGavron v. Haupt*, June term, 1859; see 7 Iowa, 9; effect of *delivery* with an agreement that the property shall remain till payment in the vendor, 8 Iowa, 331, and *Robinson v. Chapline*, June, 1859; a sale without change of possession is void as to existing creditors or subsequent purchasers without notice, either actual or by record, 3 Iowa, 59; pledge, 8 Iowa, 207; perfection of title, 7 Iowa, 142; 4 Iowa, 52; stoppage *in transitu*, 6 Iowa, 480; 1 *ibid.*, 64; warranty, 3 G., 327; 3 Iowa, 571; 8 Iowa, 108; 4 G., 63; the title to a land warrant will only pass by assignment, 4 Iowa, 22; land warrant is a chattel, 3 Iowa, 153; see case of land warrant illegally sold and then located, and the remedy of the owner, 3 Iowa, 153; when oral evidence may be received to explain, 8 Iowa, 386.

## CHAPTER 94.

### CLAIMS ON PUBLIC LANDS.

[Code—Chapter 77.]

SECTION 2205. (1197.) The owner of what is known as a valid claim or improvement on the public lands has a transferable interest therein which may be sold on execution or otherwise; and any sale of such improvement is a sufficient consideration to sustain a promise. Claims on public lands.

SEC. 2206. (1198.) The occupant of such claim will be deemed to have constructive possession thereof to the extent of three hundred and twenty acres: *provided*, it be so marked out and designated that the boundaries can be readily traced and determined, and he may protect and defend his possession by the proper civil action. Constructive possession.

DECISIONS. Claims are personalty, 8 Iowa, 463; and good consideration for a note, *M.*, 80-70-312-438; 1 Iowa, 23.

## CHAPTER 95.

## REAL PROPERTY.

[Code—Chapter 78.]

## ARTICLE 1.

- Who seized. SECTION 2207. (1199.) All persons owning lands not held by an adverse possession, shall be deemed to be seized and possessed of the same.
- "Heirs" not necessary. SEC. 2208. (1200.) The term "heirs" or other technical words of inheritance are not necessary to create and convey an estate in fee simple.
- What conveyance passes. SEC. 2209. (1201.) Every conveyance of real estate passes all the interest of the grantor therein unless a contrary intent can be reasonably inferred from the terms used.
- After acquired interests. SEC. 2210. (1202.) Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after acquired interest of such grantor to the extent of that which the deed purports to convey enures to the benefit of the grantee.
- Adverse possession. SEC. 2211. (1203.) Adverse possession of real property does not prevent any person from selling his interest in the same.
- Estates in futuro. SEC. 2212. (1204.) Estates may be created to commence at a future day.
- Trust estates. SEC. 2213. (1205.) Declarations or creations of trusts or powers in relation to real estate must be executed in the same manner as deeds of conveyance, but this provision does not apply to trusts resulting from the operation or construction of law.
- Tenancy in common. SEC. 2214. (1206.) Conveyances to two or more in their own right create a tenancy in common unless a contrary intent is expressed.
- Wives may convey. SEC. 2215. (1207.) A married woman may convey her interest in real estate in the same manner as other persons.
- Tenant at will. SEC. 2216. (1208.) Any person in the possession of real property with the assent of the owner is presumed to be a tenant at will unless the contrary is shown.  
(1209) [repealed by section 2218 hereof.]
- Possession under mortgage. SEC. 2217. (1210.) In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof; but in case of personal property the mortgagee holds that title and right.

## ARTICLE 2.

An Act to amend Section 1209 of the Code.

[Passed March 12, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 49, page 54.]

- Notice given to terminate tenancy. SECTION 2218. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That section 1209, chapter 78 of the code be so far amended as to read as follows: "Thirty days' notice in writing is necessary to be given by either party, before he or she can terminate a tenancy at will; but when in any case rent is reserved, payable at intervals of less than thirty days, the length of notice need not be greater than such interval between the days of payment. In case of tenants occupying and cultivating farms, the notice must fix the termination of the



tenancy, to take place on the first day of March: *provided*, that where an express agreement is made, whether the same has been reduced to writing or not, the tenancy shall cease at the time agreed upon, without notice. Farmers leave March 1st, unless special agreement made.

SEC. 2219. (2.) All acts and parts of acts contravening the provisions of this act, be and the same are hereby repealed.

PRIOR LAWS. 1. An act to abolish entails; to confirm conveyances by tenants in tail, and to regulate the mode of conveyances to joint tenants, passed March 2, 1821; M. D., 1833, p. 278.

2. An act authorizing aliens to hold land, passed March 31, 1827; M. D., 1833, p. 282.

3. An act to enable grantees of reversions, and of lessees mutually to avail themselves of covenants and conditions, passed March 12, 1827; M. D., 1833, p. 290.

DECISIONS. The whole bed of the Mississippi river belongs to the public, and the proprietor abutting thereon, owns only to high water mark; land dedicated as a street, may be used as a wharf, 4 Iowa, 200; executory devise, estate in futuro, contingencies, capacity to take, charities &c., 4 Iowa, 252; only one who avers that land was bought with his money can prove by *parol* the same, equitably his, 4 Iowa, 222; the title to a land warrant will not pass by delivery without assignment, 4 Iowa, 222; a verbal agreement between two or more claimants of public lands, that one shall enter and convey part to the other, who shall pay his proportion of the price, creates an enforceable trust, and is not within the statute of frauds, 5 Iowa, 259; proof of notice to quit, 2 Iowa, 435, sec. 1732 of Code, not applicable, *ibid.*; see 6 Iowa, 439; 2 Iowa, 1; 1 Iowa, 23.

## CHAPTER 96.

### THE CONVEYANCE OF REAL PROPERTY.

[Code—Chapter 79.]

#### ARTICLE 1.

SECTION 2220. (1211.) No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration without notice, unless recorded in the office of the recorder of deeds of the county in which the land lies, as hereinafter provided. To be recorded.

SEC. 2221. (1212.) It shall not be deemed lawfully recorded unless it has been previously acknowledged or proved in the manner herein prescribed. Same.

SEC. 2222. (1213.) The recorder of deeds must keep an entry book or index, the pages of which are so divided as to show in parallel columns; Index of records.

1. The grantors;
2. The grantees;
3. The time when the instrument was filed;
4. The date of the instrument;
5. The nature of the instrument;
6. The book and page where the record thereof may be found;
7. The description of the land conveyed, in the manner following:

Grantors.	Grantees.	Date of filing.	Date of instrument.	Character of instrument.	Book.	Page.	Description.
A. B.	C. D.	1848. Jan. 1,	1848. Jan. 1,	Deed.			E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ Sec. 14, T. 7, R. 2. W.
M. N.	P. Q.	Oct. 7,	June 4,	Deed.			Lot 429, in Burling- ton.
R. S.	T. V.	Nov. 3,	Sept. 19,	Mortgage.			S. $\frac{1}{2}$ Sec. 10, T. 67, R. 3. W.

Constructive notice.

SEC. 2223. (1214.) The recorder must indorse upon every instrument properly filed in his office for record the time when it was so filed, and shall forthwith make the entries provided for in the last preceding section except that of the book and page where the record of the instrument may be found, and from that time such entries shall furnish constructive notice to all the world of the rights of the grantee conferred by such instrument.

Manner of entries.

SEC. 2224. (1215.) The entries in such entry book shall be double, the one showing the names of the respective grantors arranged in alphabetical order, the other those of the grantees in like order. Where there are two or more grantors having different surnames there must be as many distinct entries among the grantors as there are different names, being alphabetically arranged in regard to each of such names. The same rule shall be followed in case of several grantees.

To be recorded.

SEC. 2225. (1216.) Every such instrument shall be recorded as soon as practicable in a suitable book to be kept by the recorder for that purpose. After which he shall complete the entries aforesaid so as to show the book and page where the record is to be found.

*Manner of Acknowledging and Proving Deeds.*

Before whom.

SEC. 2226. (1217.) If acknowledged within the state, it must be before some court having a seal or some judge, justice, or clerk thereof, or some justice of the peace, or notary public.

SEC. (1218.) [Repealed; see section 2245 hereof.]

Certificate.

SEC. 2227. (1219.) The court or person taking the acknowledgment must indorse upon the deed a certificate setting forth the following particulars:

1. The title of the court or person before whom the acknowledgment was taken;

2. That the person making the acknowledgment was personally known to at least one of the judges of the court or to the officer taking the acknowledgment to be the identical person whose name is affixed to the

deed as grantor, or that such identity was proved by at least one credible witness (naming him);

3. That such person acknowledged the instrument to be his voluntary act and deed.

SEC. 2228. (1220.) If the grantor die before acknowledging the deed, or if for any other reason his attendance can not be procured in order to make the acknowledgment, or if having appeared he refuses to acknowledge it, proof of the due execution and delivery of the deed may be made by any competent testimony. Proof, how and when.

SEC. 2229. (1221.) Such proof may be made before the same court or officers as are authorized to take acknowledgment as aforesaid. Before whom

SEC. 2230. (1222.) The certificate indorsed by them upon the deeds thus proved must state: Certificate

1. The title of the court or officer taking the proof;

2. That it was satisfactorily proved that the grantor was dead, or that for some other reason his attendance could not be procured in order to make the acknowledgment, or that having appeared he refused to acknowledge the deed;

3. The names of the witnesses by whom the proof was made and that it was proved by them that the instrument was executed by the person whose name is thereunto subscribed as a party.

SEC. 2231. (1223.) The certificate of proof or acknowledgment as aforesaid may be given under seal or otherwise, according to the mode by which the courts or officers granting the same usually authenticate their most solemn and formal official acts. Same.

SEC. 2232. (1224.) Any officer who knowingly states a material untruth in either of the certificates above contemplated, may be indicted and fined any sum not exceeding the value of the property conveyed or otherwise affected by the instrument on which such certificate is indorsed. Penalty.

SEC. 2233. (1225.) Any court or officer having power to take the proof above contemplated may issue the necessary subpoenas, and compel the attendance of witnesses residing within the county by attachment if necessary. Subpoenas.

SEC. 2234. (1226.) No instrument containing a power to convey or in any manner affect real estate, certified and recorded as above prescribed, can be revoked by any act of the parties by whom it was executed until the instrument containing such revocation is acknowledged and deposited for record and entered on the entry book in the same office in which the instrument conferring the power is recorded. Revocation of power.

SEC. 2235. (1227.) Every instrument in writing affecting real estate, which is acknowledged or proved, and certified as hereinbefore directed, may be read in evidence without farther proof. Instrument when evidence.

SEC. 2236. (1228.) The record of such instrument or a duly authenticated copy thereof is competent evidence whenever by the party's own oath or otherwise the original is shown to be lost, or not belonging to the party wishing to use the same nor within his control. And in such case it is no objection to the record that no official seal is appended to the recorded acknowledgment thereof, if, when the acknowledgment purports to have been taken by an officer having an official seal, there be a statement in the certificate of acknowledgment that the same is made under his hand and seal of office and the record show by a scroll or otherwise that there was such a seal, which will be presumptive evidence that the official seal was attached to the original certificate. Record, when.

SEC. 2237. (1229.) The provisions of the preceding section are intended to apply to all instruments heretofore recorded as well as those hereafter to be recorded. Retrospective.

- Not conclusive. SEC. 2238. (1230.) Neither the certificate nor the record nor the transcript thereof is conclusive evidence of the facts therein stated.
- Past acts. SEC. 2239. (1231.) Nothing herein contained shall invalidate any act already done.
- Forms. SEC. 2240. (1232.) The following or other equivalent forms, varied to suit circumstances, are sufficient for the purposes therein contemplated:

*For a Quitclaim Deed.*

- Quitclaim. For the consideration of ——— dollars, I hereby quit claim to A. B. all my interest in the following tract of land, [describing it].

*For a Deed in Fee Simple without Warranty.*

- Grant. For the consideration of ——— dollars, I hereby convey to A. B. the following tract of land, [describing it].

*For a Deed in Fee with Warranty.*

- With warranty. The same as the last preceding form adding the words, "and I warrant the title against all persons whomsoever," [or other warranty as the parties may desire.]

*For a Mortgage.*

- Mortgage. The same as a deed of conveyance, adding the following, "to be void upon condition that I pay," &c.

*For a Deed of Trust.*

- Deed of trust. For the purpose of securing to A. B. the sum of ——— dollars, with interest from date at the rate of ——— per cent. per annum, [or as the case may be] I hereby convey to C. D. [describe the property conveyed].

And if the sum so secured to A. B. is not paid him by the [stating the time of payment], I hereby authorize the said C. D. to sell the property herein conveyed, [stating the manner, place of sale, notice to be given, &c.], to execute a deed to the purchaser, to pay off the amount herein secured with interest and costs, and to hold the remainder subject to my order.

ARTICLE 2.

An Act to require Recorders of Counties to keep the Records of Conveyances of Town Lots separate from those of other real estate.

[Passed January 18, 1855, took effect July 1, 1855; Laws of Fifth General Assembly, Chapter 38, page 51.]

- Deeds of town lots. SECTION 2241. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That it shall henceforth be the duty of the recorders of the different counties in this state, to record all deeds, mortgages, and other conveyances of town lots, in all cities and villages, in their respective counties, the plats whereof are recorded in separate record books, from those in which other conveyances of real estate are recorded.
- Recorded separate. SEC. 2242. (2.) It shall be the duty of the respective county judges to provide suitable record books, for carrying into effect the provisions of this act.
- Books. SEC. 2243. (3.) All acts and parts of acts concerning records of deeds, in conflict with this act, are hereby repealed.
- Repeal.

ARTICLE 3.

An Act concerning Acknowledgments of Deeds in foreign countries; and also to amend section 1218 of the Code, relating to Acknowledgments of Deeds executed out of the State.

[Passed January 22, 1855, took effect January 31, 1855; Laws of Fifth General Assembly, Chapter 49, page 76.]

SECTION 2244. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That any deed or other conveyance of lands within this state, which is executed without the United States, may be acknowledged or proven before any state, republic, kingdom or province having a seal, or before any officer authorized by the laws of such foreign country to take acknowledgments of conveyances of real estate, if he have any official seal, the certificate of acknowledgment to be attested by the official seal of such court or officer, and in case said acknowledgment is taken before other than a court of record, or mayor, or other officer of a town having such seal, proof under the official seal of the proper authority, that such officer taking such acknowledgment was duly authorized by the laws of such country to do so, and that his signature thereto is genuine, shall accompany such certificate of such acknowledgment. Acknowledgment out of U. S.  
Authentication.

SEC. 2245. (2.) *And be it further enacted*, That section 1218 of the Code be amended so as to read as follows: Any deed conveyance or other instrument in writing, by which real estate in this state shall be conveyed or encumbered, when made or acknowledged out of the state, but within the United States, shall be acknowledged before some court of record or officer holding the seal thereof, or before some commissioner to take the acknowledgment of deeds, appointed by the governor of this state, or before some notary public, or justice of the peace; and when made by a justice of the peace, a certificate under the official seal of the proper authority of the official character of said justice, and of his authority to take such acknowledgments, and of the genuineness of his signature, shall accompany said certificate of acknowledgment. In the United States.  
Acknowledgment.

[Section (3) repealed. See section 2247 hereof.]

ARTICLE 4.

An Act to amend Chapter 49 of Session Laws of 1854-5.

[Passed Jan. 14, 1857, took effect July 1, 1857; Laws of Sixth General Assembly, Chapter 36, page 29]

SECTION 2246. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That all deeds, mortgages or other instruments in writing, executed out of this state, whereby real estate situated in this state, has been or shall hereafter be conveyed or encumbered, which have been duly acknowledged, in accordance with the provisions of section second, of chapter 49, of the session laws of 1854-5; and filed for record in the recorder's office of the county where such land is situated, shall henceforth be deemed notice to all persons interested, of what they contain from and after such filing. Deeds, &c., executed out of the state.

SEC. 2247. (2.) Section third, of chapter 49, of the session laws of 1854-5, is hereby repealed. This act shall take effect from and after its publication according to law. Repealed.

## ARTICLE 5.

An Act providing for the Acknowledgment and Recording of Deeds in certain cases, and rendering valid the Acknowledgment of Deeds and Instruments in Writing.

[Passed March 3, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 30, page 37.]

Acknowledgments in certain cases made valid.

SECTION 2248. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all deeds and conveyances of lands, tenements and hereditaments lying and being within this state, heretofore executed, and which said deeds and conveyances have been acknowledged or proved, according to and in compliance with the laws and usages of the state, territory or country in which such deeds and conveyances were acknowledged and proved, or in which they shall be acknowledged or proven, are hereby declared effectual and valid in law to all intents and purposes as though the same acknowledgments had been taken or proof of execution made within this state, and in pursuance to the acts and laws thereof; and such deeds so acknowledged or proved as afore-said, may be admitted to be recorded in the respective counties in which such lands, tenements or hereditaments do or may lie, anything in the acts and laws of this state to the contrary thereof notwithstanding: *provided,* that all deeds and conveyances of lands, tenements and hereditaments, situated within this state, which have been acknowledged or proved in any other state, territory or country, according to and in compliance with the laws and usages of such state, territory or country, and which deeds or conveyances have been recorded within this state, be and the same are hereby confirmed and declared effectual and valid in law to all intents and purposes although the said deeds or conveyances, so acknowledged or proved and recorded, had, prior to being recorded, been acknowledged or proved within this state.

Acknowledgments taken in other states confirmed and made valid.

Previous acknowledgments duly recorded declared legal and valid.

SEC. 2249. (2.) That the acknowledgments of all deeds, mortgages, and other instruments in writing taken and certified previous to the taking effect of this act, and which have been duly recorded in the proper counties in this state, be and the same are hereby declared to be legal and valid in all courts of law or equity in this state or elsewhere; anything in the several different acts or laws of the territory or state of Iowa in regard to acknowledgments to the contrary notwithstanding.

Act of officer legalized.

SEC. 2250. (3.) That all deeds, mortgages or other instruments in writing, for the conveyance of lands, which have heretofore been made, and executed, and the officer taking the acknowledgment has not affixed his seal to the acknowledgment, such acknowledgment shall nevertheless, be good and valid in law and equity; anything in any law heretofore passed, to the contrary notwithstanding.

## ARTICLE 6.

An Act entitled an Act prescribing the manner of Certifying Acknowledgments in certain cases.

[Passed Feb. 24, 1858, took effect March 3, 1858; Laws of Seventh General Assembly, Chapter 22, page 27.]

Attorney may acknowledge deeds and other instruments.

SECTION 2251. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the execution of any deed, mortgage or other instrument in writing, executed by any attorney in fact, may be acknowledged by the attorney executing the same.

Officer indorse.

SEC. 2252. (2.) The court or person taking the acknowledgment

must indorse upon such instrument a certificate setting forth the following particulars: 1. The title of the court or person before whom the acknowledgment was taken. 2. That the person making the acknowledgment, was personally known to at least one of the judges of the court or to the officer taking the acknowledgment, to be the identical person whose name is subscribed to the instrument as attorney for the grantor or grantors therein named, or that such identity was proved to him by at least one credible witness, to him personally known and therein named. 3. That such person acknowledged said instrument to be the act and deed of the grantor or grantors therein named, by him as his or their attorney thereunto appointed, voluntarily done and executed.

Title of court.

Identity proved.

Voluntary executions.

SEC. 2253. (3.) All acknowledgments by attorneys heretofore made and certified, substantially as herein prescribed shall be deemed sufficient.

Past acknowledgments legalized.

SEC. 2254. (4.) This act shall take effect from and after its publication in the Iowa Citizen and Iowa State Journal.

Take effect.

ARTICLE 7.

An Act to give greater Security to Purchasers and Mortgagees of Real Estate.

[Passed March 8, 1858; took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 33, page 42.]

SECTION 2255. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That in every conveyance of real estate the joining of the wife with her husband shall be deemed sufficient to pass any and all right which the said wife had or has in said property in said conveyance, either in her own right independent of the husband, or as his wife, unless the contrary appears on the face of the conveyance.

Wife joining husband in conveyance relinquishes dower.

SEC. 2256. (2.) That any deed, mortgage or other instrument of writing, heretofore executed in pursuance of law, by husband and wife, for the purpose of conveying or incumbering the estate of the wife, or her right of dower in any lands, tenements or hereditaments situated in this state, shall be received in evidence in any of the courts of this state as conveying or incumbering the estate or interest of the wife, or as releasing her right of dower, as the case may be, although the magistrate taking the acknowledgment of such deed shall not have certified that the grantors or wife were personally known, or that he read or made known the contents of such deed, mortgage or other instrument of writing to such wife, or that she relinquished her right of dower, before or at the time she acknowledged the execution thereof.\*

Defective acknowledgments made valid.

ARTICLE 8.

An Act to give Additional Security to Land Titles in this State.

[Passed March 8, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 34, page 43.]

SECTION 2257. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the several courts of chancery in this state shall be authorized and empowered to correct, amend and relieve against any errors, mistakes or defects accruing in the deed or other conveyance of any husband and wife, hereafter to be executed and intended to convey or encumber the lands or estate of the wife or her right of dower in the lands of her husband, in the same manner and to the same extent as the said courts are or shall be authorized or empowered to correct errors and mistakes or defects in the deeds or conveyances of any person.\*

Courts authorized to correct defects in conveyance of husband and wife.

\* As to relinquishment of dower of insane wife, see page 246.

## ARTICLE 9.

## An Act in relation to County Records.

[Passed March 22, 1858, took effect April 14, 1858; Laws of Seventh General Assembly, Chapter 108, page 203.]

County records may be transcribed.

SECTION 2258. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That the county judge of any organized county in this state, whenever such county judge, clerk of the district court and recorder of the proper county, or a majority of them, shall deem it necessary and expedient, shall have authority to have transcribed indexed and arranged any deed, probate or county record belonging to said county, or have made a complete index as contemplated by section numbered 1213 (2222 hereof) of the code of Iowa, of any such record.

New counties may have records transcribed.

SEC. 2259. (2.) Whenever any new county shall have been formed from other original and organized counties, or shall have been attached to another county, for judicial or other purposes, and shall afterwards be fully organized and detached, and when any records of the kind mentioned in section 1st of this act, are in the original county or counties, which properly belongs to such new county, the county judge of such new or attached county, shall, when the same is deemed best by the county judge, county clerk and recorder of such new county, or any two of them, have authority to have transcribed, indexed and arranged, such records, or any of them, for the use of such new county, and at the expense of such new county.

Compensation for transcribing records.

SEC. 2260. (3.) The county judge may employ any suitable person to perform said labor, the amount of the compensation therefor to be previously fixed by the person or persons whose duty it may be to audit claims against the county, and provided that such compensation not exceeding six cents for each one hundred words of the records proper, and twelve and one-half cents for each one hundred words of indexing—such compensation to be paid out of the treasury of the county for which the records are transcribed, and to be audited as other claims.

Records compared and certified to.

SEC. 2261. (4.) When any such records are so transcribed, the county judge of the county to which the original records belong, shall compare the copy so transcribed with the original, and upon the same being found to be correctly transcribed, such county judge shall make a written certificate in each volume or book of such transcribed records under his official seal, certifying that such transcribed records have been compared with the original by himself, and are true and correct copies of the original records.

Transcribed records received as evidence.

SEC. 2262. (5.) Such transcribed records, so certified, shall have the same force and effect in all respects, as the original records, and be admissible as evidence in all cases of equal validity with the original records.

Conflicting acts repealed.

SEC. 2263. (6.) All acts and parts of acts inconsistent with this act, are hereby repealed.

PRIOR LAWS. 1. An act concerning deeds and conveyances, passed April 12, 1827; M. D., 1833, p. 279.

2. An act authorizing aliens to hold and purchase real estate in this territory, passed March 31, 1827; M. D., 1833, p. 282.

3. An act for the prevention of fraud, passed April 12, 1827; M. D., 1833, p. 338.

4. An act to enable infant (trustees) or (mortgagees) to convey what they hold, passed March 12, 1827; M. D., 1833, p. 574. All the above repealed August 30, 1840.



5. An act concerning conveyances for burial or other easement uses, passed Jan. 15, took effect Feb. 15, 1839: I. T., 1st sess., p. 184; also, Reprint, 1843, p. 242; repealed Feb. 15, 1844; I. T., 6th sess., chap. 36, p. 57.
6. An act to regulate conveyances, passed Jan. 4, took effect June 1, 1840; I. T., 2d sess., chap. 28, p. 35; repealed by Reprint, 1843, chap. 54, p. 202.
7. An act for the prevention of fraud, passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 54, p. 75; also, Reprint, 1843, p. 271.
8. An act to amend an act regulating conveyances, passed Jan. 13, took effect Feb. 13, 1841; I. T., 3d sess., chap. 47, p. 38; repealed by Reprint, 1843, chap. 54, p. 202.
9. An act to regulate conveyances, passed Feb. 16, took effect March 16, 1843; Reprint, chap. 54, p. 202.
10. An act concerning mortgages, passed Feb. 14, took effect July 4, 1843; Reprint, chap. 103, p. 442.
11. An act to legalize deeds and other instruments of writing; I. T., 6th scss., chap. 13, p. 19, passed Feb. 13, 1844.
12. An act amending act of Feb. 16, 1843.
13. An act to authorize sheriff to make and execute deeds for lands sold on execution under the redemption law, passed Feb. 15, 1844; I. T., 6th sess., chap. 32, p. 55.
14. An act allowing collectors to make deeds, passed June 19, took effect July 19, 1844; I. T., 6th sess., extra, chap. 6, p. 4.
15. An act concerning the rights of married women, passed Jan. 2, took effect Feb. 2, 1846; I. T., 8th sess., chap. 5, p. 4.
16. An act as to deeds from the state, passed Jan. 22, 1848? 1st sess., extra, chap. 6, p. 12.
17. An act in relation to deeds of collectors of revenue, passed Jan. 15, 1849? 2d sess., chap. 112, p. 141.

DECISIONS. Purchaser includes a mortgagee, 4 Iowa, 573; actual notice dispenses with the need of record notice, 5 Iowa, 97; *pendente lite* purchaser's notice, 6 Iowa, 258; notice implied by judgment, 6 Iowa, 147; the record of a deed not legally acknowledged gives no notice, 5 Iowa, 97; the certificate may be contradicted by parol, 4 Iowa, 397; the certificate can not be aided by parol; it must itself recite the legal facts, 4 Iowa, 397; substantial compliance with the law is alone required in a certificate of acknowledgment, 5 Iowa, 187; one having an interest in a tract of land is not thereby disqualified to acknowledge a deed conveying another interest therein, 5 Iowa, 97; "voluntary" necessary, else not notice, 1 Iowa, 413; defective acknowledgment no notice, 5 Iowa, 95; the substantial words of the law will do, 3 G., 387; 5 Iowa, 157, 413; what constitutes *bona* or *mala fide* purchaser, 1 Iowa, 226; 6 *ibid.*, 187, 258; 4 G., 70; 4 Iowa, 215; 3 G., 422; under the law of Jan. 4, 1840, dower could be barred only by a strict compliance with the requirements of examination, and by stating such compliance in the acknowledgment, 4 Iowa, 398; statute for relinquishment of wife's dower must be substantially complied with, 4 Iowa, 381; how far joinder with a husband in his deed, binds the wife, 6 Iowa, 137-145; release of dower, *ibid.*; 7 Iowa, 12; 2 *ibid.*, 552; no acknowledgment, 7 Iowa, 12; 2 *ibid.*, 552; joining in the granting part, and also relinquishing dower right, *Grapengeter v. Fegevary, et. al.*, June, 1859; power of a married woman to convey, 1 Iowa, 226; 7 Iowa, 46; no acknowledgment needed between the parties to the deed, 4 G., 82; 2 Iowa, 378; actual notice, 1 Iowa, 413; 2 *ibid.*, 378-315 and 384; 5 *ibid.*, 95; acknowledgment not amendable, 4 G., 162; 4 Iowa, 381. But see art. 7 and 8, of chapter 96; defective acknowledgment, 6 Iowa, 476; *Abrahams v. Irvin*, June term, 1859; 4 Iowa, 381; 4 G., 162; release of dower, 7 Iowa, 12; foreign deeds, 3 G., 498; read without proof, when? 3 G., 498; 4 G., 82; bill of sale, 6 Iowa, 479; deed of separation, 4 G., 126; interest of notary acknowledging, 5 Iowa, 95; a power of attorney must be proved in case of deed executed by attorney, 3 G., 30; need of acknowledgment and record, 2 Iowa, 382, 378, 315, 360; 4 G., 82; 5 Iowa, 95; 2 *ibid.*, 384; 2 G., 39; grantee in existence, 2 Iowa, 315, 368; trustees need not be made parties, 4 Iowa, 482; 4 G., 126; consideration of deed is presumed, 1 Iowa, 524; oral evidence admissible to show real consideration, 3 G., 261; "love and affection," good, 1 Iowa, 282; even as to creditors, *ibid.*, 524; 3 Iowa, 543; construction of deed, 4 Iowa, 335, 314, 318, 328; 3 *ibid.*, 84; 8 *ibid.*, 551; 3 G., 96, 363, 507; 2 G., 344; *City of Dubuque v. Maloney*, Dec., 1859; delivery and approval, 4 Iowa, 361; 8 *ibid.*, 56; give and grant considered, 1 Iowa, 282; conditions, *ibid.*; determining a lost survey, 2 Iowa, 139; dedication for a church, 4 Iowa, 252; 2 *ibid.*, 315; dedication, 2 Iowa, 27; 4 *ibid.*, 215; as to river line and city rights, and individual riparian right, see *Sayer et. al. v. Lyons City*, Dec., 1859; fee of the streets of Dubuque in the adjoining owners, *City of Dubuque v. Maloney, Dec.*, 1859; selling according to a plat is a dedication of the

streets thereof, *ibid.*; land dedicated as street may be used as wharf, 4 Iowa, 199, 215; 2 Iowa, 30; as to power of railroads to put down track on streets, see *Milburne v. C. I. & N. R. R. Co.*, Dec., 1859; the riparian proprietor on the Mississippi owns only to the ordinary water mark, 3 Iowa, 26; see also, *Sayer et. al. v. Lyons City*, Dec. term, 1859; relative rights of city and lot owners in streets and wharf of Keokuk, 4 Iowa, 200; grants of lands by the United States are defined by the lines and plats and surveys, 3 Iowa, 37; construction of quantitative description, 4 Iowa, 328; the rule that a grant is most strongly construed against the grantor does not apply to public grants, 3 Iowa, 38; deed by county judge of town lot, 6 Iowa, 443; 2 Iowa, 75; infancy, 6 Iowa, 353; value of license to work mineral lands, 3 G., 344; patents, 2 Iowa, 1; 2 G., 77; patent relates back, 3 G., 349; effect of act of June 30, 1834 on half-breed lands, 2 G., 94; M., 467; chap 24, 3d sess., Iowa territory, 2 G., 97; 3 G., 86; judgment of partition final, 3 G., 509; 2 G., 165, 94; 1 G., 575; a case where majority of trustees may convey, see 2 G., 165; where one having with others an interest in land enters the same, a trust is created, and will be enforced, when? 5 Iowa, 256; 3 G., 527; register of land office, and commissioner of general land office, in issuing a certificate and patent, act ministerially, 2 Iowa, 1; definition of fixtures, 8 Iowa, 544; reservation repugnant to grant, void, 4 Iowa, 199; construction of grant to half breeds, M., 467; 2 G., 94; construction of public grants, 3 Iowa, 1; what is the guide in disputed boundary, 3 Iowa, 145; 2 G., 344; 4 G., 177, 180; 1 G., 375, 566; 3 G., 233; stream, boundaries defined, 1 G., 348; 3 Iowa, 1; construction of act of 1840, 2 G., 39; 1 G., 189; competency of parol evidence, 2 Iowa, 59; 1 *ibid.*, 423; 2 *ibid.*, 117; 3 G., 37; 7 *ibid.*, 60; covenants, 5 Iowa, 287; 5 *ibid.*, 62 and 95; 3 G., 363; 2 G., 525, 300; 5 Iowa, 297; 3 G., 261; if vendor of land with warranty sue vendee on notes given for the price, the vendee may reply that the vendor's title to part of said land was not good, and may deduct from the notes such sum as he reasonably paid for the outstanding title, 5 Iowa, 408; what will not vitiate a deed, 5 Iowa, 97; the warranty hereof is good against liens and encumbrances outstanding, and includes every covenant needed to insure a perfect title, and for a bad one indemnity—it is broken by the mere existence of an incumbrance—if vendee can not purchase incumbrance, he may recover back purchase money and interest, if same keep him permanently out; otherwise the damage sustained thereby; if he do so purchase incumbrance, he may recover the sum therefor paid, and in any event nominal damages, 5 Iowa, 63; suit on promissory note—answer averring that note was given for land—that plaintiff had no valid title to it—but that another had, from whom, to avert eviction, defendant had purchased, paying therefor a sum which he claimed to abate as failure of consideration—defendant annexed his deed from plaintiff, whence it appeared, (though the covenants were not in the petition averred as made and broken,) that plaintiff had covenanted that he was lawfully seized of the premises, that they were free from incumbrances, that he had good right and lawful authority to sell and convey the same, and that he would warrant and defend the same against the lawful claims of all persons whomsoever. This answer was demurred to, (causes not shown; was it not therefore bad, by section 1754, Code?) *Held*, that demurrer was not well taken, 5 Iowa, 296.

## CHAPTER 97.

### RIGHTS OF OCCUPYING CLAIMANTS.

[Code—Chapter 80.]

#### ARTICLE 1.

Provision concerning.

SEC. 2264. (1233.) Where an occupant of land has color of title thereto, and in good faith has made any valuable improvement thereon, and is afterwards in the proper action found not to be the rightful owner thereof, no execution shall issue to put the plaintiff in possession of the property, after the filing of the petition hereinafter mentioned, until the provisions of this chapter have been complied with.

SEC. 2265. (1234.) Such petition must set forth the grounds on which the defendant seeks relief, stating with other things as accurately as practicable the value of the improvements upon the lands as well as the value of the lands aside from the improvements. Petition.

SEC. 2266. (1235.) All issues joined thereon must be tried as in ordinary cases, and if the value of the land or of the improvements is in controversy such value must be ascertained on the trial. Issues.

SEC. 2267. (1236.) The plaintiff in the main action may thereupon pay the appraised value of the improvements and take the property. Election  
(1237) and (1238) [repealed and substituted by article 2 hereof.]

SEC. 2268. (1239.) The purchaser in good faith at any judicial or tax sale made by the proper person or officer has color of title within the meaning of this chapter, whether such person or officer had sufficient authority to sell or not, unless such want of authority was known to such purchaser at the time of the sale. And the rights of such purchaser pass to his assignees or representatives. Who claimant.

SEC. 2269. (1240.) Any person has also such color of title who has occupied a tract of land by himself or by those under whom he claims for the term of five years, or who has thus occupied the land for a less term than five years if he or those under whom he claims have at any time during such occupancy [with the knowledge and consent, express or implied, of the real owner; made any valuable improvement thereon, or where he, or those under whom he claims, have, at any time during such occupancy]\* paid the ordinary county taxes thereon for any one year and if two years afterwards elapsed without a repayment or proffer of repayment of the same by the owner of the land, provided such occupancy is continued up to the time at which the suit is brought by which the recovery of the land is obtained as above contemplated: [provided, that nothing in this act shall be construed to give tenants color of title against their landlords.†]

SEC. 2270. (1241.) In the cases above provided for, if the occupying claimant has committed any injury to the land by cutting timber or otherwise the plaintiff may set the same off against any claim for improvements made by such claimant. Waste.

SEC. 2271. (1242.) It is a sufficient cause of challenge to any juror selected to appraise the value of the land or the improvements, that he is interested in a like question. Challenge of juror.

SEC. 2272. (1243.) The plaintiff is entitled to an execution to put himself in possession of his property in accordance with the provisions of this chapter, but not otherwise. Plaintiff restricted

SEC. 2273. (1244.) The regulations contained in this chapter are intended to be retrospective. Retrospective.

ARTICLE 2.

An Act to amend Chapter Eighty of the Code of Iowa.

[Passed March 23, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 153, page 330.]

SECTION 2274. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That in all cases where judgments have been or may hereafter be rendered in any of the courts of this state under the provisions of chapter eighty of the code of Iowa, in favor of an occupying Judgment paid within three years.

\* The matter in brackets was enacted in chapter 36 of the eighth session, see special laws of eighth session, page 144.

† See last note.

claimant or claimants for the amount of his, her or their improvements, the owner of the title to the land may at any time within three years after the date of such judgment, pay the amount of the same, and he shall immediately upon the payment of the same, have the right to the possession of the land for which purpose a writ shall be issued by the clerk of the court where the judgment was rendered upon the application of the owner of the title aforesaid.

Judgment paid  
by execution.

SEC. 2275. (2.) If the owner of the title does not within three years from the date of judgment pay the amount of the judgment and take possession of the land, then the owner of the improvements may cause to be issued an execution against the property of the owner of the title for the amount of his judgment, which execution shall be satisfied in the same manner as in any other case; and when the execution is satisfied all claims of the occupying claimant upon the land, and improvements shall cease, but said execution may be levied upon the lands or any other property not exempt from execution of the owner of the title.

Conflicting acts  
repealed.

SEC. 2276. (3.) So much of chapter eighty of the code of Iowa as comes in conflict with this act is hereby repealed.

PRIOR LAWS. 1. An act declaring valid, contracts concerning improvements on claims and deeds of the same, passed Dec. 3, 1836; Wis., 1st sess., No. 8, p. 23.

2. An act defining right of claimants on public domain, passed Jan. 19, 1838; Wis., 2d sess., No. 97, p. 309; the above repealed Aug. 30, 1840.

3. An act declaring valid, contracts concerning improvements on claims, and of deeds for same, passed Jan. 15, took effect Feb. 15, 1839; I. T., 1st sess., p. 388, also, Reprint, 1843, p. 456.

4. An act defining right of claimants on public domain, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 389; also Reprint, 1843, p. 457.

5. An act for the benefit of settlers on the half breed lands, passed Dec. 6, took effect Jan. 6, 1840; I. T., 2d sess., chap. 4, p. 5.

6. An act supplementary to the above, passed Dec. 31, 1840; I. T., 3d sess., chap. 24, p. 19.

7. An act amending same, passed Jan. 13, took effect Feb. 13, 1841; I. T., 3d, sess., chap. 45, p. 37.

8. An act further amending same, passed Feb. 2, took effect March 2, 1842; I. T., 4th sess., chap. 33, p. 26.

9. An act concerning claimants in the half breed tract in Lee county, passed Jan. 24, took effect Feb. 9, 1848; 1st sess., extra, chap. 53, p. 53.

10. An act amendatory to the half breed law, passed Dec. 29, 1848; 2d sess., chap. 18, p. 41.

12. An act concerning claimants on the half breed tract, passed Jan. 12, 1849; 2d sess., chap. 54, p. 68.

13. An act in relation to the record of the decree of partition of half breed tract, passed Jan. 12, 1849; 2d sess., chap. 55, p. 70.

DECISIONS. Right of occupying claimant is strictly statutory, 6 Iowa, 401; there is a liability for improvements only in case of defendant filing his petition as herein and not if owner get possession otherwise, *ibid.*; what defendant pleading must show, 6 Iowa, 439; claimant may file his petition for improvements at any time before being removed, 6 Iowa, 466; power of court and kind of judgment rendered in case for improvements, 6 Iowa, 401, 8 *ibid.*, 263; amount of, *ibid.*

## CHAPTER 98.

## THE HOMESTEAD.

[Code—Chapter 81.]

SECTION 2277. (1245.) Where there is no special declaration of the statute to the contrary, the homestead of every head of a family is exempt from judicial sale. Homestead exempt.

SEC. 2278. (1246.) A widow or widower, though without children, shall be deemed the head of a family while continuing to occupy the house used as such at the time of the death of the husband or wife. Who head of a family.

SEC. 2279. (1247.) A conveyance by such owner is of no validity unless the husband and wife (if the owner is married) concur in and sign such conveyance. Conveyance of

SEC. 2280. (1248.) But the homestead is liable for taxes accruing exclusively thereon, and the whole or a sufficient portion thereof may be sold to pay the same. It is also subject to mechanic's liens in the cases provided by law. Exceptions.

SEC. 2281. (1249.) It may also be sold on execution for debts contracted prior to the passage of this law or prior to the purchase of such homestead (except where otherwise declared,) or for those created by written contract executed by the persons having the power to convey and expressly stipulating that the homestead is liable therefor. But it shall not in such cases be sold except to supply the deficiency remaining after exhausting the other property of the debtor which is liable to execution. When sold on execution.

SEC. 2282. (1250.) The homestead must embrace the house used as a home by the owner thereof, and if he has two or more houses thus used by him at different times and places he may select which he will retain as his homestead. What constitutes it.

SEC. 2283. (1251.) It may contain one or more lots or tracts of land with the buildings thereon and other appurtenances, subject to the limitations contained in the next section, but must in no case embrace different lots and tracts unless they are contiguous, or unless they are habitually and in good faith used as part of the same homestead. Same.

SEC. 2284. (1252.) If within a town plat it must not exceed one half an acre in extent, and if not within a town plat it must not embrace in the aggregate more than forty acres. But if when thus limited in either case its value is less than five hundred dollars it may be enlarged till its value reaches that amount. Same.

SEC. 2285. (1253.) It must not embrace more than one dwelling house nor any other buildings except such as are properly appurtenant to the homestead as such, but a shop or other building situated thereon and really used and occupied by the owner in the prosecution of his own ordinary business and not exceeding three hundred dollars in value may be deemed appurtenant to such homestead. Same.

SEC. 2286. (1254.) The owner may select his own homestead and cause it to be marked out, platted, and recorded as provided in the next section. If he neglect this the privilege of doing the same devolves upon his wife. A failure in this respect by both does not leave the homestead liable, but the officer having an execution against the property of such a defendant may cause the homestead to be marked off, platted, and recorded, and may add the expenses thence arising to the amount embraced in his execution. How selected and defined

- Same.** SEC. 2287. (1255.) The homestead shall be marked off by fixed and visible monuments, and in giving the description thereof the direction and distance of the starting point from some corner of the dwelling house shall be stated. The description and plat shall then be recorded by the recorder of deeds in a book to be called the "homestead book," which shall be provided with a proper index.
- May be changed.** SEC. 2288. (1256.) The owner may from time to time at his pleasure change the limits of his homestead by changing the metes and bounds as well as the record of the plat and description, or he may change the homestead entirely; but such changes shall not prejudice conveyances or liens made or created previously thereto.
- Liability of new.** SEC. 2289. (1257.) The new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former homestead would have been exempt, but in no other, nor in any greater degree.
- How disagreement settled.** SEC. 2290. (1258.) Where a disagreement takes place between the owner and any person adversely interested as to whether any land or buildings are properly a part of the homestead, the sheriff shall at the request of either party summon nine disinterested persons having the qualification of jurors. The parties then, commencing with the owner of the homestead, shall in turn strike off one juror each and shall continue to do so until only three of the number remain. These shall then proceed as referees to examine and ascertain all the facts of the case and shall report the same with their opinion thereon to the next term of the district court.
- Same.** SEC. 2291. (1259.) If either party fail to strike off jurors in the manner directed in the last section the sheriff may strike off such jurors.
- Same.** SEC. 2292. (1260.) The court may also in its discretion refer the whole matter or any part of it back to the same referees, or to others to be selected in the same manner or as the parties otherwise agree, giving them directions as to the report that is required of them.
- Decision of court.** SEC. 2293. (1261.) When the court is sufficiently possessed of the facts of the case it shall make its decision, and may, if expedient, direct the homestead to be marked off anew or a new plat and description to be made and recorded, and may take any farther step in the premises which in its discretion it may deem proper for attaining the objects of this statute. It shall also award costs as nearly as may be in accordance with the practice observed in other cases.
- Change of circumstances.** SEC. 2294. (1262.) The extent or appurtenances of the homestead, as thus established, are liable to be called in question in like manner whenever a change in value or circumstances will justify such new proceeding.
- Death.** SEC. 2295. (1263.) Upon the death of either husband or wife the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law.
- Descent.** SEC. 2296. (1264.) If there is no such survivor, the homestead descends to the issue of either husband or wife according to the general rules of descent unless otherwise directed by will, and is to be held by such issue exempt from any antecedent debts of their parents or their own.
- When to be sold.** SEC. 2297. (1265.) If there is no such survivor or issue, the homestead is liable to be sold for the payment of any debts to which it might at that time be subjected if it had never been held as a homestead.
- Devise of.** SEC. 2298. (1266.) Subject to the rights of the surviving husband

or wife as declared by law, the homestead may be devised like other real estate of the testator.

**PRIOR LAW.** 1. An act to exempt a homestead from forced sale, passed Jan. 15, 1849; 2d sess., chap. 124, p. 152.

**DECISIONS.** What constitutes a homestead under chapter 124, of 2d session, 1 Iowa, 435; extent and value, 3 Iowa, 287; form of claim, 6 Iowa, 374; effect of the repeal of this law, 3 Iowa, 287; 4 G., 563; a homestead under the Code defined, 1 Iowa, 435; 4 *ibid.*, 373; may include only part of a building, 4 Iowa, 368; specific performance and defense of homestead, 3 Iowa, 345; that part of the edifice used as a home is alone protected, and if other parts of same building be rented, and used by others such parts are not exempted, but all the building of which a part is used as a home will be presumed homestead, 4 Iowa, 371; "prior to the passage of this law," means "heretofore," 1 Iowa, 435; burden of proof on claimant of exemption, 3 Iowa, 287; extent limited, value not, 7 Iowa, 26; exemption of homestead is part of remedy, 3 Iowa, 287; 8 Iowa, 140; liability to antecedent debts, 1 Iowa, 442; right not impaired by the repeal of the law, 4 G., 563; 3 Iowa, 287; husband alone can not dispose of homestead, *Yost v. Devault*, June, 1859; 1 Iowa, 512; 6 *ibid.*, 30; the surviving widow is the head of a family, as to homestead, 1 Iowa, 512; if treated in the bill as a homestead, the defendant is aided so far in his proof, 6 Iowa, 19; as to marshaling of assets and subrogation in cases of mortgage of homestead by member of firm, and assignment by firm, 6 Iowa, 19; can not sell mortgaged homestead until all other property liable has been exhausted, 6 Iowa, 31; superior title of vendee under mortgage of homestead by husband and wife over that derived from one by husband alone, *Alley v. Bay*, Dec., 1859; case where homestead mortgaged to secure purchase money, and also another debt, 7 Iowa, 26.

CHAPTER 99.

LANDLORD AND TENANT.

[Code—Chapter 82.]

**SECTION 2299. (1267.)** The executor of a tenant for life who demises real property so held and dies on or before the day on which the rent is payable, and a person entitled to rent dependent on the life of another, may recover the proportion of rent which had accrued at the time of the death. Rent appor-  
tioned.

**SEC. 2300. (1268.)** A tenant giving notice of his intention to quit the demised premises at a time named and afterwards holding over, and a tenant or his assignee willfully holding over the premises after the term and after notice to quit, shall pay to the person entitled thereto double the yearly value of the premises during the time he holds over. Holding over.

**SEC. 2301. (1269.)** The attornment of a tenant to a stranger is void unless made with the consent of the landlord, or pursuant to, or in consequence of, a judgment at law or in equity, or to a mortgagee after the mortgage has been forfeited. Attornment  
when void.

**SEC. 2302. (1270.)** A landlord shall have a lien for his rent upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used on the premises during the term and not exempt from execution, for the period of one year after a year's rent, or the rent of a shorter period claimed, falls due; but such lien shall not in any case continue more than six months after the expiration of the term. Landlord's lien

**SEC. 2303. (1271.)** The lien may be effected by the commencement How effected.

of an action within the period above prescribed, for the rent due, in which action the landlord will be entitled to a writ of attachment upon filing with the proper clerk or the justice an affidavit that the action is commenced to recover rent accrued within one year previous thereto upon premises described in the affidavit.

**PRIOR LAW.** 1. An act relative to landlord and tenant, passed Dec. 30, took effect Jan. 30, 1840; I. T., 2d sess., chap. 14, p. 18.

**DECISIONS.** Need of record or notice of a lease to bind third persons, 4 G., 54; 2 *ibid.*, 39; case of rent payable in labor and crops, &c., 3 G., 111; parol evidence admitted to change name of lessee, 3 G., 502; rent goes with the reversion, 1 Iowa, 111; case of no agreed price, *ibid.*; action for work and labor, clearing land, &c., set off, rent thereof, see 1 Iowa, 111; claim of damages for interruption, 4 Iowa, 246; "effected" defined, *Grant v. Whitwell, Marsh, et al.*, June, 1859; when lien attaches—what upon—*ibid.*; good husbandry, 3 G., 520; right of the tenant of land rented on shares, to crop while growing and in the land, 4 G., 461; forfeiture of lease, 3 G., 502; estopped from denying landlord's title, 3 G., 502; 4 G., 544; lessee may redeem from tax sale, *Byington v. Ryder*, Dec., 1859.

## CHAPTER 100.

### THE ESTATES OF DECEDENTS.

[Code—Chapter 83.]

#### ARTICLE 1.

- Jurisdiction.** SECTION 2304. (1272.) The county court has power to take probate of wills, to grant administration of the estates of all persons who at the time of their death were residents of the county, or who die non-residents of the state having property to be administered upon within the county, or where such property is afterwards brought into the county, and it has jurisdiction in all matters relating to the settlement of such estates.\*
- Guardianship.** SEC. 2305. (1273.) It may also appoint guardians for minors and others requiring guardians, residing within the county, in cases prescribed by law, and may exercise a general supervision over their property, persons, and interests.
- First county.** SEC. 2306. (1274.) When a case is originally within the jurisdiction of the courts of either of two or more counties, that court which first takes cognizance thereof by the commencement of proceedings can retain the same throughout.
- May revoke.** SEC. 2307. (1275.) Any process or authority emanating from the court in probate matters may for good cause be revoked and a new one issued.
- Bonds approved.** SEC. 2308. (1276.) No bond relating to probate matters, required by law to be given and filed in the county office, shall be deemed sufficient until examined by the judge and his approval is indorsed thereon.

\* This section is amended by article 2 hereof.



*Wills.*

SEC. 2309. (1277.) Any person of full age and sound mind may dispose, by will, of all his property except what is sufficient to pay his debts, or what is allowed as a homestead, or otherwise given by law as privileged property to his wife and family. Who may make.

SEC. 2310. (1278.) Property to be subsequently acquired may also be devised when the intention is clear and explicit.

SEC. 2311. (1279.) Personal property to the value of three hundred dollars may be bequeathed by a verbal will if witnessed by two competent witnesses. Verbal wills.

SEC. 2312. (1280.) A soldier in actual service, or a mariner at sea, may dispose of all his personal estate by a will so made and witnessed.

SEC. 2313. (1281.) All other wills, to be valid, must be in writing witnessed by two competent witnesses, and signed by the testator or by some person in his presence and by his express direction. In writing

SEC. 2314. (1282.) No subscribing witness to any will can derive any benefit therefrom unless there be two disinterested and competent witnesses to the same. Witnesses.

SEC. 2315. (1283.) But if, without a will, he would be entitled to any portion of the testator's estate, he may still receive such portion to the extent in value of the amount devised. Exception

SEC. 2316. (1284.) Posthumous children unprovided for by the father's will shall inherit the same interest as though no will had been made. Posthumous.

SEC. 2317. (1285.) The amount thus allowed to a posthumous child, as well as that of any other claim which it becomes necessary to satisfy in disregard of or in opposition to the contemplation of the will, must be taken ratably from the interests of heirs, devisees, and legatees. Children.

SEC. 2318. (1286.) The word "devisee" as used in this title shall when applicable be construed to embrace "legatees," and the word "devised" shall in like cases be understood as comprising the force of the word "bequeathed." Definitions.

SEC. 2319. (1287.) If a devisee die before the testator, his heirs shall inherit the amount so devised to him unless from the terms of the will a contrary intent is manifest. Devisee.

SEC. 2320. (1288.) Wills can be revoked, in whole or in part, only by being canceled or destroyed by the act or direction of the testator with the intention of so revoking them or by the execution of subsequent wills. Revocation.

SEC. 2321. (1289.) When done by cancellation the revocation requires to be witnessed in the same manner as the making of a new will. Cancellation.

SEC. 2322. (1290.) Wills duly sealed up and indorsed may be deposited with the clerk of the court, whose duty it is to file and preserve the same until the death of the testator, unless they themselves sooner demand them. Deposit.

SEC. 2323. (1291.) Any person having the custody of a will shall, at the first stated term of the court after being informed of the death of the testator, bring the same into open court when it shall be publicly read. Of will.

SEC. 2324. (1292.) If he fail to do so after receiving reasonable notice he may be brought in by rule and attachment and committed to Same

- jail until he complies, and shall be further liable to any person aggrieved for all the damages sustained by such failure.
- Probate**      SEC. 2325. (1293.) After being thus produced and read, a day shall be fixed by the court for proving the same, which may be postponed from time to time at the discretion of the court.
- SEC. 2326. (1294.) Such notice thereof as the court directs shall be immediately given to all persons interested in the matter.
- Recorded.**    SEC. 2327. (1295.) After being proved and allowed by the county court, the will together with the certificate hereinafter required shall be recorded in a book kept for that purpose.
- Foreign wills.**    SEC. 2328. (1296.) Wills proved and allowed in any other state or country shall be allowed and recorded in any county in this state in which it may be desired to use them, upon the production of a copy thereof to the proper county court duly authenticated by the attestation of the clerk of the court in which such will was proved, together with the certificate of the judge or presiding officer that such attestation is in due form of law. If there be no clerk such attestation may be made by the judge or presiding officer, and in all cases if the clerk or officer making such attestation have a seal of office such seal shall be annexed to the attestation.
- Probate conclusive**    SEC. 2329. (1297.) Wills shall not be carried into effect unless thus allowed, and such allowance is conclusive as to the due execution of the will unless set aside by an original or appellate proceeding in the district court.
- Copy to executor**    SEC. 2330. (1298.) When proved and recorded, the court shall direct the will or an authenticated copy thereof to be placed in the hands of the executor therein named or otherwise duly appointed.
- If no executors.**    SEC. 2331. (1299.) If no executors are named therein or if the executors named fail to qualify and act, it shall be retained on file until an executor is appointed and qualified in the manner herein prescribed.
- Certificate.**      SEC. 2332. (1300.) Wills, when proved and allowed, shall have a certificate thereof indorsed or annexed thereto signed by the clerk and attested by the seal of the court; and every will so certified, or the record thereof, or a transcript of such record duly authenticated, may be read in evidence in all courts within this state without farther proof.

*Executors.*

- Executor**      SEC. 2333. (1301.) The word "executor," as used in this title, is intended to be applied to the persons who administer upon the estate of one deceased, whether appointed by the will or otherwise.
- Appointment.**    SEC. 2334. (1302.) They may in each case consist of one or more, and if not designated by will they may be appointed by the proper county court as hereinafter directed.
- Vacancies.**      SEC. 2335. (1303.) If a person appointed executor refuse to accept the trust, or if when duly notified of his appointment he neglects to appear within thirty days and give bond as hereinafter prescribed, a vacancy will be deemed to have occurred.
- Married women.**    SEC. 2336. (1304.) A married woman may act as executor independent of her husband. Her marriage subsequent to the appointment does not render it invalid.
- Minors.**          SEC. 2337. (1305.) If a minor under eighteen years of age is appointed an executor, there is a temporary vacancy as to him until he becomes of that age.
- Removal.**        SEC. 2338. (1306.) The court for good cause may remove an executor.

SEC. 2339. (1307.) In case of vacancy the court may appoint a substitute, or it may allow the other executor (if there is another) to proceed by himself in administering the estate. Vacancy.

SEC. 2340. (1308.) The substitution of other executors shall occasion no delay in the administration of the estate. The periods herein-after mentioned within which acts are to be performed after the appointment of executors, shall all, unless otherwise declared, be reckoned from the issuing of the commission to the first general executor. Substitution.

SEC. 2341. (1309.) If administration of the estate of a deceased non-resident has been granted in accordance with the laws of the state or country where he resided at the time of his death, the person to whom it has been committed may upon his application and upon qualifying himself in the same manner as is required of other executors, be appointed an executor to administer upon the property of the deceased in this state unless another executor has previously been appointed in this state. Non-resident ex-  
ecutors.

SEC. 2342. (1310.) The original letters testamentary or of administration or other authority conferring his power upon such executor, or an attested copy thereof together with a copy of the will if there be one attested as hereinbefore directed, must be filed in the office of the judge of the proper county court before such appointment can be made. Proceedings.

SEC. 2343. (1311.) In other cases where an executor is not appointed by will administration shall be granted : Who entitled.

1. To the wife of the deceased ;
2. To his next of kin ;
3. To his creditors ;
4. To any other person whom the court may select.

SEC. 2344. (1312.) The court may unite individuals belonging to the same or different classes as executors whenever it deems such a course expedient. Classes united.

SEC. 2345. (1313.) To each of the above classes in succession a period of twenty days (commencing with the burial of the deceased) is allowed, within which to apply for administration upon the estate.

SEC. 2346. (1314.) The court must appoint no person an executor who is manifestly unsuitable for the discharge of the trust, nor who is a minor except as herein otherwise provided. Restriction.

SEC. 2347. (1315.) If the persons of each class as above ordered respectively fail to apply for such administration within the twenty days above allotted to his class, without sufficient cause being shown for such failure ; or if for any reason all those who apply are improper persons to receive the appointment, the right of administration descends to the next following class. Failing to apply.

SEC. 2348. (1316.) Every executor, except as is herein otherwise declared, before entering upon the discharge of his duty must give bond in such penalty as the judge of the court approves, conditioned for the faithful discharge of the duties imposed on him by law according to the best of his abilities. Bond.

SEC. 2349. (1317.) He must also take and subscribe an oath the same in substance as the condition of the bond aforesaid, which oath and bond must be filed with the judge of the court. Oath.

SEC. 2350. (1318.) New bonds may be required by the court to be given, and in a new penalty and with new sureties, whenever the same is deemed expedient. New bonds.

SEC. 2351. (1319.) After the filing of the bond and oath aforesaid, the court shall issue a commission under its seal giving the executor the powers authorized by law. Commission.

- Special executor.** SEC. 2352. (1320.) When for any cause there is a necessary delay in granting such commission, the court in its discretion may appoint one or more special executors to collect and preserve the property of the deceased, who shall qualify as above required.
- Appeals.** SEC. 2353. (1321.) No appeal from the decision appointing such special executors shall prevent their proceeding in the discharge of their duties.
- Inventory.** SEC. 2354. (1322.) Such special executors shall make and file an inventory of the property of the deceased in the same manner in all respects as is required of general executors, and shall preserve said property from injury.
- Duties, &c.** SEC. 2355. (1323.) For this purpose they may do all needful acts under the direction of the court, but shall take no steps in relation to the allowance of claims against the estate.
- When powers cease.** SEC. 2356. (1324.) Upon the granting of full administration the powers of the special executors shall cease and all the business shall be transferred to the general executor.
- Limitation.** SEC. 2357. (1325.) Administration shall not be originally granted after the lapse of five years from the death of the decedent, or from the time his death was known in case he died out of the state.
- Provisions may be modified by will.** SEC. 2358. (1326.) The preceding provisions are in some respects subject to be changed and modified by the will of a testator. Thus, when the interests of creditors will not be thereby prejudiced, he may prescribe the entire manner in which his estate shall be administered upon, he may exempt the executor from the necessity of giving bond, may constitute him in substance his attorney in fact for the settlement of the estate, may direct that no material and immediate change be made in conducting his business affairs in consequence of his death, and may prescribe the manner in which his affairs shall be conducted until his estate is finally settled, or until his minor children become of age.
- Authority of court.** SEC. 2359. (1327.) The county court in its discretion may also authorize the executor to continue the prosecution of any business in which the deceased was engaged at the time of his death, in order to wind up his affairs with greater advantage to the interest of the estate, but such permission does not exempt the executor from the necessity of returning a full inventory and appraisalment of the effects of the deceased as accurately as practicable in the manner prescribed in other cases, and as may be farther directed by the court.

*The Inventory and Collection of the Effects of Deceased Persons.*

- Inventory.** SEC. 2360. (1328.) Within thirty days after their appointment, unless for good cause an extension of that time is specially given by the court, the executors shall make and return into the court an inventory of all the personal effects of the deceased of every description which have come within their knowledge, embracing all book accounts which do not appear by the books or papers of the deceased to have been settled.
- What not assets.** SEC. 2361. (1329.) When the deceased leaves a widow, no property which in her hands as the head of a family would be exempt from execution shall be deemed assets or administered upon as such, but the same, after being inventoried without appraisalment, shall remain with her and the family until disposed of according to law.
- Life Insurance.** SEC. 2362. (1330.) The avails of any life insurance are not subject to the debts of the deceased except by special contract or arrange-

ment, but shall in other respects be disposed of like other property left by the deceased.

SEC. 2363. (1331.) All personal property (except as aforesaid) found in the county must be appraised by appraisers, who shall be appointed by the court and shall each receive one dollar per day for his services. Appraisement.

SEC. 2364. (1332.) If any portion of such property be in another county, the same appraisers may serve or others may be appointed by the court or by a disinterested justice of the peace of such county, whose duties and compensation shall be as aforesaid. In another county.

SEC. 2365. (1333.) A supplemental inventory must be made out in like manner whenever the existence of other property is discovered. Supplemental inventory.

SEC. 2366. (1334.) The court may summon before it any person suspected of having taken wrongful possession of any of the effects of the deceased, or of having had such effects under his control, and may subject him to an examination under oath, and if upon such examination it appear to the court that such suspected person has the wrongful possession of any property or effects of the deceased, the court shall order such property or effects to be delivered to the executor of the estate. Discovery of assets.

SEC. 2367. (1335.) If he disobey such order or summons, or refuse to answer the interrogatories propounded, he may be committed to the jail of the county until a compliance be yielded.

SEC. 2368. (1336.) The executor, with the approbation of the court, may compound with any debtor of the estate who may be thought unable to pay his whole debt, or in order to avoid doubtful litigation. May compound.

SEC. 2369. (1337.) The interest of a deceased mortgagee shall be included among his personal assets, and upon its being paid off satisfaction shall be entered by the executor. Mortgage assets.

*The Disposition to be made of the Property of the Deceased.*

SEC. 2370. (1338.) Upon the death of a sole surviving parent leaving a minor child, the court may make such order and allowance for its temporary support as may be suitable and proper. Minor orphans.

SEC. 2371. (1339.) When a person by his will makes such a disposition of his effects as to prejudice the rights of creditors, the will may still be sustained by the giving of security to the satisfaction of the court for the payment of the claims of the creditors to the extent of the value of the property thus devised. Exception to will.

SEC. 2372. (1340.) When no different direction is given in the will, debts due the estate shall as far as practicable be collected and the debts owing by the estate paid off therewith, to the extent of the means thus obtained. First fund.

SEC. 2373. (1341.) The court, on the application of the executor, shall from time to time direct the sale of such portions of the personal effects as are of a perishable nature or which from any cause would otherwise be likely to depreciate in value, and also such portions as are necessary to pay off the debts and charges upon the estate, in addition to the means above provided. Personal property sold.

SEC. 2374. (1342.) If the personal effects are found inadequate to satisfy such charges, a sufficient portion of the real estate may be ordered to be sold for that purpose. Real estate.

SEC. 2375. (1343.) Application for that purpose can be made only after a full statement of all the claims against the estate, and after rendering a full account of the disposition made of the personal estate. Application.

- Notice.** SEC. 2376. (1344.) Before any order to that effect can be made, such notice as the court may prescribe must be given to all the persons interested in such real estate.
- Real estate divided.** SEC. 2377. (1345.) If convenient, the real estate must be divided into parcels and each appraised in the manner above provided for personal property, and the appraisal filed in like manner.
- Exception.** SEC. 2378. (1346.) When a part can not be sold without material prejudice to the general interests of the estate, the court may order the sale of the whole, or of such part as can be sold advantageously.
- Private sale.** SEC. 2379. (1347.) Property may be permitted to be sold at private sale whenever the court is satisfied that the interests of the estate will be thereby promoted.
- Public sale.** SEC. 2380. (1348.) In other cases sales must be made at public auction after giving the same notice as would have been necessary for the sale of such property on execution.
- Direction.** SEC. 2381. (1349.) No property can be sold at private sale for less than the appraisal price without the express approbation of the judge of the county court.
- Credit.** SEC. 2382. (1350.) Property may be ordered to be sold on a partial credit of not more than twelve months.
- Sale prevented.** SEC. 2383. (1351.) Any heir or other person interested in the estate, who may wish to prevent a sale of the whole or any part thereof, may accomplish that purpose by giving bond to the satisfaction of the court, conditioned that he will pay all demands against the estate to the extent of the value of the property thus kept from sale as soon as called upon by the county court for that purpose.
- Same.** SEC. 2384. (1352.) If the conditions of such bond are broken the property is still liable for those debts unless it has passed into the hands of a *bona fide* purchaser, and the executors may take possession thereof and sell the same under the direction of the court, or they may prosecute the bond, or both at once if the court so direct.
- SEC. 2385. (1353.) If the conditions of the bond are complied with the property passes by devise, distribution, or descent in the same manner as though there had been no debts against the estate.
- Conveyances.** SEC. 2386. (1354.) Where real estate is sold, conveyances thereof executed by the executors pass to the purchaser all the interest of the decedent therein. But such conveyance shall not be valid until approved by the judge of the county court.
- Presumption.** SEC. 2387. (1355.) Such approval shall be entered of record. A brief memorandum thereof must be indorsed upon the deed with the signature and seal affixed thereto, and the deed so indorsed shall be presumptive evidence of the validity of the sale and of the regularity of all the proceedings connected therewith.
- Limitation.** SEC. 2388. (1356.) No action for the recovery of any real estate sold by an executor can be sustained by any person claiming under the deceased, unless brought within five years next after the sale.

*Filing Claims against an Estate.*

- Executor's notice.** SEC. 2389. (1357.) Within thirty days after the receipt of their commission, the executors shall publish a notice of their appointment in such manner as the court directs, either by posting up or by publication in a newspaper.
- SEC. 2390. (1358.) This notice need be given only by the executors first appointed and qualified.

SEC. 2391. (1359.) Claims against the estate must be clearly stated, sworn to, and filed. Ten days notice of the hearing, indorsed on a copy of the claim, must be served upon one of the executors in the manner required for commencing actions in the district court. Claims.

SEC. 2392. (1360.) The same rules of evidence, including those in relation to the calling and examination of the party as a witness, shall be observed as in cases pending in the district court. Evidence.

SEC. 2393. (1361.) The executor may, with the approbation of the court, admit claims with the correctness of which he is satisfied, but not until the claimant has sworn to their correctness. The like rule shall be observed in relation to payments or set-offs to any demands due the estate. Executor may allow.

SEC. 2394. (1362.) All claims not established in the district court must be submitted to and passed upon by the county court; and no claim except such as the executors may admit can be allowed, unless sustained by such testimony as would be sufficient on a trial in the district court. Proof of claims.

SEC. 2395. (1363.) Claims for a mere money demand where no lien is to be enforced shall not, except with the approbation of the county court, be prosecuted originally in the district court. Where.

SEC. 2396. (1364.) Demands though not yet due may be presented, proved, and allowed as other claims.

SEC. 2397. (1365.) Contingent liabilities must also be presented and proved, or the court or executor shall be under no obligation to make any provision for satisfying them when they may afterwards accrue. Contingent.

SEC. 2398. (1366.) Claims against an estate and set-offs thereto may in the discretion of the court be proved up before one or more referees to be agreed upon between the parties or approved by the court, and their decision being entered upon the record becomes a decision of the court. Referees.

SEC. 2399. (1367.) Unsatisfied judgments rendered prior to the death of the decedent shall be entered in the catalogue of claims, and so much thereof allowed as the plaintiff will show by his own oath or otherwise is still unpaid. But they possess no preference over other claims except the liens allowed by law in their favor. Unsatisfied judgments.

SEC. 2400. (1368.) Suits pending at the time of such death may be prosecuted to judgment and then placed in the catalogue of established claims. But no lien is created by such judgment. Suits pending.

SEC. 2401. (1369.) If either of the executors is interested in favor of a claim against the estate he shall not serve in any matter connected with that case. And if all the executors are thus interested the court shall appoint some competent person a temporary executor in relation to such claims. Executor interested.

*The Payment of Claims against the Estate.*

SEC. 2402. (1370.) As soon as the executors are possessed of sufficient means over and above the expenses of administration they shall pay off the charges of the last sickness and funeral of the deceased. Referred claims.

SEC. 2403. (1371.) They shall in the next place pay any allowance which may be made by the court for the maintenance of the widow and minor children, previous to the time when a sufficient amount for such maintenance can be paid to them out of their shares of the estate, which amount so advanced shall afterwards be deducted from their respective portions. Allowance to widow and children.

Order of payment.	<p>SEC. 2404. (1372.) Other demands against the estate are payable in the following order:</p> <ol style="list-style-type: none"> <li>1. Debts entitled to a preference under the laws of the United States;</li> <li>2. Public rates and taxes;</li> <li>3. Claims filed within six months after the notice given by the executors of their appointment;</li> <li>4. All other debts;</li> <li>5. Legacies.</li> </ol>
Limitation.	<p>SEC. 2405. (1373.) All claims of the fourth of the above classes not filed and proved within one year and a half of the giving of the notice aforesaid are forever barred, unless the claim is pending in the district or supreme court or unless peculiar circumstances entitle the claimant to equitable relief.</p>
When to pay.	<p>SEC. 2406. (1374.) After the expiration of the time for filing the claims of the third of the above classes, the executors shall proceed to pay of all claims against the estate in the order above stated as fast as the means of so doing come into their hands.</p>
Same.	<p>SEC. 2407. (1375.) Claims of the fourth class may be paid off at any time after the expiration of six months aforesaid without any regard to those claims not filed at the time of such payment. And even legacies may be paid off at any time after the expiration of one year from the date of the notice of appointment of the executor: <i>provided</i>, sufficient be left on hand to satisfy all the claims filed at the date of such payment, the claims of the fourth class as well as the legacies being, within the limits above fixed, preferred to the unfiled claims whether the estate be solvent or not.</p>
Same.	<p>SEC. 2408. (1376.) No payment can be made to a claimant in any one class until those of a previous class are satisfied.</p>
Not due.	<p>SEC. 2409. (1377.) Demands not yet due shall be paid off if the holders will consent to such a rebate of interest as the court thinks reasonable. Otherwise the money to which such claimant would be entitled shall be safely invested until his debt becomes due.</p>
Order of payment.	<p>SEC. 2410. (1378.) Within their respective classes, debts shall be paid off in the order in which they have been proved up subject to the provisions of the following section; but the court shall permit them to be proved up in the order in which they are filed.</p>
Dividend.	<p>SEC. 2411. (1379.) If there are not likely to be means sufficient in all to pay off the whole of the debts of any one class, the court shall from time to time strike a dividend of the means on hand among all the creditors of that class, and the executors shall pay the several amounts accordingly.</p>
Incumbrances.	<p>SEC. 2412. (1380.) The executors may with the approbation of the court use funds belonging to the estate to pay off incumbrances upon lands owned by the deceased, or to purchase lands claimed or contracted for by him prior to his death.</p>
Specific legacies.	<p>SEC. 2413. (1381.) Specific legacies of property may be turned over to the rightful claimant at any time upon his giving unquestionable real estate security to restore the property or refund the amount at which it was appraised if wanted for the payment of debts.</p>
Those payable in money.	<p>SEC. 2414. (1382.) Legacies payable in money may be paid on like terms whenever the executors possess the means which can be thus used without prejudice to the interest of any claim already filed.</p>
Paying them.	<p>SEC. 2415. (1383.) After the expiration of the one year and a half allowed for filing claims as above provided, such legacies may be paid off without requiring the security provided for in the preceding two</p>



sections, if the means are still retained to pay off all the claims proved or pending as hereinbefore contemplated.

SEC. 2416. (1384.) If the testator has not prescribed the order in which legacies are to be paid off, and if no security is given as above provided in order to expedite their time of payment, they may be paid off in the order in which they were contained in the will, where the estate is sufficient to pay all. Order.

SEC. 2417. (1385.) Or, when not incompatible with the manifest intention of the testator, the court may direct all payments of money to legatees to be made ratably. Same.

SEC. 2418. (1386.) Such must be the mode pursued when there is danger that the estate will prove insufficient to pay off all the legacies, unless security be given to refund as above provided. Same.

SEC. 2419. (1387.) If the executors fail to make payment of any kind in accordance with the order of the court, they and their sureties may be summoned to appear before the court at a time to be specified in the summons not less than ten days from the time of service, to show cause why they have so failed as aforesaid. Executor failing.

SEC. 2420. (1388.) If no sufficient cause be shown the court shall render judgment on the bond of the executors for the amount of money directed to be paid together with costs, and shall issue execution accordingly. Judgment.

SEC. 2421. (1389.) When any of the obligors in the bond is not served with such summons, a similar course may be pursued to that authorized in parallel cases in the district court and with like consequences. Parties not served.

*The Distribution of Personal Property.*

SEC. 2422. (1390.) The personal property of the deceased not necessary for the payment of debts nor otherwise disposed of as hereinbefore provided, shall be distributed to the same persons and in the same proportions as though it were real estate. Distribution.

SEC. 2423. (1391.) The distributive shares shall be paid over as fast as the executor can properly do so. Payment.

SEC. 2424. (1392.) The property itself shall be distributed in kind whenever that can be done satisfactorily and equitably. In other cases the court may direct the property to be sold and the proceeds to be distributed. In kind.

SEC. 2425. (1393.) When the circumstances of the family require it the court, in addition to what is hereinbefore set apart for their use, may direct a partial distribution of the money or effects on hand at any time after filing the inventory, upon the execution of security like that required of legatees in like cases. Partial distribution.

*The Distribution of Real Property.*

SEC. (1394.) [Repealed and substituted by section 2477.]

SEC. 2426. (1395.) Such share shall be so set off as to include the ordinary dwelling house and the land given by law to the husband as a homestead, or so much thereof as will be equal to the share allotted to her by the last section unless she prefers a different arrangement. But no different arrangement shall be permitted where it would have the effect of prejudicing the rights of creditors. Includes homesteads.

SEC. 2427. (1396.) The share thus allotted to her may be set off by the mutual consent of all the parties interested when such consent can be obtained, or it may be set off by referees appointed by the court. How set off.

- Application.** SEC. 2428. (1397.) The application for such admeasurement by referees may be made at any time after twenty days and within ten years after the death of the husband, and must specify the particular tracts of land in which she claims her dower, and ask the appointment of referees.
- Notice.** SEC. 2429. (1398.) The court shall fix the time for making the appointment and direct such notice thereof to be given to all the parties interested therein as it deems proper.
- Action of referees.** SEC. 2430. (1399.) The referees may employ a surveyor if necessary; and they must cause the widow's share to be marked off by metes and bounds, and make a full report of their proceedings to the court as early as practicable.
- Same.** SEC. 2431. (1400.) The court may require a report by such a time as it deems reasonable, and if the referees fail to obey this or any other order of the court it may discharge them and appoint others in their stead, and may impose on them the payment of all costs previously made unless they show good cause to the contrary.
- Confirmation.** SEC. 2432. (1401.) The court may confirm the report of the referees, or it may set it aside and refer the matter to the same or other referees, at its discretion.
- Same.** SEC. 2433. (1402.) Such confirmation after the lapse of thirty days, unless appealed from according to law, shall be binding and conclusive as to the admeasurement, and she may bring suit to obtain possession of the land thus set apart for her.
- Her right contested.** SEC. 2434. (1403.) Nothing in the last section shall prevent any person interested from controverting the general rights of the widow to the dower thus admeasured.  
(1404.) (1405.) (1406.) [Repealed and substituted by section 2478.]
- Dower and will.** SEC. 2435. (1407.) The widow's dower can not be affected by any will of her husband if she objects thereto and relinquishes all rights conferred upon her by the will.
- Descent.** SEC. 2436. (1408.) Subject to the rights and charges hereinbefore contemplated, the remaining estate of which the decedent died seized shall, in the absence of other arrangements by will, descend in equal shares to his children.
- Representation.** SEC. 2437. (1409) If any one of his children be dead the heirs of such child shall inherit his share in accordance with the rules herein prescribed, in the same manner as though such child had outlived his parent.  
Sections (1410) and (1411) [repealed and substituted by article 7 hereof.]
- Female line.** SEC. 2438. (1412.) If heirs are not found in the male line the portion thus uninherited shall go to the mother of the intestate and to her heirs, following the same rules as above prescribed.
- When wife to inherit.** SEC. 2439. (1413.) If heirs are not thus found the portion uninherited shall go to the wife of the intestate or to her heirs if dead, according to like rules; and if he has had more than one wife who either died or survived in lawful wedlock it shall be equally divided between the one who is living and the heirs of those who are dead, or between the heirs of all if all are dead, such heirs taking by right of representation.
- Escheat.** SEC. 2440. (1414.) If, still, there be property remaining uninherited it shall escheat to the state.
- Illegitimate children.** SEC. 2441. (1415.) Illegitimate children inherit from the mother, and the mother from the children.

SEC. 2442. (1416.) They also inherit from the father whenever they have been recognized by him as his children, but such recognition must have been general and notorious or else in writing. Same.

SEC. 2443. (1417.) Under such circumstances, if the recognition of relationship has been mutual the father may inherit from his illegitimate child. Same

SEC. 2444. (1418.) But in thus inheriting from an illegitimate child the rule above established must be inverted so that the mother and her heirs take preference of the father and his heirs, the father having the same right of inheritance in regard to an illegitimate child that the mother has in regard to one that is legitimate. Rule in such cases.

SEC. 2445. (1419.) Property given by an intestate, by way of advancement to an heir shall be considered part of the estate so far as regards the division and distribution thereof, and shall be taken by such heir towards his share of the estate at what it would now be worth if in the condition in which it was so given to him. Advancement.

SEC. 2446. (1420.) But if such advancement exceeds the amount to which he would be entitled he can not be required to refund any portion thereof. Same.

[Section (1421) repealed and substituted by section 2479.]

SEC. 2447. (1422.) Within one year from the issuing of the first commission to the executor, and sooner if required by the court, he shall render his account to the court showing the then condition of the estate, its debts and its effects. And from time to time as may be convenient and as may be required by the court he shall render farther accounts until the estate is finally settled. Time.

SEC. 2448. (1423.) Such accounts shall embrace all matters directed by the court and pertinent to the subject. To embrace.

SEC. 2449. (1424.) The executor may be examined under oath by the court upon any matters relating to his accounts when the vouchers and proofs in relation thereto are not sufficiently full and satisfactory. Executor examined.

SEC. 2450. (1425.) He must account for all the property inventoried, at the price at which it was appraised, as well as for all other property which has come into his hands belonging to the estate. Accounting

SEC. 2451. (1426.) The appraisement is only presumptive evidence of the value of an article and shall be so regarded either for or against the executor. Appraisement presumptive.

SEC. 2452. (1427.) He shall derive no profit from the sale of property for a price higher than the appraisement, nor is he chargeable with any loss occurring without any fault of his own. Profit and loss.

SEC. 2453. (1428.) Any executor failing to account upon being required to do so by the court, may be removed and shall be liable on his bond for all the damage caused by such failure. Failure

SEC. 2454. (1429.) Executors shall be allowed the following commissions upon the personal estate sold or distributed by them, and for the proceeds of real estate sold for the payment of debts, which shall be received in full compensation for all their ordinary services: Compensation.

For the first one thousand dollars at the rate of five per cent.;

For the overplus between one and five thousand dollars, at the rate of two and a half per cent.;

For the amount over five thousand dollars, at the rate of 1 per cent.

SEC. 2455. (1430.) Such farther allowances as are just and reasonable may be made by the court for actual, necessary, and extraordinary expenses or services. Farther allowance.

SEC. 2456. (1431.) Any person interested in the estate may attend Accounts con-

upon the settlement of the accounts of the executor and contest the same. Accounts settled in the absence of any person adversely interested and without notice to him may be opened within three months on his application.

Mistakes.

SEC. 2457. (1432.) Mistakes in settlements may be corrected at any time before final settlement and discharge of the executor, and even after that time on showing such grounds for relief in equity as will justify the interference of the district court.

Execution against executor.

SEC. 2458. (1433.) If judgment is rendered against an executor for costs in any suit prosecuted or defended by him in that capacity, execution shall be awarded against him as for his own debt if it appear to the court that such suit was prosecuted or defended without reasonable cause. In other cases the execution shall be awarded against him in his representative capacity only.

Discharge.

SEC. 2459. (1434.) Upon final settlement by the executor an order shall be entered discharging him from farther duties and responsibilities.

#### *Miscellaneous Provisions.*

Specific performance.

SEC. 2460. (1435.) When a person, under such an obligation to convey real estate as might have been enforced against him if living, dies before making such conveyance, the district court may enforce a specific performance of such contract by the executor and require him to execute the conveyance accordingly.

Who made party.

SEC. 2461. (1436.) It is not necessary to make any other than the executor party defendant to such proceedings in the first instance, but the court in its discretion may direct other persons interested to be made parties and may cause them to be notified thereof in such manner as they may deem expedient. Heirs and devisees may on their own motion at any time be made defendants.

Notice.

SEC. 2462. (1437.) In an action against several executors they are considered one person, and judgment may be taken and execution issued against all as such although only part were duly served with notice.

Executor of executor.

SEC. 2463. (1438.) An executor has no authority to act in a matter wherein his principal was merely an executor or trustee.

Executors in their own wrong.

SEC. 2464. (1439.) Any person who, without being regularly appointed an executor, intermeddles with the property of a deceased person is responsible to the regular executor, when appointed, for the value of all property taken or received by him and for all damages caused by his acts to the estate of the deceased, but his liability extends no farther.

Action v. Heir, &c.

SEC. 2465. (1440.) In an action against the heirs and devisees, where the judgment is to be against them in proportion to the respective amounts received by them from the estate, costs awarded against them shall be in like proportion.

Tender.

SEC. 2466. (1441.) In such cases any one may tender the amount due from him to the plaintiff, which shall have the same effect so far as he is concerned as though he was the sole defendant.

Receipts by one executor.

SEC. 2467. (1442.) One of several executors may receive and receipt for money. Such receipt shall be given by him in his own name only, and he must individually account for all the money thus received and receipted for by himself; and this shall not charge his co-executor except so far as it can be shown to have come into his hands.

Escheats.

SEC. 2468. (1443.) When the judge of any county court has reason to believe that any property within his county should by law escheat to the state, he must forthwith inform the superintendent of public in-

struction thereof, and must also appoint some suitable person executor to take charge of such property unless an executor has already been appointed for that purpose in some county in the state.

SEC. 2469. (1444.) The executor must thereupon give such notice <sup>Notice.</sup> of the death of the deceased and the amount and kind of property left by him within this state, as in the opinion of the judge of the county court will be best calculated to notify those interested, as far as practicable and as the circumstances of the case require.

SEC. 2470. (1445.) The property may be sold or the money appro- <sup>Sale.</sup> priated, as soon thereafter as the superintendent of public instruction directs, and the proceeds thereof treated like those arising from the sale of school lands.

SEC. 2471. (1446.) The money or any portion thereof shall be paid <sup>Re-payment.</sup> over to any one who shows himself entitled thereto within ten years after the sale of the property or the appropriation of the money as an escheat, but not afterwards.

ARTICLE 2.

An Act to amend Section 1272, Chapter 83, of the Code of Iowa.

[Passed Jan. 24, 1853, took effect July 4, 1853; Laws of Fourth General Assembly, Chapter 91, page 148.]

SECTION 2472. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That where administration is duly granted by the county court upon the estate of any deceased per-son, in any county of this state, the said county court shall have the same power and authority over any lands and tenements of the decedent, situate in any other county in this state, which said county court may by law exercise over the lands and tenements of such decedent in the county where said administration is granted. <sup>Lands of decedents.</sup>

SEC. 2473. (2.) That the county court shall order a transcript of <sup>Transcript.</sup> any proceeding in said court, affecting the title to lands in any other county, ordered to be sold by said court, to be transmitted for record to the county judge of the county in which said lands are situated.

ARTICLE 3.

An Act to amend the Law in relation to Executors, &c.

[Passed Jan. 24, 1853, took effect July 4, 1853; Laws of Fourth General Assembly, Chapter 86, page 144.]

SECTION 2474. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That in all cases where any order of the county or probate court has been, or hereafter may be made, requiring any executor, administrator, or guardian of any estate, or person to do or perform any particular thing or things, in relation to said estate or person, and notice of such order can not be personally served on such executor, administrator, or guardian, service of the same be made and had by publication of such notice in some weekly newspaper published in said county four weeks in succession. <sup>Notice.</sup> <sup>Publication.</sup>

SEC. 2475. (2.) When there is no newspaper published in such county, then said notice may be published in the newspaper published <sup>Nearest county.</sup> nearest to the county seat of the county in which said order is made, which publication may be proved as required in like cases in the district court.

**Effect.** SEC. 2476. (3.) Service made as above, shall be as effectual as if personally served, and suits and proceedings may be prosecuted or commenced, had and maintained, in all respects, as if such notice or notices, order or orders, had been personally served.

## ARTICLE 4.

An Act to amend Chapter Eighty-three of the Code.

[Passed Jan 24, 1853, took effect July 1, 1853; Laws of Fourth General Assembly, Chapter 61, page 97.]

**Repeal.** SECTION 2477. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That section thirteen hundred and ninety-four of the code, be, and the same is hereby repealed, and that there be enacted in lieu thereof, the following, to wit: section 1394. One-third in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, and to which the wife has made no relinquishment of her rights, shall under the direction of the court, be set apart by the executor, as her property in dower upon the death of the husband, if she survive him. Said estate in dower to be and remain the same as at common law; continuous cohabitation as husband and wife, is presumptive evidence of marriage for the purpose of giving the right aforesaid.

**Dower.**

**Evidence of marriage.**

**Repeal.**

**Property indivisible may be appraised.**

**Yearly rent.**

**Repeal.**

**Husband.**

**Personal property.**

SEC. 2478. (2.) *Be it further enacted,* That sections fourteen hundred and four, fourteen hundred and five, and fourteen hundred and six, be, and the same are hereby repealed, and that there be enacted in lieu thereof the following, to wit: section 1404. If the referees report that the property can not be readily divided as above directed, the court, if satisfied with such report, may order the whole to be appraised, and may fix a reasonable yearly rent thereon, and may order the whole to be sold, subject to one-third of said yearly rent, which the court shall order to be secured by the purchaser thereof to said widow during her natural life, which rent, so secured upon said land, shall be a lien thereon.

SEC. 2479. (3.) *Be it further enacted,* That section fourteen hundred and twenty-one, be, and the same is hereby repealed, and that the following be enacted in lieu thereof, to wit: section 1421. All the provisions hereinbefore made in relation to the widow of a deceased husband, shall be applicable to the husband of a deceased wife. The estate, by courtesy is hereby abolished.

SEC. 2480. (4.) *Be it further enacted,* That said widow is entitled to receive the same amount of personal property that she is entitled to receive by virtue of section thirteen hundred and ninety, and that her title thereto shall remain absolute.

## ARTICLE 5.

An Act to provide for the Relinquishment of Escheated Lands.

[Passed Jan. 25, 1855, took effect July 1, 1855; Laws of Fifth General Assembly, Chapter 154, page 225.]

**Claimant to file petition in chancery.**

SECTION 2481. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That if any person within five years after an inquisition found vesting any lands in this state as an escheat, shall appear and claim said land vested in the state aforesaid, may file their petition in the district court, as a court of chancery of the county where said claimed estate shall be, setting forth the nature of his claim, and praying that said estate may be relinquished to him.

SEC. 2482. (2.) A copy of the petition shall be served on the attorney general, or prosecuting\* attorney, of said county, who shall answer; and the allegations and proofs; and if it appear that the person is entitled to such claim, the court shall decree accordingly, which shall divest the interest of the state in such estate; but no costs shall be adjudged against the state in such case. Service.  
Decree.

SEC. 2483. (3.) All persons who fail to appear and file their petitions within the time limited, shall be forever barred, saving, however, to infants, maimed women, and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petition at any time within five years after their respective disabilities have been removed. Bar.

SEC. 2484. (4.) The general assembly may cause such estate to be sold at any time after "inquest of office found" in such manner as may be provided by law, in which case the claimants shall be entitled to the proceeds in lieu of the real estate, upon obtaining a decree or order as aforesaid. Sale.

SEC. 2485. (5.) The following persons, and none others, shall be entitled to the benefits of this act: 1st. The children of the decedent, in equal portions among them, and the children of any deceased child shall take the share of their deceased parent. 2nd. If there are no children, then the father and mother, in equal portions, and if either father or mother be dead, then the survivor shall take the whole. 3rd. The brothers and sisters if there be no parents or children, in equal portions, and the children of any deceased brother or sister, shall take the share of such deceased parent. Who entitled.  
Children.  
Father, mother.  
Brother, sister.

SEC. 2486. (6.) If none of the above be found, the lands shall be sold absolutely to the state. State.

SEC. 2487. (7.) None of the above named persons shall have the benefit of this act unless they are residents of some one of the United States, and if a male over the age of eighteen years shall have filed his declaration of intention to become a citizen of the United States: provided, however, that if any such person so residing without the United States, are infants, or of extreme old age, or are in extremely indigent circumstances, so that from any or either of these disabilities they could not become citizens of, or remove to, the United States, the court shall, upon full proof of their disability, enter a decree as provided in the second section of this act. Residents.  
Non-residents.

ARTICLE 6.

An Act respecting Aliens.

[Passed March 15, 1858, took effect March 24, 1858; Laws of Seventh General Assembly, Chapter 65, page 98†.]

SECTION 2488. (1.) Be it enacted by the General Assembly of the State of Iowa, That all aliens residing in the United States who shall have made a declaration of their intentions to become citizens of the United States, by taking the oath required by law, and all aliens residents of this state shall be capable of acquiring real estate in this state by descent or purchase, and of holding and alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States. Aliens may acquire and dispose of property as citizens.

\* District attorney, chapter 25.

† As to taking effect of this act see chapter 77 of eighth session, page 55 of special laws of eighth session.

Aliens may acquire property by devise as citizens.

SEC. 2489. (2.) It shall be lawful for every alien who except for his alienage would be capable of acquiring real estate by devise or descent from any person hereafter dying, capable at the time of the death, of holding real estate in this state, to acquire real estate in this state by devise or descent, from any person as aforesaid, hereafter dying, and of holding and alienating the same, and shall incur the like duties and liabilities in relation thereto, as if they were citizens of the United States.

Aliens may acquire real estate by purchase.

SEC. 2490. (3.) It shall be lawful for every alien who were it not for his alienage would be capable of acquiring real estate by purchase in this state, to purchase real estate in this state from any person capable at the time of holding an absolute title to real estate in this state: *provided*, that such alien shall in good faith, sell and convey the same within ten years from the date of his said purchase, or taking effect of this act, to some person capable at the time of acquiring and holding an absolute title to real estate under the laws of this state, other than by virtue of this section: *provided further*, that all such aliens who may have previous to the taking effect of this act, acquired any real estate by gift, devise, descent or purchase may hold the same according to the provisions of this act.

Must sell it within ten years.

Previous purchases affected.

An alien wife entitled to dower

SEC. 2491. (4.) Every married woman whose husband hereafter dies, capable at the time of the death of acquiring and holding an absolute title, to real estate in this state, though she be an alien shall be entitled to the same rights of dower in her husband's lands as if she were a resident of this state.

Aliens may acquire personal property as citizens.

SEC. 2492. (5.) All aliens who, except for their alienage, would be capable of acquiring personal property as a distributive share of an intestate estate in this state shall be capable of taking the same, and incur the like duties and liabilities in relation thereto as if they were citizens of the United States.

An alien non-resident may acquire property by devise by becoming a citizen.

SEC. 2493. (6.) If any person being a citizen of this state at the time of his decease shall have made a will bequeathing his property to a person who at the time of making such bequest was an alien non-resident, but who subsequently to the making of such bequest, became a resident, such alien shall be capable in law of becoming a devisee of such property, as well as if he was a resident of this state at the time of making such devise.

#### ARTICLE 7.

An Act to repeal sections 1410 and 1411 of the Code prescribing the descent of property.

[Passed March 15, 1858, took effect July 4, 1858; *Laws of Seventh General Assembly, Chapter 63, page 96.*]

Provisions of code modified.

SECTION 2494. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That sections 1410 and 1411 of the code are hereby repealed, and that the descent of property as prescribed by these provisions of the code be modified as follows:

Estate to be divided between parents and wife.

SEC. 2495. (2.) If the intestate leave no issue, the one-half of his estate shall go to his parents and the other half to his wife; if he leave no wife, the portion which would have gone to her shall go to his parents.

Surviving parent takes the share of both.

SEC. 2496. (3.) If one of his parents be dead, the portion which would have gone to such deceased parent, shall go to the surviving parent, including the portion which would have belonged to the intestate's wife had she been living.



SEC. 2497. (4.) If both parents be dead, the portion which would have fallen to their share or to either of them by the above rules, shall be disposed of in the same manner as if they or either of them had outlived the intestate and died in the possession and ownership of the portion thus falling to their share or to either of them, and so on, through ascending ancestors and their issue.

One-half of the estate to go to heirs of parents.

SEC. 2498. (5.) If the mother be the surviving parent as contemplated in section three of this act, she shall take only a life estate in the intestate's property, and after her death it shall go to the children of her body, if there be any, had by her deceased husband, he being the father of the intestate. If there be no such children, nor issue of such children in the descending line, then the intestate's property shall be divided between the nearest heirs of the father and mother of the intestate, share and share alike, and after such distribution is made the same rules shall be applied to any further distribution thereof, as prescribed in this act.

Mother only to have a life estate.

Property to be divided equally among nearest relations.

PRIOR LAWS. 1. An act prescribing the manner of devising land, tenements, and hereditaments, passed July 27, 1818; M. D., 1833, p. 262.

2. An act concerning the probate of wills, passed July 27, 1818; M. D., 1833, p. 288.

3. An act directing the settlement of estates of the deceased, and for the conveyance of land, in certain cases, passed April 12, 1827; M. D., 1833, p. 291.

4. An act establishing courts of probate, passed April 12, 1827; M. D., 1833, p. 297.

5. An act amending same, passed Sept. 29, 1829; M. D., 1833, p. 299.

6. An act amending same, passed March 4, 1831; M. D., 1833, p. 301.

7. An act empowering probate judges to appoint guardians to minors and others, passed April 12, 1827; M. D., 1833, p. 301.

8. Same amended, passed June 26, 1832; M. D., 1833, p. 305.

9. An act regulating suits on probate bonds, &c., passed July 27, 1818; M. D., 1833, p. 305. All the above repealed Aug. 30, 1840.

10. An act directing the descent of intestate estates, and empowering probate judges to make partition therein, passed April 12, 1827; M. D., 1833, p. 309.

11. An act concerning executors and administrators, passed April 12, 1827; M. D., 1833, p. 315.

12. An act of limitation on suits against administrators, &c., of the mode of preserving notice of sales of land, made by guardians and executors, passed July 27, 1818; M. D., 1833, p. 319.

13. An act giving certain powers to administrators, and to administrators *de bonis non*, passed July 3, 1828; M. D., 1833, p. 322.

14. An act amending the same, and extending power as to insane to probate judge, passed Sept. 23, 1829; M. D., 1833, p. 323. All the above repealed August 30, 1840.

15. An act authorizing executors and administrators to make sale of real estate, mortgaged to their testator or intestate, and also such as they shall take in execution in cases, passed July 27, 1818; M. D., 1833, p. 324.

16. An act authorizing settlement of the claims of executors and administrators in probate court by referees, passed July 27, 1818; M. D., 1833, p. 326.

17. An act concerning the contracts and bonds of administrators, executors and guardians, non-residents, passed July 27, 1818; M. D., 1833, p. 327.

18. An act giving a remedy at law against the executors and administrators of deceased joint debtors, passed July 27, 1818; M. D., 1833, p. 328. All the above repealed Aug. 30, 1840.

19. An act as to rendering judgment against the estate of deceased persons when the representative does not defend, passed July 27, 1818; M. D., 1833, p. 328.

20. An act for the speedy assignment of dower, and to prevent waste of the same, passed 1833; M. D., 1833, p. 332.

21. An act for the distribution of insolvent estates, passed April 12, 1827; M. D., 1833, p. 434.

22. An act to appoint public administrators in counties, and their duties, Jan. 19, 1838; Wis., 2d sess., No. 83, p. 279. All the above repealed Aug. 30, 1840.

23. An act establishing courts of probate, passed Jan. 17, took effect Feb. 17, 1839; I. T., 1st sess., p. 126.

24. An act to authorize appointment of public administrators, and duties, passed

Jan. 19, took effect Feb. 19, 1839; I. T. 1st sess., p. 385; repealed by the Reprint, 1843, chap. 162, p. 658.

25. An act relative to wills, executors, administrators, and the settlement of estates, passed Jan. 25, took effect May 1, 1839; I. T. 1st sess., p. 471, (repealing all in its purview); repealed by Reprint, 1843, chap. 162, p. 658.

26. An act to regulate the institution of suits by foreign executors, administrators, and guardians within this territory, passed Dec. 20, 1839; I. T., 2d sess., chap. 6, p. 8; also Reprint, 1843, p. 243.

27. "An act to amend an act relative to wills and testaments, passed Jan. 25, 1833," passed Jan. 15, 1841; I. T., 3d sess., chap. 86, p. 95; repealed by Reprint, 1843, chap. 162, p. 658, being No. 28 hereof.

28. An act relative to the probate of wills, executors, administrators, guardians, trustees of minors and probate courts, and for defining their duties, passed Feb. 13, took effect July 4, 1843; also Reprint, 1843, chap. 162, p. 658.

29. An act amending same, passed June 10, took effect July 10, 1845; I. T., 7th sess., chap. 21, p. 39.

30. An act amending that of Dec. 20, 1839; I. T., 7th sess., chap. 28, p. 49.

31. An act amending that of Feb. 13, 1843, passed Jan. 17, 1846; I. T., 8th sess., chap. 25, p. 23.

32. An act further amending, Feb. 13, 1843, passed Feb. 25, took effect March 18, 1847, 1st sess., chap. 106, p. 151.

**DECISIONS.** Every presumption is in favor of the proceedings and jurisdiction of courts of general jurisdiction. There is no presumption in favor of the jurisdiction of a limited court; but that being shown then every presumption is in favor of its proceedings; the jurisdictional averments of the record of a limited court are presumed true; jurisdiction existing, error is irremediable save by appeal; where the court has adjudicated on the fact conferring jurisdiction, such adjudication shall not be assailed collaterally, unless there was a total and not merely partial want of such fact, 4 Iowa, 77; jurisdiction of licensing court, 7 Iowa, 339, 324; 4 *ibid.*, 77 and 361; 3 Iowa, 114; petition to sell real estate, sufficiency of, 7 Iowa, 324; 4 Iowa, 77; 7 *ibid.*, 339; 4 *ibid.*, 361; 3 *ibid.*, 114; copy of account, &c., should be annexed to claim filed against estate, 4 G., 480; copy of claim with time of hearing indorsed thereon, under 1399, of Code, constitutes the notice to be served on the representatives, 4 G., 480; proceeding to sell did not abate by resignation of guardian, and license prayed for by the first was properly granted to the second guardian, 4 Iowa, 361; to set aside sale of land made by probate court, under a description, partly wrong—application made by residuary legatee, who had settled and been paid the money of purchase—not *vacated*, 4 Iowa, 315; a woman divorced from her husband for her fault, and on personal notice has no dower, 5 Iowa, 251; there can not be but one widow entitled to dower, 5 Iowa, 252; a decree of divorce can not be decreed void merely to such effect as to allow dower to the woman party thereto, and yet stand in every other effect, 5 Iowa, 252; the wife's right of dower is governed by the law of the date of the conveyance in which she did not join, 4 Iowa, 400; the law of Jan. 25, 1839, sec. 44, gave dower according to the course of the common law, 4 Iowa, 400. [But the law of Missouri territory first introduced dower here, Jan. 19, 1816; see territorial laws, Missouri, page 436.] Value of report of referees, in case of dower, 6 Iowa, 471; how assigned, 4 Iowa, 381; 6 *ibid.*, 471; dower assigned in money, 1 Iowa, 560; damages are recoverable in the action of dower, 4 Iowa, 308; what defense to claim of dower, 4 G., 453, 358; dower in pre-emption, 4 G., 358; statute of limitations, 6 Iowa, 106; dower not barred by sale under execution, when? 8 Iowa, 482; right to dower unassigned is no defense in ejectment, 8 Iowa, 360; should coverture be continuing at time of husband's death to entitle to dower, 5 Iowa, 232; devise instead of dower, 4 Iowa, 405; 2 Iowa, 552, 558; dower may be pursued at law or in equity, 6 Iowa, 106; 5 *ibid.*, 232; 4 G., 453; what creates the right to dower, 5 Iowa, 232, 251; 7 Iowa, 26; 8 *ibid.*, 132; based on the ordinance of 1787; 4 *ibid.*, 381; statute of 1839, 4 G., 168; effect of Code of 1851, 3 G., 533; 4 G., 168, 358; dower as at common law, 6 Iowa, 46; right to emblements, 3 Iowa, 533; the right to dower governed by law of date of conveyance, 4 G., 168, 358; 1 Iowa, 174; 4 *ibid.*, 381; "value" in section 1394, defined, 6 Iowa, 471; dower attaches to equitable interests, 4 G., 453; is not defeated by repeal of the dower law, 8 Iowa, 132; unless a devise is clearly intended to be in lieu of dower the wife may take both, 4 Iowa, 408; this only holds of an intestate, a husband may by will defeat all but dower, and if he dispose of part of his estate wife does not take half, although he leave no issue, 4 Iowa, 408; proof of claim as heir, 6 Iowa, 150; how to proceed against heirs to realize of them a judgment against the executor, 4 G., 283; probate of will decides nothing but due execution and publication, 5 Iowa; declarations of a testator, on making his will, are *res gestae*, and for some purpose admissible, 5 Iowa, 203; a will creates no rights till the death of the testator, 5 Iowa, 200; executory devises—estate *in futuro*—contingencies—capacity to take—charities,

&c., 4 Iowa, 252; construction of wills and charitable uses, 4 Iowa, 181; our courts of chancery have judicial power only, and can construe but not create a will; and where a devise takes no beneficial interest, and the beneficiary is not clearly indicated, such devise is void, 5 Iowa, 124; how wills are to be construed, 5 Iowa, 124; 4 Iowa, 180; takes effect only at death, 5 Iowa, 196; parol, when admissible, 5 Iowa, 196; revocation, 4 Iowa, 520; charitable devise, 5 Iowa, 124; 4 Iowa, 180; no *cy pres* here, 2 Iowa, 315; 4 *ibid.*, 252; donee not incorporated, 4 Iowa, 180; our courts have only judicial power, 5 Iowa, 124; form of question as to testator's capacity, *Pelamourges v. Clark*, June, 1859; see case of mental unsoundness, 7 Iowa, 60; a verbal disposition under belief that a will was void, and with an intention that will should be void, is not enough to revoke such will, 4 Iowa, 522; only claims arising out of personalty need be filed under section 1367, 4 Iowa, 151; section 1362 may qualify section 1373; 4 Iowa, 153; right of a foreigner as heir, 3 G., 408; preference under chap. 162 of Reprint of 1843; 4 G., 307; widow's right aside from dower, and secs. 1294, 1295, 1410, and 1411 of code of 1851, construed, 3 G., 535; her right to personalty, 6 Iowa, 44, 144; meaning of "intestate," 4 Iowa, 409; notes for wife's land given to husband pass to his representatives, 1 Iowa, 271; the laws contemplate the appointment of an administrator, and supreme court presumes it, 3 Iowa, 365; a case may need to be continued until an administrator can be appointed and have time to administer it, *ibid.*; administration may be granted upon the estate of a deceased non-resident who owns only real estate in Iowa, 7 Iowa, 324; administrator not to receive rents accruing after death of intestate, 6 Iowa, 123; oath to administrator's account, 6 Iowa, 123; secs. 1336, 1359, 1361, 1362, don't affect validity of contract made with administrator—nor power to settle pending suits, 2 Iowa, 84; secs. 1362, 1363; see 3 Iowa, 171; joinder of causes in own and in administrative capacity, not allowable, 4 G., 196; contract for sale of land by administrator, 1 Iowa, 573; executor redeeming land with money of estate and taking title in own name is trustee, 1 Iowa, 271; a widow can not settle the estate of her husband, except under administration, 6 Iowa, 137; 1 *ibid.*, 226; form of judgment against executor, 6 Iowa, 274; actions against executor, M., 436; 1 G., 26; a conveyance of land of deceased to executor void, as to creditors, 1 G., 265; how a foreign executor must proceed to sue here, 4 G., 144; but see case where executor had been by the law of the foreign state made a party to the judgment, *Greason v. Davis*, Dec., 1859; widow's right to her proportion not assailable by replevin of executor, 6 Iowa, 274; nature of a proceeding against an estate as to the judgment entry, 6 Iowa, 274; no order should be entered for the issuance of an execution, 6 Iowa, 123; in creditors' bill administrator is a necessary party, 3 Iowa, 365; he has no interest in the land of the intestate, 5 Iowa, 124; heirs must be made parties, when, *ibid.*; designation of heirs, 6 Iowa, 123; distinctness of account of guardian and executor, *ibid.*; form of judgment against executor, 6 Iowa, 274, 123.

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## TITLE XVII.

### OF THE DOMESTIC RELATIONS.

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#### CHAPTER 101.

##### HUSBAND AND WIFE.

[Code—Chapter 84.]

SECTION 2499. (1447.) The personal property of the wife does not vest at once in the husband, but if left under his control it will, in favor of third persons acting in good faith and without knowledge of the real ownership, be presumed to have been transferred to him, except as hereinafter provided. Her personal property.

SEC. 2500. (1448.) If the wife has such property which she leaves under his control she must, in order to avoid the entire surrender of her She a creditor of his estate.

interest therein, file for record with the recorder of deeds a notice, stating the amount in value of such property and that she has a claim therefor out of the estate of her husband, and if during her life time he dies or becomes insolvent she shall be deemed a preferred creditor of the estate to that amount without interest and may hold and control the same in her own right; but this preference shall not prejudice the interests of those creditors who became such after the property was thus placed under the husband's control and before the filing of the notice aforesaid, unless they had knowledge of her right in that respect.

- Proof.** SEC. 2501. (1449.) The provisions of the preceding section shall not prevent the necessity of proof on the part of the wife of the actual amount of property thus in good faith placed by her under the control of her husband, but the notice aforesaid will after the lapse of five years from the time of the recording thereof be presumptive evidence of the facts therein stated in this respect.
- Specific articles.** SEC. 2502. (1450.) Specific articles of personal property may be owned by the wife exempt from the husband's debts, although left under his control, if during his lifetime and prior to its being disposed of by him or levied upon for his debts notice of her ownership is filed for record with the recorder of deeds of the county. But such notice shall not exempt her property from liability for his debts contracted after it was left under his control and before the filing of the notice aforesaid except as against those having knowledge of her rights.
- Notice.**
- Record.** SEC. 2503. (1451.) The notices aforesaid must be recorded in the book kept for recording mortgages and conveyances of personal property and indexed in like manner.
- Stock, &c.** SEC. 2504. (1452.) In the case of bank stock, written securities, things in action, or other property which does not ordinarily pass by mere delivery or by oral contract without an indorsement, assignment, or other written evidence of such transfer, knowledge of the ownership of the wife will be presumed without the recording required by the preceding two sections, unless such property has been conveyed to the wife by the husband.
- Debts.** SEC. 2505. (1453.) Except as herein otherwise declared, the husband is not liable for the separate debts of the wife, nor is the property of the wife nor the rent nor income thereof liable for the debts of the husband. But the separate debts of the wife as herein contemplated are only those growing out of the contracts mentioned in the next section.
- Her contracts.** SEC. 2506. (1454.) Contracts made by a wife in relation to her separate property or those purporting to bind herself only, do not bind the husband.
- Expenses common.** SEC. 2507. (1455.) The expenses of the family, the education of the children, and such other obligations as come within the equity of this provision, are chargeable upon the property of both husband and wife or of either of them, and in relation thereto they may be sued jointly or the husband separately.
- Abandoned.** SEC. 2508. (1456.) Married women abandoned by their husbands may obtain authority from the district court of the county in which they reside to act and to transact business as though unmarried.
- Petition.** SEC. 2509. (1457.) The petition for that purpose must be sworn to, filed, and served as in ordinary civil actions, and issues may be joined and tried in like manner.
- Decree.** SEC. 2510. (1458.) If the fact of abandonment be established either by the default of the defendant or by proof, that fact shall be entered of record and the court shall make a decree giving the power sought.

SEC. 2511. (1459.) The court may also under such circumstances **Powers given.** authorize the wife to sue or defend in any or all cases in place of her husband, to sell or otherwise dispose of so much of the husband's property as is necessary for the maintenance of the family, and to collect debts due the husband. Deeds made and receipts and discharges executed and delivered by the wife in accordance with the power so given are valid.

SEC. 2512. (1460.) The court may in its discretion modify or revoke **Decree revoked.** its orders and decrees herein authorized.

SEC. 2513. (1461.) The husband has the same rights in relation to **Same to husband** the wife and her property as is above given to the wife, and he may have the same proceedings in like cases.

SEC. 2514. (1462.) The husband can not remove the wife nor their **Homestead.** children from their homestead without the consent of the wife, and if he abandons her she is entitled to the custody of their minor children, unless the district court upon application for that purpose shall for good cause otherwise direct.

**PRIOR LAWS.** 1. An act concerning the rights of married women, passed Jan. 2, took effect Feb. 2, 1846; I. T., 8th sess., chap. 5, p. 4.

**DECISIONS.** A married woman sued on her promissory note, answered coverture at time of making same and now, and the answer was held good defense, 5 Iowa, 427; a wife can not be sued during coverture at *law*, only on the contracts mentioned in sections 1454 and 1455, Code, and petition should state such contract, 5 Iowa, 428; the liability at law of a married woman on her contracts made during marriage, is not a personal liability, only one affecting her property, 5 Iowa, 428; an abandoned wife, self dependent, may sue and be sued as sole woman, 4 Iowa, 321; property of wife, 4 G., 231; the right of the widow in property left with her as the head of a family, 6 Iowa, 44, 137; her portion must be fixed by administration, 6 Iowa, 137; 1 *ibid.*, 226; effect of becoming administrator, *de son tort*, *ibid.*; need of ratification of lease of wife's property by her, 4 G., 54; right of dower no defense in action of right, 8 Iowa, 360; joinder of husband and wife in actions, 4 Iowa, 420, 424; wife's right to sue and be sued alone, 4 Iowa, 321; 1 G., 103, 97; 5 Iowa, 426; husband's liability for wife's debts, contracted before marriage, 4 G., 185; actions *v.* husband by trustee for maintenance of wife, 4 G., 126; under Code, wife may convey to husband, 7 Iowa, 46; 1 Iowa, 271; liability of wife—mode of charging it, 5 Iowa, 426; 1 G., 97; 2 *ibid.*, 435; suing for necessaries furnished to wife who was insane, 8 Iowa, 51.

## CHAPTER 102.

### MARRIAGE.

[Code—Chapter 85.]

SECTION 2515. (1463.) Marriage is a civil contract requiring the **A contract.** consent of parties capable of entering into other contracts, except as herein otherwise declared.

SEC. 2516. (1464.) A marriage between a male person of sixteen **When valid.** and a female of fourteen years of age is valid, but if either party has not attained the age thus fixed the marriage is a nullity or not at the option of such party made known at any time before he or she is six months older than the age thus fixed.

SEC. 2517. (1465.) Previous to any marriage within this state, a **License.** license for that purpose must be obtained from the judge of the county court of the county wherein the marriage is to be solemnized, agreeable to the provisions of this chapter.

- Same.** SEC. 2518. (1466.) Such license must not in any case be granted where either party is under the age necessary to render the marriage absolutely valid, nor shall it be granted where either party is a minor without the previous consent of the parent or guardian of such minor, nor where the condition of either party is such as to disqualify him for making any other civil contract.
- Proof.** SEC. 2519. (1467.) Unless the judge of the county court is acquainted with the age and condition of the parties for the marriage of whom the license is applied for, he must take the testimony of competent and disinterested witnesses on the subject.
- Entry of record.** SEC. 2520. (1468.) He must cause due entry of the application for the issuing of the license to be made on the records of the county court, stating that he was acquainted with the parties and knew them to be of competent age and condition, or that the requisite proof of such facts was made to him by one or more witnesses (stating their names.)
- Consent, &c.** SEC. 2521. (1469.) If either party is a minor the consent of the parent or guardian must be filed in the county office, after being admitted by the said parent or guardian or proved to be genuine, and a memorandum of such facts must be also entered on the records of the county court.
- License.** SEC. 2522. (1470.) If the judge of the county court grants a license contrary to the provisions of the preceding sections he is guilty of a misdemeanor, and if a marriage is solemnized without such license being procured the parties so married, and all persons aiding in such marriage, are likewise guilty of a misdemeanor.
- Penalty.**
- Fee.** SEC. 2523. (1471.) The license shall not be issued until the amount of one dollar has been paid into the county treasury and the receipt therefor filed with the judge of the county court.
- By whom.** SEC. 2524. (1472.) Marriages must be solemnized either:
1. By a justice of the peace, or judge of the county court of the county, or the mayor of the city, wherein the marriage takes place;
  2. By some judge of the supreme or district court of this state;
  3. By some officiating minister of the gospel, ordained or licensed according to the usages of his denomination.
- Certificate.** SEC. 2525. (1473.) After the marriage has been solemnized, the officiating minister or magistrate shall on request give each of the parties a certificate thereof.
- Penalty.** SEC. 2526. (1474.) Marriages solemnized (with the consent of parties) in any other manner than is herein prescribed are valid, but the parties themselves and all other persons aiding or abetting shall forfeit to the school fund the sum of fifty dollars each.
- Same.** SEC. 2527. (1475.) The person solemnizing marriage shall forfeit a like amount unless within ninety days after the ceremony he make return thereof to the county court.
- Return.**
- Register.** SEC. 2528. (1476.) The clerk of the county court shall keep a register containing the names of the parties, the date of the marriage, and the name of the person by whom the marriage was solemnized, which (or a certified transcript therefrom) is receivable in all courts and places as evidence of the marriage and the date thereof.
- Exception.** \* SEC. 2529. (1477.) The preceding provisions, so far as they relate to the manner of solemnizing marriages, are not applicable to marriages among the members of any particular denomination having, as such, any peculiar mode of performing that ceremony.
- Return.** SEC. 2530. (1478.) But where any mode is thus pursued which dispenses with the services of a clergyman or magistrate, the husband is

responsible for the return directed to be made to the county court and is liable to the above named penalty if the return is not made.

SEC. 2531. (1479.) Illegitimate children become legitimate by the subsequent marriage of their parents. *Illegitimates.*

PRIOR LAWS. 1. "An act regulating marriages," passed April 23, 1833; M. D., 1833, p. 329; repealed March 1, 1840, by I. T., 2d sess., chap. 25, p. 31, being No. 3 hercof.

2. An act amending same, passed June 23, 1838; Wis. special session, No. 20, p. 350; repealed March 1, 1840, I. T., 2d sess., chap. 25, p. 31, being No. 3 hercof.

3. An act regulating marriages, passed Jan. 6, took effect March 1, 1840; I. T., 2d sess., chap. 25, p. 31; also Reprint, 1843, p. 434.

4. An act supplementary thereto, passed Feb. 17, 1842; I. T., 4th sess., chap. 97, p. 87; also Reprint, 1843, p. 437.

5. An act to amend an act entitled an act regulating marriages, passed June 19, 1844.

DECISIONS. Age of consent to marry, 2 G., 329; no cause of action *v.* one who induces by fair means a minor to marry against the consent of parents, *ibid*; breach of promise of marriage, 3 Iowa, 337, and *Thurston v. Cavner*, June term, 1859.

## CHAPTER 103.

### DIVORCE AND ALIMONY.

[Code—Chapter 86.]

#### ARTICLE 1.

SECTION 2532. (1480) The district court in the county where the plaintiff resides has jurisdiction of all cases of divorce and alimony, and of guardianship connected therewith. *Jurisdiction.*

SEC. 2533. (1481.) The petition for divorce, in addition to the facts on account of which the plaintiff claims the relief sought, must state that he has been for the last six months a resident of the state and that the application is not made through fear or restraint or out of any levity, but in sincerity and truth for the purpose set forth in the petition. It must also be sworn to by the plaintiff. *Petition.*

SEC. 2534 (1482.) Divorces from the bonds of matrimony may be decreed against the husband in the following cases: *Causes.*

1. When the defendant at the time of his marriage was impotent;
2. When he had a lawful wife then living;
3. When he has committed adultery subsequent to the marriage;
4. When he willfully deserts his wife and absents himself without a reasonable cause for the space of two\* years;
5. When he is convicted of felony after his marriage;
6. When, after marriage, he becomes addicted to habitual drunkenness;
7. When he is guilty of such inhuman treatment as to endanger the life of his wife.

8. [Repealed January 24, 1855, laws of fifth general assembly, chapter 76, page 112, by a law which repealed chapter 86 of the code, and was itself repealed March 15, 1858, laws of seventh general as-

\* Made two years March 15, 1858, laws of seventh general assembly, chapter 64, page 97.

sembly, chapter 64, page 97, which last law revived all chapter 86 of the code found herein.]

SEC. 2535. (1483.) The husband may in all cases obtain a divorce from the wife for like causes.

Default.

SEC. 2536. (1484.) If the defendant does not appear and answer the petition at the proper time the court, if satisfied that the complainant is the injured party, may decree a dissolution of the marriage contract; or when the defendant can be found, it may in its discretion bring him in by attachment and compel him to answer.

Order concern-  
ing children.

SEC. 2537. (1485.) When a divorce is decreed the court may make such order in relation to the children and property of the parties and the maintenance of the wife as shall be right and proper. Subsequent changes may be made by the court in these respects when circumstances render them expedient.

#### ARTICLE 2.

An Act for the relief of all persons heretofore divorced to whom the disability to marry again has been attached, either by the law under which the divorce was had, or by decree of the court granting the same.

[Passed March 22, 1853; *Laws of Seventh General Assembly, Chapter 117, p. 236.*]

Persons divorced  
allowed to marry  
again.

SECTION 2538. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all persons heretofore divorced under or by virtue of any law of this state, whether the same may have been from the bonds of matrimony or from bed and board, and to whom by decree of the court granting such divorce or by virtue of the provisions of law under which such divorce may have been obtained, a disability to marry again may have attached, shall from and after the taking effect of this act, be restored to all the rights and privileges of an unmarried person.\*

PRIOR LAWS. 1. "An act concerning divorce," passed April 4, 1833, p. 334; repealed Aug. 30, 1840.

2. An act concerning divorce, passed Dec. 29, took effect Jan. 29, 1839; I. T., 1st sess., p. 179; repealed by Nos. 3 and 5 hereof.

3. An act concerning divorce, alimony, &c., passed Jan. 17, took effect Feb. 17, 1840; I. T., 2d sess., chap. 81, p. 120.

4. An act to amend same, passed Feb. 17, 1842; I. T., 4th sess., chap. 98, p. 87.

5. An act relative to divorce, alimony, and other purposes, passed Jan. 20, 1843; also, Reprint 1843, chap. 65, p. 237.

6. An act amending same, passed Jan. 17, 1846; I. T., 8th sess., chap. 24, p. 23.

7. Code of 1851, chap. 86.

8. "An act to amend the law in relation to divorce and alimony," passed Jan. 24, took effect July 1, 1855, 5th sess., chap. 76, p. 112; repealed by an act to amend the law in relation to divorce and alimony, passed March 15, took effect July 4, 1858, 7th sess., chap. 64, p. 97.

DECISIONS. A case where the fact of petition being unsworn did not defeat jurisdiction, 5 Iowa, 254; a desertion commencing before the passage of the act under which the proceedings are had, and continued after its passage the full term demanded by the act, entitles to a divorce thereunder, 5 Iowa, 254; to grant a divorce under the welfare clause, the court in a sound discretion must be fully satisfied that the permanent, moral, mental, and social welfare of the parties and their children requires it, and it should not be granted to the wrong doer, 5 Iowa, 212; adultery may be inferred indirectly from circumstances when they being all taken are inconsistent with the hypothesis of innocence, and consistent only with that of guilt, 5 Iowa, 208; alimony, 1 Iowa, 9; 4 Iowa, 509; 4 G., 26, 29; sec. 1485 applies to divorce *a vinculo*, 5 Iowa, 541; the permanent alimony may be money or land, and should be determined by respect to the exact interests of each actual

\* The law of January 24, 1855, allowed a divorce only from bed and board.



party, 5 Iowa, 222; after divorce *a vinculo*, court may modify the decree as to children and property, 5 Iowa, 544; the form of making this application was by motion and hearing on merits, and the objection to the form was made too late in the appellate court, 5 Iowa, 543; a proceeding to modify a decree as to alimony abates by the death of the former husband, defendant, 4 Iowa, 515; divorce regulated only by the legislative department, 2 G., 604; a legislative divorce bars dower, *ibid.*; divorce bars dower while the decree remains of force, 5 Iowa, 232; desertion continued, the statutory term after the taking effect of the law is good cause for divorce, 5 Iowa, 232, 254; the right to a divorce, actually in court, is not divested by a repeal of the law, 5 Iowa, 204; resides, and resident, defined, 1 Iowa, 36; *bona fide* residence, 4 G., 266; where cause arose out of the state, 4 G., 266; the affidavit not a jurisdictional fact, 5 Iowa, 232, 254; what the petition should state, 4 G., 324; no divorce to wrong doer, 5 Iowa, 204; 4 G., 324; as to the clause "peace and happiness," see 1 Iowa, 40 and 130; 5 Iowa, 204.

## CHAPTER 104.

### MINORS.

[Code—Chapter 87.]

SECTION 2539. (1487.) The period of minority extends, in males <sup>Majority.</sup> to the age of *twenty-one* years, and in females to that of *eighteen* years, but all minors attain their majority by marriage.

SEC. 2540. (1488.) A minor is bound, not only by contracts for <sup>His contracts.</sup> necessaries, but also by his other contracts unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money or property received by him by virtue of the contract and remaining within his control at any time after his attaining his majority.

SEC. 2541. (1489.) No contract can be thus disaffirmed in cases <sup>Bound.</sup> where, on account of the minor's own misrepresentations as to his majority or from his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting.

SEC. 2542. (1490.) Where a contract for the personal service of a <sup>Payment to</sup> minor has been made with him alone, and those services are afterwards <sup>minor.</sup> performed, payment made therefor to such minor in accordance with the terms of the contract is a full satisfaction for those services, and the parent or guardian can not recover therefor a second time.

PRIOR LAWS. 1. An act empowering probate judges to appoint guardians for minors, passed April 12, 1827; M. D., 1833, p. 301.

2. An act amending same, passed June 26, 1832; M. D., 1833, p. 305. The above repealed Aug. 30, 1840.

3. An act concerning minors, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 347; also Reprint, 1843, p. 430.

DECISIONS. A minor may be sued in his own name, but can appear only by guardian, and he must have his day in court by proper guardian, before he can be divested of his estate, 5 Iowa, 193; how minor must sue and be sued, 5 Iowa, 157; case of minor assuming to be of majority, an infant trustee may be compelled to convey, 6 Iowa, 353; infant engaged in business, 1 Iowa, 380; M., 82; infant can not disaffirm his deed, if he represented himself of age, 6 Iowa, 353; right of parents to infant's services and compensation therefor, 1 Iowa, 356; presumption of relinquishment of such right, 8 Iowa, 116; 1 Iowa, 356; custody of children in divorce cases, 4 G., 216; marriage of minor, 2 G., 329; when infant is bound by decree—

time to show cause against—nature of the showing—diligence—when he may object to decree—effect of admissions by his guardian—how guardian appointed—affidavit evidence—not ground for vacating decree—can title of innocent vendee under such decree, be affected by its vacation? 8 Iowa, 17.

## CHAPTER 105.

### GUARDIANSHIP OF MINORS.

[Code—Chapter 88.]

#### ARTICLE 1.

- Natural guardians.** SECTION 2543. (1491.) The father is the natural guardian of the persons of his minor children. If he dies or is incapable of acting the mother becomes the guardian.
- Guardian appointed.** SEC. 2544. (1492.) The natural and actual guardian of any minor child may by will appoint another guardian for such minor. If, without such will, both parents be dead or disqualified to act as guardian the county court may appoint one.
- Of property.** SEC. 2545. (1493.) Although the parents are living and of sound mind, yet if the minor has property not derived from either of them a guardian must be appointed by the county court to manage such property.
- Same.** SEC. 2546. (1494.) The father, or in case of his death, absence, or incapacity, the mother may be appointed the guardian to take charge of the property of his minor child, if deemed by the court a suitable person for that purpose.
- Choosing guardian.** SEC. 2547. (1495.) If the minor be over the age of fourteen years and of sound intellect he may select his own guardian, subject to the appointment of the court.
- Bond and oath.** SEC. 2548. (1496.) Guardians appointed to take charge of the property of a minor must give bond with surety to be approved by the court, in a penalty double the value of the personal estate and of the rents and profits of the real estate of the minor, conditioned for the faithful discharge of their duties as such guardians according to law. They must also take an oath of the same tenor as the condition of the bond.
- Inventory.** SEC. 2549. (1497.) Within forty days after their appointment they must make out an inventory of all the property of the minor, which shall be appraised in the same manner as the property of a deceased person. The inventory must be filed in the office of the county judge.
- Powers.** SEC. 2550. (1498.) Guardians of the persons of minors have the same power and control over them that parents would have if living.
- What guardians must do.** SEC. 2551. (1499.) Guardians of the property of minors must prosecute and defend for their wards. They must also in other respects manage their interests, under the direction of the court. They may thus lease their lands or loan their money during their minority, and may do all other acts which the court may deem for the benefit of the wards.
- Real estate.** SEC. 2552. (1500.) When not in violation of the terms of a will by which a minor holds his real property, it may, under the discretion of the county court, be sold or mortgaged on the application of the guardian,

either when such sale or mortgage is necessary for the minor's support or education, or where his interest will be thereby promoted by reason of the unproductiveness of the property or of its being exposed to waste or of any other peculiar circumstances.

SEC. 2553. (1501.) The petition for that purpose must state the Petition. grounds of the application, must be verified by oath, and a copy thereof with a notice of the time at which such application will be made to the court must be served personally upon the minor, at least ten days prior to the term fixed for such application.

SEC. 2554. (1502.) The court in its discretion may direct a post- Publication ponement of the matter, and may order such farther publication through the newspapers or otherwise as it may deem expedient.

SEC. 2555. (1503.) It may also direct a reference for the purpose Of reference of ascertaining the propriety of ordering the sale or mortgage as applied for.

SEC. 2556. (1504.) Before any such sale or mortgage can be exe- Bond. cuted the guardian must give security to the satisfaction of the court, the penalty of which shall be at least double the value of the property to be sold or of the money to be raised by the mortgage, conditioned that he will faithfully perform his duty in that respect and account for and apply all moneys received by him under the direction of the court.

SEC. 2557. (1505.) When the application for the sale of property is Costs. resisted the court may in its discretion award costs to the prevailing party, and may when satisfied that there was no reasonable ground for making the application direct the costs to be paid by the guardian from his own funds.

SEC. 2558. (1506.) Deeds may be made by the guardian in his own Sales approved name, but they must be returned to the court and the sale or mortgage be approved before the same are valid.

SEC. 2559. (1507.) The same rule that is prescribed in the sale of Directions real property by executors shall be observed in relation to the evidence necessary to show the regularity and validity of the sales above contemplated.

SEC. 2560. (1508.) No person can question the validity of such sale Validity after the lapse of five years from the time it was made.

SEC. 2561. (1509.) A failure to comply with any order of the court Breach of bond in relation to guardianship shall be deemed a breach of the condition of the guardian's bond, which may accordingly be put in suit by any one aggrieved thereby, for which purpose the court may appoint another guardian of the minor if necessary. The court may also commit him to jail until he complies with such order.

SEC. 2562. (1510.) Guardians of the property of minors must Guardians to account account on oath annually, or oftener if required by the court. It may also direct them to give new or supplemental security, or may remove them for good cause shown which cause must be entered on the records.

SEC. 2563. (1511.) Where a new guardian is appointed the court New guardian may order the effects of the minor which are in the hands of his predecessor to be delivered up to such new guardian.

SEC. 2564. (1512.) The foreign guardian of any non-resident Foreign guard-  
ians. minor may be appointed the guardian of such minor by the court of the county wherein he has any property, for the purpose of selling or otherwise controlling that and all other property of such minor within this state.

SEC. 2565. (1513.) Such appointment may be made upon his filing Same. in the office of the judge of the county wherein there is any such prop-

erty, an authenticated copy of the order for his appointment. He shall thereupon qualify like other guardians except as in the next succeeding section.

Same.

SEC. 2566. (1514.) Upon the filing of an authenticated copy of the bond and the inventory rendered by the guardian in the foreign state, if the court is satisfied with the sufficiency of the amount of the security it may dispense with the filing of an additional bond.

Compensation.

SEC. 2567. (1515.) Guardians shall receive such compensation as the court may from time to time allow. The amount allowed and the service for which the allowance was made must be entered upon the records of the court.

## ARTICLE 2.

An Act requiring Guardians to account for the Property of Minors.  
[Passed Jan. 22, 1853; Laws of Fourth General Assembly, Chapter 56, page 93.]

Guardians to render account.

SECTION 2568. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all guardians of minors, hereby are required to appear at least once in each year before the county judge, and render an account of all moneys or other property in their possession, together with all the interest which may have accrued on moneys loaned, belonging to the minor or minors.

Liability.

SEC. 2569. (2.) In case the said guardian shall fail to appear before the county judge within the time above specified, he shall forfeit and pay into the county treasury the sum of fifty dollars as in other actions of misdemeanor.

## ARTICLE 3.

An Act to amend the Law in relation to Executors, &c.  
[Passed Jan. 24, 1853, took effect July 1, 1853; Laws of Fourth General Assembly, Chapter 86, page 144.]

Notice.

SECTION 2570. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That in all cases where any order of the county or probate court has been or hereafter may be made, requiring any executor, administrator or guardian of any estate or person to do or perform any particular thing or things in relation to said estate or person, and notice of such order can not be personally served on such executor, administrator or guardian, service of the same be made and had by publication of such notice in some weekly newspaper published in said county for four weeks in succession.

Publication.

Nearest county.

SEC. 2571. (2.) When there is no newspaper published in such county, then said notice may be published in the newspaper published nearest to the county seat of the county in which said order is made, which publication may be proved as required in like cases in the district court.

Effect.

SEC. 2572. (3.) Service made as above shall be as effectual as if personally served, and trials and proceedings may be prosecuted or commenced, had and maintained in all respects as if such notice or notices, order or orders had been personally served.

PRIOR LAWS. 1. An act empowering probate judge to appoint guardians to minors and others, passed April 12, 1827; M. D., 1833, p. 301.  
2. Same amended, passed June 26, 1832; M. D., 1833, p. 305.  
3. An act providing mode of preserving proof of guardian's notice of sales, passed July 27, 1818; M. D., 1833, p. 319.

4. An act allowing guardian's sale of estate of *non compotes*, passed Sept. 23, 1829; M. D., 1833, p. 323.

5. An act regulating chancery proceedings, section 40, and on, passed April 23, 1833; M. D., 1833, p. 362.

All the above repealed Aug. 30, 1840.

6. An act concerning guardians, &c., passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 347.

DECISIONS. Under the law of Jan. 25, 1839, Reprint of 1843, p. 430, a guardian was such both of property and person, and proceedings to sell land commenced by one might be continued by another guardian without a new notice, and the record of the county court averring notice will not be allowed to be collaterally assailed, 4 Iowa, 361; proceedings to sell do not abate by reason of resignation of guardian, 4 Iowa, 361; the power to manage property of minors is derivable only from county court, 4 G., 207; oath of, 3 Iowa, 114; 7 *ibid.*, 339; duty and compensation of guardian, 6 Iowa, 123; jurisdiction in guardian sales, 4 Iowa, 77; 3 *ibid.*, 114; 7 *ibid.*, 324, 339; 5 Iowa, 157; the limitation of sec. 1508 don't apply, when? 3 Iowa, 114; approval and delivery of deed of guardian, 4 Iowa, 361; this approval is not merely a formality, and the approval is of the sale, and not of the mere deed, 4 Iowa, 366; the appellate court will only review points made in the court below, 5 Iowa, 199.

## CHAPTER 106.

### MASTER AND APPRENTICE.

[Code—Chapter 89.]

SECTION 2573. (1516.) Any minor child may be bound to service Minors. until the attainment of the age of legal majority as hereinafter described.

SEC. 2574. (1517.) Such binding must be by written indenture By indenture. specifying the age of the minor and the terms of the agreement. If the minor is more than twelve years of age and not a pauper the indenture must be signed by him of his own free will.

SEC. 2575. (1518.) A written consent must be appended to, or in- Consent. dorsed upon, such agreement and signed by one of the following persons, to wit:

1. By the father of the minor; but if he is dead, or has abandoned his family, or is for any cause incapacitated from giving his assent, then

2. By the mother; and if she be dead, or unable, or incapacitated for giving such consent, then

3. By the guardian; and if there be no guardian then by the judge of the county court.

SEC. 2576. (1519.) The judge of the county court may bind minors Paupers. who are paupers, till they have attained the age of majority, without obtaining their assent.

SEC. 2577. (1520.) The written indenture must in that case be signed by the master and said judge.

SEC. 2578. (1521.) The indenture must in all cases where there is Indentures. a parent or guardian be in three parts, one being left with the master, another with the county judge, and the third with the person by whose assent he is bound.

SEC. 2579. (1522.) The powers, liabilities, and duties of the master Powers, rights, &c. and the rights of the apprentice are the same as those of parent and child respectively, except as to inheritances and except as is otherwise provided by law.

- Duty.** SEC. 2580. (1523.) The parent, guardian, or officer, by whose act or consent any minor is thus bound must watch over the interest of the minor, and if the case require must enter complaint as provided for in the following section.
- Complaint against master.** SEC. 2581. (1524.) Upon complaint by the minor or by any other person made to the judge of the county court, stating under oath that the master is ill-treating his apprentice or is in any other manner palpably failing in the discharge of his duty in regard to him, and stating the particulars with reasonable certainty, the court shall summon the master to appear and answer such complaint.
- Service.** SEC. 2582. (1525.) The complaint with the proper notice indorsed thereon must be served and returned in the same manner as in the commencement of an action in a justice's court and the time for appearance shall be regulated by the same rules.
- Answer. Issue.** SEC. 2583. (1526.) The answer of the master must also be under oath and if any issue be joined thereon it must be tried as in other cases in the county court.
- Judgment.** SEC. 2584. (1527.) If the court or jury before whom the case is pending finds the cause of complaint, admitted by the master or proved upon the trial, to be of sufficient magnitude to justify the discharge of the minor from farther service, judgment shall be rendered accordingly and a certificate of such judgment placed in said minor's hands.
- Appeals.** SEC. 2585. (1528.) From any judgment in such cases, either the minor or the master may appeal to the district court in the same manner as is provided for in ordinary cases.
- No bar.** SEC. 2586. (1529.) The above proceedings form no bar to the bringing of a suit by or on behalf of the minor for damages or for compensation for services.
- Complaint v. apprentice.** SEC. 2587. (1530.) If the apprentice, bound as aforesaid, refuses to serve according to the terms of the indenture, upon complaint made in the manner aforesaid, the judge shall issue a warrant to cause the apprentice to be brought forthwith before him and shall also cause notice of the proceedings to be given to the parent, guardian, or officer, by whose act or consent the minor was bound as an apprentice, if to be found in the county.
- Time for answer.** SEC. 2588. (1531.) A reasonable space of time not exceeding three days shall be allowed to the minor to consult with his parent, guardian, or other friends previous to making his answer to the complaint.
- Proceedings.** SEC. 2589. (1532.) The answer must be made, and the issue thereon tried, in the manner hereinafter provided.
- Discharged.** SEC. 2590. (1533.) If he shows sufficient cause for refusing to serve he may be discharged from service in the manner hereinbefore provided.
- Released from indentures.** SEC. 2591. (1534.) Instead of proceeding as aforesaid the master may, for any refusal to serve or for any gross misbehaviour on the part of the apprentice, file a complaint for the purpose of releasing himself from the force and effect of the indenture aforesaid.
- Proceedings.** SEC. 2592. (1535.) Proceedings shall thereupon be had similar to those provided for in case of a complaint by or in behalf of the apprentice, and judgment rendered in like manner, with the same right of appeal.
- Dissolution.** SEC. 2593. (1536.) The death of the master or his removal from the state works a dissolution of the indenture, unless otherwise provided therein or unless the apprentice elects to continue in his service. And in the event of a dissolution, the apprentice shall receive such allowance

for services previously rendered as may be thought necessary under the circumstances of the case.

SEC. 2594. (1537.) Upon complaint being made to the district court of the proper county, verified by affidavit, that the father or mother of a minor child is, from habitual intemperance and vicious and brutal conduct, or from vicious, brutal and criminal conduct towards said minor child, an unsuitable person to retain the guardianship and control the education of such child, the court may if it find the allegations in the complaint manifestly true, appoint a proper guardian for the child, and may if expedient also direct that such child be bound as an apprentice to some suitable person until he attains his majority. But nothing herein shall be so construed as to take such minor child if the mother be a proper guardian. Natural guardian removed.

SEC. 2595. (1538.) The same proceedings may take place and a same like order be made where the mother, who has for any cause become the guardian of her minor child, is in like manner found to be manifestly an improper person to retain such guardianship. Same

SEC. 2596. (1539.) The complainant in such cases must be sworn to his complaint and file it in the office of the judge, and a copy thereof, with a notice thereon indorsed stating the time when the matter will be brought before the district court for adjudication, must be served personally on the parent from whom the guardianship is sought to be taken at least ten days before the time so fixed for the adjudication. Proceedings.

SEC. 2597. (1540.) Issues joined shall be tried in the same manner as in ordinary civil actions. Issue.

SEC. 2598. (1541.) Preference shall be given to such cases over the ordinary business of the court, but trials actually commenced need not be suspended for that purpose. Preference.

SEC. 2599. (1542.) The master shall send the said minor child, after the same be six years old, to school at least four months in each year if there be a school within the district, and in all cases and at all times the master shall clothe the minor child in a comfortable and becoming manner. Treatment of minor.

PRIOR LAWS. 1. An act concerning apprentices and servants, passed April 12, 1827; M. D., 1833, p. 344.

2. An act concerning apprentices and servants, passed April 12, 1827; M. D., 1833, p. 516. The above repealed Aug. 30, 1840.

3. An act concerning apprentices and servants, passed Jan. 18, took effect Feb. 18, 1839; I. T., 1st sess., p. 47; also Reprint, 1843.

4. An act to regulate blacks and mulattoes, passed Jan. 21, took effect Feb. 21, 1839; I. T., 1st sess., p. 65; also Reprint, 1843, p. 98.

## CHAPTER 107.

### ADOPTION OF CHILDREN.

An Act to authorize and regulate the Adoption of Children.

[Passed March 16, 1858, in force March 24, 1858; Laws of Seventh Session, Chapter 67, page 102.]

SECTION 2600. (1.) *Be it enacted by the General Assembly of the State of Iowa,* Any person competent to make a will is authorized in Any person may adopt child.

manner hereinafter set forth, to adopt as his own, the minor child of another, conferring thereby upon such child all the rights, privileges, and responsibilities which would pertain to the child, if born to the person adopting in lawful wedlock.

The consent of the parent, or of the mayor, or the county judge, must be obtained in writing.

SEC. 2601. (2.) In order thereto, the consent of both parents, if living and not divorced or separated, and if divorced or separated, or if unmarried, the consent of the parent lawfully having the care, and providing for the wants of the child, or if either parent is dead, then the consent of the survivor; or if both parents be dead, or the child shall have been and remain abandoned by them, then the consent of the mayor of the city where the child is living, or if not in a city, then of the county judge of the county where the child is living, shall be given to such adoption, by an instrument in writing, signed by the parties or party consenting, and stating the names of the parent, if known the name of the child, if known, the name of the person adopting such child, and the residence of all if known, and declaring the name by which such child is hereafter to be called and known, and stating also that such child is given to the person adopting, for the purpose of adoption as his own child.

Instrument of adoption acknowledged and recorded in the same manner as deeds.

SEC. 2602. (3.) Such instrument in writing shall be also signed by the person adopting, and shall be acknowledged by all the parties thereto in the same manner as deeds affecting real estate are required to be acknowledged: *provided*, that when both parents of the child execute the same, the mother shall be examined apart from her husband, by the officer taking the same, and he shall certify whether or not she executed the same freely and without compulsion or undue influence of her husband, and if not the instrument shall not be valid; and when duly acknowledged, the same shall be recorded in the county where the person adopting resides in the office, and with the record of deeds of real estate, and shall be indexed with the name of the parent by adoption as grantor, and the child as grantee in its original name if stated in the instrument.

The relations of child changed.

SEC. 2603. (4.) Upon the execution, acknowledgment and record of such instrument, the rights, duties and relations between the parent and child by adoption shall thereafter in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth.

Maltreatment subjects adopted parent to be deprived of child.

SEC. 2604. (5.) In case of maltreatment committed or allowed by the adopted parent, or palpable neglect of duty on his part, toward such child, the custody thereof may be taken from him and entrusted to another at his expense if so ordered by the court, and the same proceedings may be had therefor so far as applicable as are authorized by law in such a case in the relation of master and apprentice, or the court may, on showing of the facts, require from the adopted parent, bond with security, in a sum to be fixed by him, the county being the obligee, and for the benefit of the child, conditioned for the proper treatment and performance of duty toward the child, on the part of the parent: *provided*, that no action of the court or judge in the premises shall affect or diminish the acquired right of inheritance on the part of the child, to the extent of such right in a natural child of lawful birth.



# PART THIRD.\*

OF THE COURTS, AND THE PROCEDURE THEREIN.

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## CODE OF CIVIL PRACTICE AT LAW AND IN EQUITY.†

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### TITLE.

*Be it enacted by the General Assembly of the State of Iowa, as follows :*

This Act shall be known as the Code of Civil Practice.

### CHAPTER 108.‡

#### PRELIMINARY PROVISIONS.

SECTION 2605. Remedies in civil cases in the courts of this state, Two classes of remedies. are divided into two classes—1st, Actions ; 2d, Special Proceedings.

SEC. 2606. A civil action is a common proceeding in a court of justice, by one party against another, for the enforcement or protection of a private right, or the redress or prevention of a private wrong. It may also be brought, in certain cases, for the recovery of a penalty or a forfeiture. Civil action.

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\* This Code of civil practice stands in the place of the "PART THIRD" of the Code of 1851, but it is not divided into titles as that was.

† With this Code of civil practice, the commissioners also presented a report in regard to which they say :

"Some notes showing the spirit in which the act is wrought out,—the object sought to be attained—the codes consulted and laid under contribution—the history and illustration of some sections thereof, and the opinions of distinguished legal men on other leading sections, as well as our reasons in recommendation thereof, will be found placed after the act."

That report or rationale, which extends over about 175 pages, will be found to contain much which may be of value in getting a correct conception of the Code of civil practice. It is not supposed that such report will be imperative on the construction of the act, but such reports have always been consulted as suggestive.

‡ This chapter is taken from Kentucky, which state agrees with us in maintaining a limited dissimilarity between proceedings, asking legal and those asking equitable relief. The reformed practice of New York, which is used now in several states, ignores the distinction of ordinary and equitable, and demands all sorts of rights by one mode, which is a simple statement of the facts entitling thereto. The departure of this Code from that system is based upon a supposed requirement of the constitution not conceded by the Code commissioners, but deferred to because so fixed in the legal mind of Iowa. See Report on Civil Code, and also note, page 450.

Special proceed-  
ing

SEC. 2607. Every other remedy in a civil case is a special proceeding.

The proceeding supplementary to an execution is a special proceeding, per Willard, J., in *Davis v. Turner*, 4 P. R., 190, 192; and the proceeding to assess damages upon laying out a plank road, under chapter 210, of the laws of 1847, is most undoubtedly what under the Code is denominated a special proceeding, per Mason, J., *ex parte Ransom*, 3 Code Rep., 148. Cited and approved, 1 Kernan, 277.

The proceeding upon a bond taken to suspend the sale of personal property under an execution, can not be considered an *action* but more properly comes within that class of remedies denominated *special* or *summary* proceedings, and no written pleadings are allowable. *Watson v. Gabbey*, 18 B. M., 662.

Forms abolished.

SEC. 2608. The forms of all actions and suits heretofore existing are abolished; and hereafter, there shall be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be called a civil action.\*

\* As the report of the commissioners on civil practice is difficult of obtainment, I here insert a part of it on the subject of this section—the abolition of forms and actions.

In the earliest practice of law, common sense presided, and the plaintiff stated the facts which he considered entitled him to the remedy which he demanded. These facts were sworn to, and of course could with no propriety include legal conclusions. The chancellor, to whom was presented this statement, who in such affairs, represented the king, issued a writ to the defendant, ordering him to do the thing demanded, or if he did not, to state in some court his reason for refusal.

There was then no division of tribunals into legal and equitable, and the only question was this—has the plaintiff *rights* which should be adjudged to him?

The chancellor had not long issued such writs before he and his clerks began to give names to them—as debt, covenant, detinue, replevin, &c., up to the number of sixty or more names. And soon they came to confound *names* with *things*, and then when a demand of justice arose, the facts of which had not been before presented, and so could not be classed under any of the names which had been given to writs, they said there is no remedy by any writ. That meant, we can not confer the right on any court of law to try this case, by issuing to such court a power to try the same, because we find no precedent for it—we have not done so before. For it was also true, that this writ was an authority to the court to which sent, to try the cause recited in it, if the defendant did not do the duty required. Now, it was very evident that the state was established to do justice, and if the chancellor could not furnish an order to the defendant to do justice, or to a court to make him do it, the remedy must be demanded of the king himself. So parties who stated a *new class* of facts, and so could not obtain the original writ, went to the king himself and demanded justice. This was nothing new to the king because he had been accustomed a little before this time to have justice done without the intervention of any writs, by trying causes in his own hall. But as the chancellor had been substituted for him in issuing the writ, the king in all such cases now came to send the parties to the chancellor, with the understanding that the chancellor should, instead of submitting it to any other court by a writ, try it himself; and this was the origin of *chancery*, for this last tribunal was so called. To overcome this difficulty, and provide for justice in the regular courts, a statute was passed, which was intended to allow the chancellor, in *all* new cases, to make a writ, resembling as near as might be, the writs before issued in similar cases; but he was so wedded to the letter that he failed to see its purpose; besides he was, probably, desirous of preserving his new jurisdiction as a trier of causes, and so he only made another writ or two, which, whilst these very much enlarged the jurisdiction of common law courts yet left it possible for many cases to arise which could not be included within any writ, and so could get into no common law court. The result was as had before been, that new cases arose which had to go before the chancellor, and thus increase the business and consequence of this tribunal; the new tribunal called *chancery*.

Now it so happened that this chancellor was the keeper of the king's conscience, and therefore a priest; and because a priest, he was chiefly, and indeed largely conversant with the Roman law; and by that law, which at that time was the most excellent in equity, and good conscience, and morality, and logic, a different mode of procedure was established from that which existed in England by the common law, and so he, the chancellor, in the causes tried before him, introduced the *forms* of the Roman law. This law was much less fettered with technicality than the common

The code does not change the law which determines what facts shall constitute a cause of action, though, by reducing all forms of action to one, it changes the question, whether the facts show a cause of action in trespass, trover, assumpsit, or any other particular form, into the question whether the petition shows a right of action in any form—by showing a right in the plaintiff, and an injury to that right by the defendant, which is to be determined by the general rules of law, respecting rights and wrongs, as established by long usage in particular actions. *Hill, for Wintersmith v. Barrett, etc.*; 14 B. M., 85.

law, and was then much more informed with life, much better adapted as an appliance of justice than any other known. It also occurred thereupon, when this last fact became understood, that whenever the common law formula was insufficient for the attainment of justice, the more pliable formula used by the chancellor was resorted to. Now, these courts had fees and honors attached to them; the officers whereof began to struggle, each with the other, for a more extended and more lucrative jurisdiction, so that between 13 Richard II, and Henry VI, during eighty years, there raged between them a hot contest for power.

The people also took a part in this struggle on the side of law, and for a time it seems to have been feared that chancery would swallow up the dearest rights of our race. Year after year the commoners petitioned parliament to prevent the issuance of the subpoena of chancery, protesting that they had a right to the trial by jury and by battle, and denouncing the introduction of a foreign law of procedure. Officers serving the subpoena were in cases treated with great indignities, being compelled, sometimes, to eat it. The law courts countenanced disobedience to equitable process by granting the habeas corpus to relieve those restrained for disobedience thereto. In process of time, much that had been clear law jurisdiction, was usurped by the chancellor, and became also equitable jurisdiction, and soon much that had become of chancery jurisdiction, ceased to be of law jurisdiction; and while there was a large ground common to both, each slowly began to demark its jurisdiction, and in the reigns of Elizabeth and James, the separation of equity from law was complete.

The court of chancery had not then the jurisdiction it has now, but one less settled, and much more extended, being tempered largely by conscience and honesty rather than by precedent—a jurisdiction which has now become as fixed as that of law, and is as much observant of precedent.

Now the chief differences of procedure in these two tribunals were, that in law, pleadings were narrowed down till it was supposed that only *one* fact was in dispute. The reasons given for this demand was, that juries were of ignorant men, and could not well understand any but the plainest affirmative and negative, and that as they might be punished for rendering a wrong verdict, it was unjust to subject them to that risk, by accumulating points of dispute. In equity the pleadings were at first of the same form, but soon the number of pleadings were abridged, so that many issues might be found in the same case, and an answer followed by a merely formal replication denying it, completed the mutual altercation.

At first, in both courts, proof was taken the same way and oral—but deposition testimony came to be taken and used, though not exclusively, in chancery, many years before it was allowed to be used at law, so that men went into chancery to obtain written testimony, which they could not get at law. Again the party could not make his adversary testify at law, and could in chancery, and so instead of the simple mode of putting his adversary on the witness stand, the party needed to go into chancery, and file a bill against him asking answers to questions therein propounded, and if the party wanting the testimony was a defendant in some other suit, perhaps asking also, that such suit be stopped till he get such answer—having got which, he could come back to the law court and announce himself ready for trial. The modes of trial were also dissimilar. At law, what was called an issue of fact, though it was very seldom purely fact, and very seldom simply one fact, was tried by various modes, from the duel to the jury. But the jury of early times was not the institution now so called. It was of various numbers as 6, 8, 12, 13, 16, 24, &c. It did not require unanimity. It might decide on belief. It decided on its own knowledge. Indeed it possessed, for years, the function of the judge and the witness; and we know comparatively little about its real powers.

In chancery the chancellor might try the cause himself,—he had no jury as part of his court,—it was urged against his having one, that if he had, he might usurp all jurisdiction, by inventing new writs and making them returnable to himself, and it was also said that the chancellor could not try any facts, which he disproved by his constant practice. Perhaps this saying grew out of the circumstance that then, as now, equitable cases were chiefly cases wherein there were few facts in dispute, and the fact that *some* issues must be tried by juries. But he did, when he pleased,

Plaintiff and defendant.	SEC. 2609. In such action the party complaining is known as the plaintiff, and the adverse party as the defendant.
Ordinary and equitable.	SEC. 2610. The proceedings in a civil action may be of two kinds; 1, ordinary—2 equitable.
Equitable when?	SEC. 2611. The plaintiff may prosecute his action by equitable proceedings, in all cases where courts of equity, before the adoption of this

send facts disputed out to the law courts to be tried, and when the finding was sent back to him, he might, save in some cases, ignore it, and send it back to another jury, or find another way, just as pleased himself.

The principle of decision in a common law court, was largely based on the idea of compensation by damages. This would grow out of the fact, that early, the remedies were simple; and yet an action at law was not so much confined to damages, as some cursory readers have supposed, for in early times there were a class of writs whose office was to prevent injustice being done, and we will quote a little in this regard from a learned English writer. Finlason, pp. 10, 11, 12, 13, says:

"In the 'Mirror of Justice' the chancery is spoken of as the seat and source of the common law jurisdiction; and in Bracton, equity is spoken of as an attribute of legal justice. Nor can there be any ground to think that in ancient times there was any such separation between the two jurisdictions, in so far as legal rights were concerned, as that a court of law could not grant all the remedy and relief for an injury thereto as the court of chancery. The most ancient forms of our writs are all, except in the case of debt, directed to enforce the doing or not doing of acts of every kind. Thus they commanded the defendant that he "render an account," or that he "keep his covenant," with the plaintiff, or that he render to the plaintiff his manor, or his horse, cup, sheep or book, or that he permit the plaintiff to put down a market, set up to the nuisance of his fair, or that he "show cause why he has straightened a certain way," or why he "deforceth the plaintiff of his term," or that he permit the plaintiff to present to his church, or that he unjustly vex not the plaintiff, nor permit him to be vexed, concerning the freehold he holds of the defendant, or that the defendant do *full right* to the plaintiff of her dower, or his freehold, &c. In some cases, as still in replevin, the writ was to the sheriff, commanding him to do right, as to replevy the plaintiff his cattle, or to cause justice to be done to him. And it was only in cases in which from the very nature of the grievance it could only admit of pecuniary compensation, as debt or deceit, that damages in money formed the sole claim.

In process of time, however, it is very easy to see how, the courts of law ceased to exercise the power of compelling to do, or forbear doing, any acts in respect to real or personal property, except so far as to enforce delivery of goods or premises, and payment of money or pecuniary compensation, although in the real actions, in actions of detinue, replevin and ejectment—to this day remaining—and in some old writs which have long been obsolete, the ancient principle of doing full right to the party who asserted a legal claim in a court of law, continued to be carried out. It was only by degrees the change took place. No later than the reign of Edward IV, we meet in the year books such observations as these: "If men were (good) pleaders (*i. e.* sound lawyers,) they need not go from the common law, and the Queen's Bench could grant an injunction."

The struggle which ensued in the succeeding reigns between the courts of law and equity, was not whether courts of law could do equity, but whether courts of equity could overturn law. In the reign of Henry VI, we find a decree in chancery for canceling a bond pleaded at law: in the next reign, we find several cases in which the question was whether, as the party had no remedy at law, he could have any in chancery. In the reign of Henry VIII, Sir T. Moore's vast abilities were devoted to the establishment in chancery of an equitable jurisdiction, the need of which was apparent to control law, since law had ceased to embrace the elements of equity, as it had done in the reign of Henry III. And in the reigns of Elizabeth and James, the victory was finally determined in favor of the court of chancery; and law having lost equity, equity triumphed over law. At that time, of course the separation of equity from law was complete; and the court of chancery and law each commenced a disastrous career of litigation in distinct jurisdictions, in which it was too often found that suitors could get no equity at law, nor justice either in law or equity. This was the end of the perversion of pleading and common law procedure. The same spirit which produced one evil, produced the other."

As originally the only demand for chancery was based on the fact that the law had made no provision for the case, so in proportion as the law did make such provision, it in reason ceased to be a chancery and became a law remedy, but yet such case in practice was not always then abandoned as chancery.

code, had jurisdiction; and must so proceed in all cases where such jurisdiction was exclusive.

SEC. 2612. In all other cases, except in this code otherwise provided, the plaintiff must prosecute his action by ordinary proceedings. Ordinary when ?

SEC. 2613. An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but Effect of error.

We repeat, there never was any necessity for chancery in the reason of things, but only in imperfect *legal* forms. If the first party who, applying to the chancellor for a writ to the law courts, was refused, had not been refused, and thus compelled to go to the king, there never would have been any chancery. And if all cases had been retained by the chancellor to try himself, instead of being sent to a court, there would have been no law. But there would then have been the simple administration of justice without baptising it as law or as equity.

Now, it resulted from this division of justice into two distinct departments, that there was a court of law, and a court of equity—but no court of justice. A man may have had never so clear rights to relief, but if he asked the wrong court he was turned out with costs. And, perhaps, the court itself might not be very clear. And although by the hypothesis, of the essential difference of jurisdiction which supposed a chancellor *unable* to determine law, yet he had often to determine law, to see whether the complainant had a cause which was good at law, before he would concede a remedy as of discovery, and in other causes, had to decide that a remedy did exist at law as a reason for a refusal of one in equity.

Then again it occurred that remedies were slow to be introduced at law, because they could be obtained at chancery. Would any one believe that for hundreds of years it would have remained the law, that if a party litigant wanted the testimony of his adversary, he could not swear him, but must file a bill in a distinct and expensive court, and bring him thereto, and get an answer which he might be very obstinate and tedious in giving, and then might answer evasively, while there was really no practical way of extracting promptly the truth, and that all the while the case in which the testimony was to be used, must stand still. Would any one believe this of our practical race, if not undeniable history? And, indeed, would this have been true, if a class of men whose interest it was to keep it so, had not presided over such stupidity, and vindicated it by an embalmment in some learned nonsense. And so it further happened, that one court was often incompetent to administer even that part of justice with which it was commissioned, so that often to get one court to act, a party had to go to another for help, and having got the required help, bring it back to be used in the former. So, too, it was often true, that if a defendant urged one class of reasons in a law court, they could not be regarded by that court, and he would have to be defeated there, and then go into the other court to have that decision arrested in its execution, and to have the injustice done by defeat, vacated by another trial. So that no man was sure of justice in one court. He could have law in one and equity in another, and, perhaps, fall between, and get justice in neither.

Now, while chancery was erected to cure the insufficiency of law, instead of the more practical mode of making statutes to do so, the same folly was apparent in the criminal department. When *that* was insufficient, a similar appeal was made to the king, who committed that department of the law to his council, who sat in the starred chamber, and thus established the star chamber—a chancery court of criminal law.

This, however, as it touched men in a more tender point—*punishment*—was abolished by statute 16, Car. 1, while the chancery, just as much an excrescence of a barbarous age, continued till it has been but lately abolished by many of the states, and in great part by England.

Now, while it proved true that the formula of equity procedure were variant from law formula, so much so that different men were needed or supposed to be needed for judges and practitioners of it; it is also true that this evil of many-formed practice, was not thus confined. Not only were the great remedies of law and equity to be demanded by dissimilar forms, but the same was true in one action at law as differed from another. These *writs* gave names to actions, and a peculiar writ belonged to each, so that if a plaintiff sued out the wrong writ he was defeated with costs. His facts might entitle him to a remedy which a court of law could give, and yet he could not prove them, unless they were of that class of facts which had heretofore been attached to the name of his writ or action; and then some of these distinctions were so acutely drawn by the scholastic subtlety of that age, that the lawyers and judges disagreed as to the proper form of the remedy. This was not the only evil which grew up. In the early and logical age of pleading, the plaintiff stated his facts, and then the defendant denied, particularly, one of these, or admitting it, sta-

merely a change into the proper proceedings, by an amendment in the pleadings, and a transfer of the action to the proper docket.

Where the court has no jurisdiction of the subject-matter of the plaintiff's petition, his suit may be dismissed; but if the court has jurisdiction, either by ordinary or equitable proceeding, an error in the form of bringing the suit does not authorize a dismissal of the action, but merely a transfer of it to the proper docket. *Landsdale v. Mitchell*, 14 B. M., 349.

ted some other fact, which altering the case, avoided the effect of such admitted fact: that is, if the disagreement was on facts and not on law; and this was done that each party and the court might know before hand what was the true point in dispute. But very soon it came to pass that the defendant might make a general denial of all, instead of a special one of some of the material allegations of the petition, and then the plaintiff did not any longer know what the defendant meant to rely on, as his ground of defense on trial—for he might then prove any fact disproving any fact which the plaintiff needed to prove to make his case. This would not have been so bad, but soon this privilege of ambuscade was so far extended to the defendant that under this general denial, which got the name of general issue, the defendant might prove, not only any negative fact, but many affirmative ones. And under some of these technical denials, a defendant might prove almost anything which showed that at the time of suit he was not liable. The result now was that such pleading had abandoned its office, and no longer served to apprise any body of what was in controversy. But this abandonment of *fact pleading* was not confined to the defendant. The plaintiff also came to invent a mode of ambuscade; and abandoning facts, acquired a right of stating a number of legal conclusions, under the name of common counts, which were as ample in uncertainty, and as devoid of *fact statement*, as was the general issue itself. This, too, occurred in the most frequent actions. And so it became true that in most suits, the plaintiff had a right so to state his cause, as that any one of many causes of action, could be proved under it, to which the defendant might reply in legal conclusion mode of general issue, and thus no one could tell, from the pleadings, what the plaintiff wanted, nor what the defendant had to say against it.

One would think, that this was ambuscade enough, but it remains to be told that the plaintiff might unite many of these ambuscade counts in one suit for one thing, and that the defendant might also state one special defense in many ways; and, after A. D. 1700, *many* defenses, *each* in many ways, and all this with no regard to their truth. Add, also, that many downright falsehoods, such as that of "force and arms," and "finding and losing," &c., were necessary to be stated at the expense of being defeated by the omission of these lies, and you have an idea of the perversion which had fallen upon the beautiful system of good sense, which pleading, at first, really was.

Pleading had now under these principles made a departure from its original purpose, so great as to lead men to look in its face and ask by what reason or what sound logic it came recommended.

In England, and in this country, numerous surface changes were made, many years ago, but the judges seemed so averse to all change, that almost every reform was defeated by judicial legislation. Indeed, it may as well here be said, that all this absurdity had been introduced by the judges. The good sense of the legislature would never have enacted it, and so the less the wonder that the judges opposed its removal. In 1828, Lord Brougham made the first strong and elaborate attack upon this bastille of absurdities. From that speech, I will quote the following. He says:

"The precedents of the ancient pleaders, and the other rules recognized in their times, furnish the most valuable materials for this reform; and, indeed, it is chiefly from the science as they left it, that the principles I am about to state are drawn. The first great rule of pleading should be, to induce and compel the litigant parties to disclose fully and distinctly the real nature of their respective contentions, whether claim or defense, as early as possible. The second is, that no needless impediment should be thrown in the way of either party, in any stage of discussion within the court, whether plea, replication, or rejoinder, whereby he may be hindered to propound his case in point of fact, or of law. In the third place, all needless repetitions, and generally all prolixity should, as well as mere reasoning, which neither simply affirms or denies any proposition of fact or of law, be prevented; and all repugnant or inconsistent pleas should be disallowed, as well as all departure from ground once taken.

That these were the principles on which the ancient pleaders bottomed their system *entirely*, I will not affirm; but upon them it was mainly built. And I regret to say, that the last century and a half has witnessed great and prejudicial alterations

In a proceeding by ordinary petition, where the proceeding at law is the appropriate remedy, it is not proper to transfer the case to the equity docket, unless the equitable matter presented as a defense be valid, and one which the party has a right to insist upon. *Jones v. Letcher*, 13 B. M., 365.

Where an answer is filed to an ordinary petition, and which answer contains an equitable defense, no judgment for the plaintiff can be rendered

in the original plan; so that the record in the great majority of cases, instead of exhibiting a plain view of what each party is prepared to prove, contains an endless multitude of words, from which, if the real matter in dispute can be gathered at all, it is only by guess-work, or by communications out of the record relating to things of which it gives not even a hint. Let us look into this a little more narrowly. The count of a declaration should convey information as to the subject of an action; but it conveys no precise knowledge of the plaintiff's demand, or indeed, of what the suit is about. Take the instance of the common counts, as they are justly termed, in assumpsit, being those constantly resorted to; and take the most common of these, the count for money had and received. I will take no advantage of the audience I speak before, being unacquainted with legal niceties, in order to make merry with the venerable formalities of the art. All lawyers know how easy it would be in this place to raise a smile, at the least, by recounting the little fooleries of our draftsmen; but I disdain it, and will treat the subject precisely as if I were addressing professional men. The plaintiff declares that the defendant, being indebted to him for so much money had and received, to the use of the said plaintiff, to wit, one thousand pounds, undertook, and faithfully promised to pay it, but broke his engagement; and the count is thus framed, the self-same terms being invariably used, whatever be the cause of action which can be brought into court under this head. Now, observe, how various the matters are which may be all described by the foregoing words. In the first place, such is the declaration for money paid by one individual to another, for the use and benefit of the plaintiff—this is what alone the words of the count imply, but to express this they are rarely, indeed, made use of. 2. The self-same terms are used on suing for money received on a consideration that fails, and used in the same way to describe all the endless variety of cases which can occur of such failure, as an estate sold with a bad title, and a deposit paid; a horse sold with a concealed unsoundness, and so forth. 3. The same words are used when it is wished to recover money paid under mistake of fact. 4. To recover money paid by one person to a stakeholder, in consideration of an illegal contract made with another person. 5. Money paid to revenue officers for releasing the goods illegally detained, of the person paying. 6. To try the right to any office instead of bringing an assize. 7. To try the liability of the landlord for rates levied on his tenant. What information, then, does such a declaration give? It is impossible, on reading this count, to say which of the seven causes of action has arisen; and it is not merely those seven, for each one of them has a vast number of varieties, which are declared on in the same words. In actions of trover, the case is even worse. Suppose the case of a plaintiff suing for any chattel, as a gun, the declaration will be such as may apply equally to at least eight different heads, under each of which are many different causes of action. The words in all would be the very same—that the plaintiff was possessed of a gun, as of his own proper goods and chattels, that he accidentally lost it; that the defendant found it, and converted it to his use. Now this count describes only one case, that of a gun lost by its owner, and detained by the finder. But it is employed to mean, secondly, that the gun has been taken by the defendant under pretence of some title, or in any way not felonious. 3. That it was deposited with the defendant, who refused to deliver it up. 4. That it was stopped in *transitu* the price not having been paid. 5. That the plaintiff is the assignee of a bankrupt, and seeks to recover the gun, as having been sold after the bankruptcy of the vendor. 6. That the plaintiff has been improperly made a bankrupt, and sues the assignees to try the bankruptcy. 7. That his goods have been unlawfully taken, and he sues to try the validity of an execution, on any of the various grounds of fraud which impeach the validity of the process. 8. That the gun has been misdelivered, or detained by a warehouseman or carrier. All those causes of action differ from each other as much as different things can differ, and yet they are all stated in the declaration the same way and signified under the same form of words."

The result was that commissioners were instituted to examine into the imperfection of the law in its various departments. These have labored in collecting the written experience of the ablest men in such departments, and out of the enormous mass of matter thus collected, have gradually been evolved, and recommended the desired reforms. In 1834, some valuable changes were made in the rules of pleading, and in 1852 and 1854, those important acts were passed which have in England

until some disposition has been made of the answer; and the issues that may arise upon it, which are exclusively equitable in their character, are to be tried in the manner such issues were tried before the adoption of the code. They should be transferred to the equity docket. *Bosley v. Maitingly*, 14 B. M., 91.

If a party, in his petition in equity, fails to show that he is entitled to the

restored pleading to its ancient simplicity, and swept away in one forgotten mass, all the irrational technicalities which had for so many years disgraced the bench and bar.

Of these acts we can only have space to say, that through them a man may be sued, whether in or out of the kingdom, by service of process. That the mode of service is natural, simple and prompt. That the facts are to be stated—that all technical forms and fictions are abolished, and the sufficiency of a pleading is determined by the sufficiency of its statement of facts—that there is established the power of adding or striking out parties, so that non or misjoinder of parties may not be fatal—the right of joinder of *any sort* of causes of action, except in replevin and ejectment—the allowance of stated cases—the sufficiency of a mere statement of *facts* in slander and libel, without statement of colloquium or innuendo—general averment of performance in actions on contracts with conditions precedent—a need of statement of specific ground of demurrer—no use of formal commencement or conclusion to pleas—special pleas of facts—abolition of distinction between debt and damages—facile production of documents in law courts—simple action to try title to land—such a power of amendment, in the language of the act, “as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties.” Power of common law courts to issue injunctions in law cases—also to issue a *mandamus* to compel the performance of a duty—the allowance of equitable defenses to be put in in law courts to law cases, and the ability of the law court to try the same—the allowance of an oral examination of witnesses in chancery, and an abolition of all technicalities in chancery pleadings, and power to add new facts by simple amendment, and a cheap mode of appeal.

This is a statement of only a few of the provisions of these two acts, and these with the act allowing parties to become witnesses in their own cases mark, to-day, the advance of English reform.

In this country, the state of New York, in 1847, appointed a commission of law reform, the result of which was a series of reports which in civil law, became the law of that state, and in *criminal* and *civil* law became, in substance, the law of nearly every state, including Iowa, which has made any change for the last ten years, and has been, to the smaller detail, since adopted in some fifteen states and territories of the Union. The central ideas of the New York act, are a simple mode of *notice*—an abolition of all technical forms of action and pleading—one plain mode of asking for relief by a simple and concise statement of the facts entitling thereto, and without any regard to whether the facts are such as demand a legal, or such as demand an equitable remedy—and a power to confer just such remedy as the facts may justify, whether such remedy is that formerly called legal or equitable—a liberal joinder of parties, and ample power to avoid by amendment any mistake in the number of them—a union under a new classification in one petition, of many causes of action, and in an answer of any number of defenses, or of other causes of action which are related to the plaintiff's cause—a mode of securing a true statement of facts by swearing to the pleadings, not for the purpose of making them evidence, but only to secure an issue of truth unincumbered by falsehoods, and thus to save time and costs—a short mode of pleading, stopping with the answer, and letting the law supply the replication, so as to save time, and the possibility of legal irregularity—a mode of taking all testimony, orally, when it can be so obtained—the fact that the demurrer shall state its reasons—the introduction of the motion to correct all defects of form, and to secure exact statements, which motion must itself indicate the fault sought to be corrected—letting the court try cases as a jury—allowing an examination of the defendant after judgment to discover his means—the power of amendment so that justice may be at once done, if possible. These are some of the reforms recommended by the commission of New York, which have left little to do, and have been since largely appropriated by all legal reformers.

This system was introduced even down to its detail, into Ohio, in 1853—into Missouri in 1850—into California in 1851—into Minnesota in 1851—into Wisconsin in 1857—into Oregon, in law, in 1854—into Indiana, with a slight departure in detail, in 1852—into Kentucky, with a departure precluding equity cases from being united with law cases, in 1851. It was recommended in a Code prepared by commissioners for the District of Columbia in 1857. It was introduced into Iowa, in spirit, with much departure from the letter, in 1851. It is the law also of Kansas, Nebraska, Utah, and Washington territories. Alabama in 1852, Massachusetts in 1852, Tennessee in 1858, Texas and Mississippi at a date unknown to us, also introduced



specific relief asked for, and shows a right to any relief, even in a court of law, a demurrer to the petition should not be sustained to the whole claim, but the case transferred to the common docket. *Foster v. Watson, etc.*, 16 B. M., 387.

Though a suit may be, in form, a suit at law, yet if the parties try it as a case in equity, and it be decided as an equity case, and it be a proper case for equity decision, and there be no objection, the court of appeals will so consider and decide it. *Bates v. Calver*, 17 B. M., 167.

reforms based, more or less, upon these reports—while Maryland in 1856, introduced an act, which is mainly a *literal copy* of the provisions of the English act of 1852.

We have said this system was introduced into Iowa in 1851. It forms the main features of the "Part Third" of our Code of that year. There were some misfortunes attendant upon its introduction here. 1st. There was no attendant report to tell us of its origin—to point out its aims, or to guide to sources of illustration. It hence followed that many, of both the bar and bench, not acquainted with the latest legal thought, deemed the Code a startling innovation, and without example as a departure from precedent. 2d. That while borrowed almost entirely from New York, except some parts which we think clearly improvements, even on the New York system, yet the terms of the parent act were so far departed from as to make it difficult even to those well versed in both acts, and almost impossible for others to apply the judicial illustration which the New York act has secured, to the illumination of our own. Besides, this act had not then attained its present extended popularity, nor won its way to the general acceptance of so many states and territories.

Then, too, in the older cities of the state, among the old men, the oldest and best lawyers, who were worked gray in the profession, there was a strong cleaving to the friendly old forms in the use of which they did, or were supposed to excel. It was hard for such men to forego a superiority, well and laboriously earned, and to be compelled to begin again by the side of the youth just immersing into the legal arena, with whose sweat, and blood, and scars, these veterans were so gallantly mantled. For these men had not learned then, what they have since—that the new system was the old system shorn only of its nonsense, and that no lesson learned in the logic or philosophy of the old, but applied as well to the new.

Then, too, were the mechanical men, who never went below the surface to find the reason of a thing, who lived and breathed in lifeless forms. There was also the fearfully conservative man, who thought that his long buried ancestors knew much better, not knowing his surroundings, what was best for him amid such surroundings, than he possibly could—and among them all, and rather for the reasons we have given, it turned out that the Code was not welcomed as warmly as it had the right to be.

Thus it was that ill-digested, hasty, unelaborated, *obiter dicta*, made with a poverty of inquiry deeply to be deplored amid the majesty of such an occasion, were announced, bearing upon its applicability to chancery, and as to what was in the total absence of all clear thinking, called its blending of law and equity. In *Clausen v. Lafranze*, 4 Green, 224, it was said that chancery was not included in the reform of the Code, and that we must go to England and English books and others, to learn what our law of pleading on that subject was.

And it can not be denied that while we have had no *decision*, expressly deciding that the Code does not apply to chancery, we have had none deciding that it does as well and as amply apply to pleading in chancery as in law, and while we know, as a fact, that it was so intended by the very distinguished lawyer, Judge Mason, who framed the pleading part of it, yet it seemed to be successfully insisted by its opponents that it only in some very undefined measure, so applies, and in many decisions a want of such applicability, in the same undefined way, seems assumed. The question was never made and discussed with an elaboration befitting its dignity and its value to the state, whether the Code did constitute the sole criterion of equity as well as law practice, or rather, of all practice. Its negative seems to have been rather assumed by an easier process. Nor was the question ever clearly decided whether or not the *Constitution* required pleadings stating facts, when the demand was for equitable relief, to be framed in a mode, and judged by a criterion different from what obtained as to pleadings which stated facts entitling to a legal remedy. Nor whether a statement of facts entitling to a legal remedy could be stated in the same petition with one entitling to an equitable remedy. But these seem to have been denied rather by implication, than by open avowal. Some vague reference has been constantly made to the *Constitution*, and because it uses the words "equity" and "law," it has been assumed that in demanding equitable rights, you must use a *mode*, which has heretofore been used in demanding them, and could not change the same—an argument, which, if applied to law, would also prevent any change in the mode of

An error as to the kind of proceedings should not cause the abatement or dismissal of the action, but it should be changed into the proper proceeding, by amendment, and transferred to the proper docket. A demurrer is not applicable to the question, whether the proceeding should have been at law or in equity. *Trustees of Lebanon v. Forrest*, 15 B. M., 172.

The defendant in an action to recover the possession of land, may rely upon an equitable defense, such as a claim to hold the land under executory contract; in such case, the party may have the cause transferred to the equity docket; if that be not done, the issue made upon such defense is not to be disregarded, but must be disposed of according to the principles which may be involved, either equitable or legal. *Petty v. Maber*, 15 B. M., 604.

asking for a legal remedy, and perpetuate the formal actions of debt, covenant, detinue, trespass, &c., as much as the formal character of a pleading wherein an equitable relief was demanded.

The fallacy lies in the fact, that these words have a *substantive* and an *adjective* meaning; they are used in the constitution to secure substantive rights. Inasmuch as all rights were included as legal or equitable, and both were needed to make the sum of justice, it was deemed best to use both lest it might be thought that while a man's right to sue for damages was secured to him by the constitution, his right to ask for a specific performance of a contract was not. But the *adjective* right, the mode of asking was not embalmed in the constitution, because it was, and is, a thing of no consequence—this would change with the wants and intelligence of the race. What was the use of the right of making a man swear to his answer, if you could make him swear in the case? What was the use of the bill of discovery, if you could put the man on the stand, and obtain the discovery by a shorter and more sensible, and more efficient mode? The advocates of the Code never dreamed that it *confounded law and equity*, because it provided a common mode of asking for relief in each, any more than that it confounded the substantive things, covenant and debt, because it provided a common mode of asking for relief in each of them; namely, the simple statement of the facts entitling to remedy. In equity, as at law, there was much not substantive, not essential to the obtainment and enjoyment of substantive equitable rights. The forms at law and at equity, too, were cumbrous, and often absurd; each needed change—and the aim was to preserve the substantive rights, and abolish the unnecessary and stupid formula of demanding them. And as the right to have a judgment for \$100 on statement and proof of the facts entitling you thereto, which facts are legal, as heretofore classed, and which right is in no manner impaired, by the abrogation of the forms of debt or assumpsit, or covenant; so the right to have a judgment that a contractor shall perform to you an agreement, on the statement and proof of the facts entitling you to that remedy; which facts are equitable, as heretofore classed; will just as surely follow, although the form of the petition and answer, and replication and proof and trial is no longer as it was, but is as in law. Rights substantive are embalmed in the constitution—rights adjective, or the modes of asking for the former, are accidental—have been always flexible—never have been, in many particulars, well defined, are as obnoxious to the censure of useless pedantry and red tape circumlocution, as the forms at law.

In its acceptance, as to procedure, asking law remedies, our Code was more fortunate; and yet the writer hereof, who has been compelled to make some considerable acquaintance with the same system as accepted in other states, with much diffidence would suggest, that even at law, it has not secured that prompt justice, which it was meant to do; too many technical constructions have been applied to it, and it has been interpreted too much in the light of the very forms and precedents which it was designed to abate and ignore. We know that human language can not be put into a Code which will not need construction; the only hope of the reformer is to avoid this, as much as may be possible, and that such construction may be made by a mind imbued with the genius of the act, so that each extension of it to a new case may be in harmony with its main purpose. But we are led to think, that our new Code has not been thus construed, for the reason that although ample learning from the *old cases* adorns each decision of a point of practice, yet the multitude of decisions on the parent code in New York, or the sister codes in the states where used, which may be supposed more capable of furnishing sound illustration, seem to have been entirely overlooked. Since our Code came into force, a similar code has been in force in Kentucky, and in that state there have been five volumes of reports. The same has been true of Missouri, and in that state there have been twelve volumes of reports—in Ohio, in which there have been eight—in Indiana, in which there have been eight—in California, in which there have been eleven. All these reports are replete with learning on this system.

In New York, we find eighteen volumes of Howard and eight of Abbott's, con-

SEC. 2614. The error mentioned in the last section may be corrected by the plaintiff, without motion, at any time before the defendant has answered; or, afterwards, on motion, in court. Same before answer by plaintiff.

SEC. 2615. The defendant shall be entitled to have the correction made, in the following cases:—Where the action has been commenced by equitable proceedings, the defendant, by motion made, at the time of filing his answer, may have them changed into ordinary proceedings when it appears that by the provisions of section 2612, the plaintiff should have adopted ordinary proceedings, and in addition that his answer presents a defense on which he is entitled to trial by jury. Defendant may correct

A prayer in an answer to transfer the action to the one or the other side of the court, is not equivalent to a motion to transfer. *Duvall, J., Lander v. Nunn*, Mss. opinion, September, 1857. Cited from Ky. Code by Stanton.

SEC. 2616. Where the action has been commenced by ordinary proceedings, the defendant, by motion made, at, or before, the time of filing his answer, may have them changed into equitable proceedings. Ordinary changed into equitable.

taining decisions which have been made on the Code, and then through eighteen volumes of the court of last resort, we find scattered many decisions on the Code. Now, although our Code of practice is in its central ideas, the same as the New York code, and these sister codes, we have yet to find in all our nine printed volumes of decisions made since it came into force, the first intimation that the reasoning of any other of these states had been consulted, or that there was a code any where else, the decisions on which could be of the remotest use to the bar or the bench in determining the meaning of ours.

We say this not in any spirit of finding fault with our supreme tribunal, the very eminent ability of whose distinguished judges we would regard ourselves as very assuming, should we even endeavor to commend. In this, the state herself is not without blame, for she does not own the books on this subject, which should be at the disposal of her court. \* \* \*

But we mention these things as our solution of the difficulties attendant upon an early, and favorable, and correct recognition of a code, which, although assuming to be its reformers, we hold to be a work of marked excellence, and only unsuccessful because it did not tell us its origin, and because in its scientific conciseness, it did not address itself more to detail, and in its compact generalization, it did not more closely follow the terms of the act, from which its spirit was borrowed.

These things being thus, the Code being in many applications doubtful, and in some having clearly failed to secure its purpose, the general assembly imposed upon us the duty, among other things, of making a Code of civil practice.

In the preparation of this act, all the reports made by former commissioners, engaged in the same duty, have been consulted. The codes of all the states we have before mentioned, have been before us, as well as all the reported decisions on the same—the English practice acts of 1852, and 1854, and the last expressions of English reform in chancery—the codes of Louisiana and France, which, by the way, in the inception of this reform movement, contributed much to the system, as well as all the works on the new practice in the states and in England, and the latest English works on evidence. \* \* \* We preserve and appropriate most of the reforms of the code, and some of them we push further. We can not consent to return again to the dead mummements of the past, and we know that neither the people, nor the bar, nor the bench would allow it.

We offer no invention of our own—all we recommend has been tried. Some sections have been wholly suggested by decisions of the states where the new system is in force, some phrases in the sections got from those states, have been slightly changed on the same suggestion, and some have been wrought out into further detail. It were a prouder office to create an act, but it is a safer one to imitate. We have copied the very words, where we found no good adverse reason, thinking, that thus we might better avail ourselves of the construction of sister states—this copying literally, where practicable, has been done in other states, and we will soon have a body of practice decisions in the Union, which will make the new system as well understood as the old, while it will be free from its follies and technicalities. But let no man think this appropriation and adaptation to our use, has been without patient, protracted, and painful labor. To New York, and England, and Kentucky, we are most largely indebted for our act, but every state which has adopted the new system has contributed something.—*Report on Civil Code.*

when it appears that, by the provisions of section 2611, the plaintiff should have adopted equitable proceedings.

Trial of equitable issue.

SEC. 2617. Where the action has been properly commenced by ordinary proceedings, either party shall have the right, by motion, to have any issue, which before the adoption of this code was exclusively cognizable in equity, tried in the manner hereinafter prescribed in cases of equitable proceedings; and if all the issues are such as, before the adoption of this code, were cognizable in equity, though none were exclusively so, the defendant shall be entitled to have them all tried as in cases of equitable proceedings.

Where the answer of a defendant to an ordinary petition sets up an equitable defense, the trial of the issue should be as in case of equitable proceedings, and if the equitable defense be adjudged insufficient, and there be a legal issue, that should be referred to a jury, unless a jury be waived in some of the modes pointed out by the code. *Smith v. Moberly*, 15 B. M., 73.

Case where money is sought to be enjoined.

SEC. 2618. If the plaintiff's claim is for money due by contract, and the defendant puts in a defense of exclusively equitable cognizance, upon the plaintiff filing an affidavit that he verily believes that he will succeed in the action, and that the collection of his claim after judgment will be endangered by the delay arising from such defense being put in, the court shall require the defendant to give security for the payment of any judgment the plaintiff may obtain in the action, and upon his failure to give such security, shall order the defendant to pay into court an amount sufficient to discharge the plaintiff's claim and his probable costs; upon which order execution may be issued as upon a judgment, and the amount collected upon execution shall be brought into court and await the decision of the action, and be paid to the plaintiff or defendant, according to such decision. But no such security shall be required if the trial of the equitable defense takes place during the term at which it is put in, nor until all defenses to the action, other than those of equitable cognizance, are tried or disposed of in favor of the plaintiff.

Error waived.

SEC. 2619. An error as to the kind of proceedings adopted in the action, is waived by failure to move for its correction at the time and in the manner prescribed in this chapter; and all errors in the decisions of the court, on any of the motions named in this chapter, are waived, unless excepted to at the time; which may be done by the clerk noting at the end of such decision words of the following import: "To which decision the plaintiff (or defendant) excepts."

The code requires that when the petition is in equity, when it should have been at law, and at law when it should have been in equity, it is to be reached by motion, and if not so moved, the error is waived. *Trustees of Lebanon v. Forrest, etc.*, 15 B. M., 172.

Uniformity of procedure.

SEC. 2620. The provisions of this code concerning the prosecution of a civil action, apply to both kinds of proceedings, whether ordinary or equitable, unless the contrary appears.\*

\* We purpose here more at length remarking on its central idea. Uniformity in the *pleadings* of law and equity, with a possible uniformity throughout, but a right of dissimilarity in the mode of proof, trial, and appeal.

We provide, see section 2999, that, as a main rule, in an equitable case, the proof be in writing, that the judge may try the same—and that all the testimony on appeal goes to the supreme court. Then as the *exception*, in consent, default, divorce, mortgage cases, and so forth, we provide that the proof may be as in law case—jury, or judge, may try, and find, and state finding of facts, that the court shall from such

SEC. 2621. Judgment obtained in an action by ordinary proceedings, shall not be annulled or modified by any order in an action by equitable proceedings, except for a defense which has arisen or been discovered since the judgment was rendered. But such judgment does not prevent the recovery of any claim, though such claim might have

A judgment is not to be defeated by equitable proceedings.

facts, find the law, which last finding is that upon which is taken the appeal. The former is substantially the Kentucky mode, the latter is that of our Code of 1851, and its retention in this limited manner we urge.

Its allowance in consent cases will not be opposed. Default, if there is notice means consent—if no notice the plaintiff can have no advantage, for the defendant has a liberal time for new trial on showing good cause.

In divorce cases, a jury has been in our judicial history always allowable to either party, who demanded it.

In mortgage the facts are nearly allied in character to law, and commonly no defense is made. The experience of courts has put them on the law docket under our code in many districts.

Perhaps to say this is to say enough to remove objection to its retention thus far. We will add, however, that the last mode is believed by two of this commission to be the most rational mode—the only mode consistent with real scientific legal growth; to be fully approved by experience wherever fairly tested; to be very necessary to a chancery reform; to be now commended by more legal ability all over the Anglo-Saxon world, than any other, as a mode of chancery practice; to be in conflict with no provision of our constitution, old or new; to be the most important, by far, of all the principles commended herein, and to be only the law as it has stood on the code, perhaps doubtfully expressed, for years. But the desire of unanimity in our report, and a conviction that something must be conceded to the opponents of this form of chancery procedure, until experience shall dissipate their opposition, has induced us to cordially unite in the double methods proposed, hoping thus to gradually disclose the excellencies as to the short mode, and thus correct misconceptions and prepare the way for its becoming, in a future day, the sole mode, if duly approved.

We provide that, if a statement of facts is made which the party thinks entitle him to a legal remedy, and placed on the legal docket, and found to entitle only to an equitable remedy, that then the defendant may have the case transferred to the equitable docket, and *vice versa*. Certainly none can object to this. While a distinct court had sole charge of all adjudication of facts entitling to equitable remedies, with a distinct judge, and differently named and trained legal advisers, and a totally different method of determining the issues, there were, whatever good objections might exist to these two systems of courts, and judges, and procedure, fewer objections against ejecting a case brought in the wrong court. But since we have gone the length of abolishing the duality of these courts, and of the judges, and since, long ago, by the best equity lawyers, the petition in equity was defined, as we define petition in all cases, there remains no reason for dismissing a case, which must come back before the same court—the same judge—the same lawyers, and in the same phraseology, indeed the very same petition, with only the change of additional costs and delay.

If a party, defendant, decline making the objection, he has the right to do so, and thus waive his privilege to have the case tried as a chancery case, that is to say, he may decline the right to have a judge pass on the issues, and may consent that a jury do so in the choice of either party—he may decline having the testimony taken in writing, so as to have the testimony taken up in full, to be tried again, by the supreme court. Both these privileges have, in the chancery practice of this state, been always waivable—so here is nothing new.

But lest the objection to this *short* mode even in its very guarded use, may be so formidable as to render its acceptance doubtful, we will proceed to discuss the objections made against its use.

And lest some may also object that we provide for uniformity even in the *pleadings* at law and equity, we will include that question in the argument. And, although we do distinctly recognize in this act the distinction between law and equity, and do not allow an equitable cause to be united in the same petition with a legal one, nor an equitable defense to be united with a legal one, nor used as a defense to a legal cause, save under the condition of being transferred to an equity docket, if the other party so desire; yet we will push this argument a little further than need be, and attempt to show that not only should the uniformity we recommend in *pleadings* be allowed, and the further uniformity in proof, and trial, and appeal, which we recommend in a very limited class of cases; but also that in all cases there should be not only a perfect uniformity, in all these, but that so far as adjective law is concerned, that is so far as forms of procedure go, the division into legal and

been used by way of set-off, counter-claim, or cross-demand, in the action on which the judgment was recovered.

A party can not set off a judgment against his debtor, against one of an assignee of his debtor against him, though the debt upon which his judgment was founded would have been a good set-off if pleaded in time. *Stiles, J., Pi cher v. Craig*, Mss. opin., June, 1857.—Stanton's Ky. code.

equitable should be ignored, merged into a simple demand for established rights, and that any number of such demands should be allowed to be united in one petition or answer, without any regard to the kind of relief demanded, whether the same be a substantive legal or a substantive equitable right, so that in one cheap contestation the entire legal relations of two litigants could be adjusted.

Now all the objections made to one or the other of the positions assumed here must be classed under one of three leading heads.

1. That the appliances of procedure should be dissimilar in a claim for a legal, and a claim for an equitable substantive right, or,

2. That a claim for a legal substantive right should not be united in a petition with a claim for an equitable substantive right, or that an equitable substantive defense should not be allowed to be made in the same cause to a legal claim; or

3. That the same tribunal should not try both classes of claims, but that a judge should try law, and a chancellor equity.

Now whichever of these positions is maintained, must be so maintained, either,

1. On the ground that there is some essential difference between law and equity requiring it—or,

2. Some accepted decision requiring it—or,

3. Some constitutional provision requiring it.

We will consider in their order, each objection upon all the grounds thereof, and 1. We will ask whether the appliances of procedure should be dissimilar as above stated. If so this dissimilarity must be either

1. In the notice.

2. In the statement of the cause of action or defense.

3. In the form of proof, as oral or written.

4. In the mode of trial as by judge or jury.

5. In the power of controlling the subject of contestation during the pendency of the action.

6. In the kind of decision rendered.

7. In the kind of execution, or the appliance for enforcing a decision.

8. In the value of an appeal as to what shall be passed upon by the supreme court, law only, or facts also.

Dissimilarities have existed in all these appliances, but we will show that such dissimilarities were only accidental, never founded in any but a temporary necessity, and that the circumstances which demanded and perpetuated them no longer exist.

1. A suit is a claim made on some tribunal to do something for you, and a statement of the facts which entitle you to have that thing done. Now it makes no matter whether the thing you want done is a decision against your adversary for \$100, or that he convey you one hundred acres of land—the former request would be a right based on *the law* as distinguished from *the equity*, the latter on *the equity* as distinguished from *the law*, but both on *law*, in the sense of the municipal justice of the land. In both alike you would need to have the defendant advised that you had made such a claim against him. But what in the essential difference of law and equity is there, which requires that in one case you should call the notice the court gives him in the former case, summons or notice, and in the latter a subpoena? Common sense would say, let the consequence be the same in both—namely, that whether the defendant come or not, the plaintiff have his decision on proper proof. Compulsory attendance and answer of the defendant, might have been necessary, when he was ordered to do something personally, and when you have no means of making him testify only in an answer in equity, but is of no need so far as *pleading* goes, when you can summon him as a witness and compel his attendance in that capacity, and thus more easily and simply obtain the same result.

There is nothing in the constitution that requires different forms of notice, and there has been an Iowa decision that a simple notice is enough. So here is no need of dissimilarity. Nor has there been any really in our judicial history as a territory or state.

2. Is there any demand in the essential difference of law and equity substantively which requires a dissimilarity in the mode of statement and counter-statement, or pleadings? Reason says, state the facts entitling you to \$100, and ask for a decision giving it, and state also the facts entitling you to a decision, that the court

The code permits, but does not require, an equitable defense to be made to an action to recover a legal demand. The defendant permitting a judgment to pass upon a legal demand may thereafter have relief from the judgment by a proceeding by petition in equity. *Dorsey v. Reese*, 14 B. M., 157.

compel the defendant to convey you one hundred acres of land, and ask for a decision compelling it. The objector says, you sometimes, in equity, want a decision which depends on many and very complicated facts—the reply is, then state the many and complicated facts. Nobody says a petition in equity will be as short as one at law, any more than that all at law will be the same length. Each will depend on its contained facts. The objector says again, sometimes one wants to state facts which are not ultimate but mere evidence, so as to get a sworn reply to them for proof. There are two replies: 1. If a sworn answer for *testimony* were needed, and allowable, you might get it by our principle of stating the facts entitling you thereto. But 2. You have no longer any need of the sworn pleading as evidence, because you can take the testimony of your adversary either on the stand on interrogatories, or in deposition form, and thus better secure the result you want. It is true that former chancery pleadings were dissimilar from law pleadings, in this, that they were not only statements of a cause of action, but were also drawn with the purpose of making the defendant a witness. But this was an accident growing out of the fact that no law court could make a defendant a witness. Again, the objector says, a bill in chancery must anticipate the defense, and by new facts displace the same. This was not true while pleading at law and chancery were alike in going past an answer and having a replication and further pleadings. But when a special replication was no longer allowed, then if the plaintiff wanted the defendant's testimony to the new matter, which would have been stated in his replication, had he made a special one, he must state such new matter in his petition, in order to call the defendant out thereon. But now a petition will not be bad, because it makes more than a *prima facie* case, although it need not make more than that. And, indeed, the anticipating mode would be the preferable mode of pleading in all cases where the defense of infancy, statute of limitations, etc., would be replied, for such total statement would really constitute the cause of action. But such injection of matter of anticipation or replication into a petition in chancery, is not now necessary, because the testimony of the defendant to any fact can be forced as a witness.

Again, the *plea* was, as a pleading, a defense, such as may now be used in an answer at law, and the attendant answer sometimes necessary, was only on the ground that the plaintiff had a right to the testimony of the defendant, and the defendant could not defeat that right by any style of defense. And so, although the defendant might plead matter showing that the plaintiff had no right to an *answer as testimony*, yet he must support such plea by an answer; so far as concerned the matter he pleads, at least. But the need of this is avoided by the law allowing testimony to be got from him as a witness.

There were other parts of a chancery bill which were equally the result of accident. When a bill was allowed to be filed to prevent a strong man from oppressing a weak one—or because a man was too poor to sue at law—or because, in the days of force, several men had conspired to prevent another obtaining a remedy at law, there was some sense in the charge of combination, etc. But these grounds of chancery jurisdiction passed away, and with them the need of such statements in the bill.

The *answer* in law and equity, both constitute in reason the statement of facts showing that the plaintiff should not have the decision he asks. Whether these facts are facts constituting a legal or equitable reason, can make in reason no difference, in the mode of stating them. As we have said, when the petition sought testimony as well as stated the facts, the answer stated testimony as well as the facts of defense. But this necessity having been removed, such answer also becomes unnecessary; indeed, improper. This was an accident of chancery pleading, which at first was otherwise; indeed, was as law, and like it, was oral, and put into writing by the clerk.

I need not speak of the replication, which no one will deny is the proper subject of change, and was as in law till the time of Elizabeth.

In requiring a mere statement of facts, we offer no new theory of chancery pleadings—the best equity writers now hold that the bill need contain but a simple statement of the facts entitling to the remedy, and such has been the law during all our history, territorial and state. So we take it, there is nothing in the essential nature of equity and law, which requires that the remedies should now be demanded by dissimilarly drawn pleadings.

Nor is there in our constitution. That don't define or qualify the mode of asking for legal and equitable relief. It only declares that no such relief shall yet be accorded. It preserves the *substantive* right, and don't concern itself about the *adjective*

Construction.

SEC. 2622. The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it, shall be liberally construed with a view to promote its object and assist the parties in obtaining justice.\*

*appliance.* That it leaves to be suggested by the intelligence of the age and its changing conditions.

In the decisions of this *state*, is nothing demanding dissimilarity in the statement of a legal and an equitable claim, and the constitution expressly provides, that the district court's jurisdiction of equitable demands shall be "in such a manner as shall be prescribed by law;" and our law, territorial and state, has never demanded dissimilarity; so, we conclude, no good objection holds for dissimilarity in *pleading* in the two kinds of cases.

3. Is there any ground in the essential nature of law and equity, why the *district judge*, hearing the case, should have the testimony in writing, rather than produced before him orally?

The object is to get to know whether the stated facts of the plaintiff and defendant are true or not. Reason says *hear* the witness so that you can *see* whether he states the truth or not; you thus have the *words*, all a deposition gives you, and also the actions of the witness to illustrate the words. Besides, you are not then confined to the ambiguity of the words, or hopeless, under the doubt inspired by them, but can ask further questions to make the matter clear.

Historically, this was the most early mode, and remained chiefly the law until about the time of Elizabeth. And all chancery reformers have sought to introduce this mode of taking testimony, so that most of the systems which yet adhere to trying chancery cases by a distinct judge, have nevertheless introduced the mode of taking testimony orally, or allowing the chancellor to have a witness brought before him, whenever he desires it, for the purpose of examination. Such is the English practice—and this practice is recommended everywhere in this country, where the thing has been opened to the light of modern thought.

Again, the constitution interposes no objection to this. The question, whether or not, this need of written proof is implied in the appeal, we will postpone till the discussion of that question. Now, you remember, we are considering whether the *district judge* is compelled to have for *his* determination of the case, written proof. In the early history of chancery, *parties* were examined before the chancellor. More latterly, before the master of the rolls; and it was only when sick or aged, so that his personal attendance could not be obtained, that an answer in writing was *allowed*. Examination of *witnesses* was also at first *oral* and in court; and in our own judicial history, the right of oral testimony was established in Michigan, in 1805, and has been our law, territorial and state, always. It was also the law of the territory of Missouri, while such law reached over the now Iowa, that law and chancery proof should be taken in the same way. There have been dicta under the code which seemed to imply the need of written testimony in equity. But they proceeded on that right as a basis of appeal, and that question will not now be treated. There has been no decision that a case tried below, would be wrong, if not tried on written testimony.

We conclude, then, there is no ground for insisting that the mode of proof shall be dissimilar in a claim of equitable right from what it is in one of legal right.

\* Every utterance in words is but a very imperfect presentation of the idea which lies behind, which idea gives birth to the words, and is sought to be announced by them. When the question of what the words were intended to enact, arises, it can not be wisely determined except by interrogating the idea which presided over the utterance. The mere utterance is but an effort to embody that idea, and may have been more or less successful.

The principle of interpretation, though of the nicest logic, is also of the most every-day common sense. A sympathizing friend can alone catch every shade of his friend's meanings. An enemy will half conceive, and misconceive, and distort them, quite away from their purpose. It is said, that, if to a daguerreotype, of a large town, in which image the naked eye can detect only a mass of indistinct houses, you apply a microscope, you will have revealed the life of the town, and the wares in which it traffics. These were in the picture before the microscope was applied, but the eye of the observer was not acute enough to find them. So is it with any pronounced sentence, it contains infinite possibilities of application. Sympathy with the idea, lying behind the expression, like the applied microscope, brings out its hidden meanings, and enables you to trace it down into its most secret and minute revealings, so that you may apply it to all the affairs of trade and life. *Report on Civil Code.*



Whether, however, the report of the commissioners ought to be ever referred to in construing the code, may admit of a doubt. In *Martin v. Hemming*, 28 E. L. & E., 544, where such a report was cited, POLLOCK, P. B., said—"I must protest against the construction of the statute being at all controlled by that. Several wholesome rules for the construction of the statutes are given in Bac. Ab. tit. 'Statute,' 1, and the reports of the commissioners

4. There is nothing in the essential natures of law and equity requiring that one should be tried by a judge alone, and the other by a jury. Certain facts being established, certain rights follow therefrom; and whether the right is a right which is called legal, or one called equitable, makes no difference in the integrity of the logic. Whether these facts exist or not, it is said should be determined in the one case by a judge, and in the other by a jury. If the case is named equity, then the facts must be tried by a judge, although they may be the very ones which a jury passed on yesterday, in a case called law. But the change of the name of the case has impaired the jury's faculties of finding the facts. But it is said that the facts in an equity case are so blended with the law that it is difficult to separate them. We reply, that it is also true in law that difficulties attend the statement of an issue which shall be of pure fact. Indeed, most issues in law, under the past mode of pleading, have been, howsoever narrowed, a statement of what but seemed a fact, till trial, and then branched out into a legal conclusion. That "A, promised," looks quite like a fact-statement, until the objector starts the question, whether the promise was legal or not, and then the proposition is seen to be a legal one, capable of being divided into its elemental facts of *consideration*, capacity of promissor, illegal constraint, etc. And the *fact-part* of all these propositions, not before seen, must be addressed to the jury by process of *hypothetical instructions*, after the style of this—if such facts are so, then such law follows. The jury in such case, pass on the facts stated in such directions, which facts were not supposed before to be wrapped up in the statement which looked so simple and clear. This was practically true in most cases at law, till the need of stating *facts* in some measure diminished the frequency of its recurrence.

Indeed, the difficulty is not greater in this respect in equity than in law. It is said again that the facts in equity are more multiplied. We reply, this is not practically true. Most cases in equity are little encumbered with disputed facts. More cases in law than in equity, have a complex mass of facts in dispute, now, of late years, since the allowance of joinder and of many defenses. The doubt in equity is chiefly on the law—on the *rights* established by the facts, not on the facts. Besides, to say that the number of facts, as one, or twenty, should determine the tribunal—whether it should be jury or judge, is to abandon the position that the *nature* of the remedy, as legal or equitable, should determine this. Again, to the insistence that the facts are so blended, etc. We reply—the facts, however blended, have got first to be found in each case. Facts establish relations and confer rights. It makes no matter whether a *jury* finds them—and then the judge pronounces the law on them—or the judge finds them, and then pronounces the law on them. Either the jury or the judge may be the best appliance to do this—but whichever you say *is best*, is so, without regard to the result which may come of the facts; and is by your own concession the best fact-trier, whether in law or in equity. Indeed, facts are facts, whether legal or equitable conclusions are deduced from them. Indeed, the same facts might entitle to either a legal remedy or to an equitable remedy, and often do; and yet, in one case, these facts must, by your theory, be found by a jury, and in the other, only by a chancellor, depending on the name you give the case. If you say, and we yet address the objector, the judge can make a lumping decision without any unmixing of facts and law—then, we reply, that he can not thus do his duty, because law and equity confer rights on parties by virtue of certain relations, that are established by facts proved; and to confer these rights without having found the facts entitling thereto, is to confer them, without having found the party entitled to *them*.

Again, the fact that juries are better able to try facts than a judge, has been, since trial by battle ceased, assumed in all Anglo Saxon history. It was said that the chancellor could not try facts, and must needs send them out to a jury.

The chancellor did, as a matter of history, send much matter, clearly fact, to be tried by a jury—and in *our* judicial history a party has always had a right to a jury to try any *fact*, and more than that, such finding has been binding upon the judge.

The main prejudice against equity, which lasted so long in England, was based on the charge that it was introducing a new mode of trial, unknown to our ancestors.

There is nothing in the constitution that requires one fact to be tried by a judge and another by a jury. Indeed that instrument would rather support the idea that the jury trial of facts was favored.

There has been no decision that one fact must be tried by the judge and another by the jury.

appointed by the crown are not mentioned among them." And PARKE, B. remarked: Lord DENMAN, in his judgment, in a very important title case, (*Fellowes v. Clay*, 4 Q. B., 356,) relied on the report of the real property commissioners. There can, however, be no doubt, that it is not a legitimate mode of construing statutes." But in *Wood v. Dillingham*, 1 Handy, 30, GHOLSON, J., in speaking of the sufficiency of a petition uses this language: "It is in accordance with the form given by way of illustration, by the learned com-

So we conclude that there is no such difference in the nature of the facts establishing an equitable, from those establishing a legal conclusion, as to require a dissimilar mode of trial—but that in both cases, it may be left to the choice of the parties.

5. Is there any reason why, in a case called equitable and one called legal, the court or judge, should have other and dissimilar power of control over the property in dispute during the pendency of the action?

Should not the court and judge, in both alike, have all the power necessary to protect and preserve it, if it needed this protection and preservation?

In early, though not the earliest times, law, judges and courts, had none of this power which the chancery had.

The reason was that a law court, acted in a case by a writ which defined its power to trying and rendering judgment—it had no power to do anything else—at least after equity grew up. Besides the law court was only open during its terms—sometimes there was no standing judge, but one with a commission for that term only, whose power was defined. The chancellor, on the contrary, was a fixed person, having power at first, by special, but soon, by general deputation, as standing for the king. He had no terms—his court was always open. If the chancellor had not had the power the statute would probably have created it in the judge, but did not, because the chancellor had it—and so there was no need of it in law. This is a necessary power in a tribunal—but it may also be useful in law cases, and should not be limited to one kind of cases, but exercised in all when the interests of the litigants require it. There is nothing in the constitution or in decisions which deny the allowance of this power to any judge, or confine it to a particular class of cases.

6. The kind of decision rendered at law was called judgment—at equity, decree—in each case it was the declaration of the tribunal, what the party or parties should do. The law could render only *one* judgment. Its power to act was conferred upon a stated case or set of facts; it could not touch any other matter. The judgment must follow the *writ*. Thus it soon attained a fixed unbending form, and was chiefly, that *one* have money or a piece of property. The decree or decision of the chancellor, was made by a court whose jurisdiction was not of that defined sort. It could make such decision as seemed to promote justice between the parties; it might award money or property, and might order things to be done, by either, for the other. It went so far in its inception as to order *apologies* to be made by one to another. This power of multiform decision is a very necessary one, but was only exercised by the chancellor because it could not be by the judge, and was not extended by statute to the judge, because it existed in the chancellor. Law courts now have general jurisdiction underived from any original writ, and so are not thus straightened in jurisdiction, and we could and should provide by statute that this power should be used by every court alike, and not be confined to any one.

The established justice of the land affixes to certain relations, certain rights. Reason says, let the court finding such relations confer those rights, by a decision, such as will secure their enjoyment—and no matter what you call it—judgment or decree. Nothing in the constitution or decisions denies this principle.

7. The execution is the means of attaining the enjoyment of the decision. Now this must vary with the thing to be attained. A chancellor constrained the person to do the *thing* ordered, by imprisonment—if the judge make the decision, he can compel its execution by such means as are given him by legislation, and these can be the same, or others, than those used by the chancellor—such as under the constitution are adapted to the urgency. Let no power of coercing right-doing be lost, but yet exist unimpaired, whenever it should be exercised.

8. Should there be a dissimilarity in the value of an appeal, in a case where the right demanded is equitable, from that in a case where the right demanded is legal?

Common sense, *uninfluenced* by law, would argue the question thus: The object of an appeal is to get some point, either law or fact, tried over again. The good reason for desiring such re-trial of such point, is the hope that it will be more fairly done. Will that hope be most likely realized in a new trial of a point of law or of fact? Is it more likely that three judges will correct the errors of one judge on law, than which judge they are presumed better lawyers, than that they will correct

missioners who prepared the code, and the construction given by them to the provisions of the code, though not obligatory is certainly very persuasive authority, and will always have with me great weight." And in *Watson v. Sullivan*, 5 O. S., 44, a passage from the report is cited in the opinion of the court for the purpose of aiding in the construction of the code. See also 2 O. S., 621, 643; 3 *ibid.*, 46; 7 *ibid.*, 546, as to the authority of the debates in the constitutional convention, as aids in construing the constitution.

errors of twelve men on fact, each man of which twelve is presumed to be of as sound fact judging sense as any of such three judges?

Common sense would therefore conclude that getting errors of law better tried, would thus be much more hopeful, than getting errors of fact better tried; unless such trial of errors of fact were before another jury, which could occur only in a lower court, and not on appeal. That is to say, if our pretence is well founded that juries best try fact, then fact should not be appealed, but law alone. Each, if to be tried over, should go to that tribunal conceded by our system, best able to do it justice.

But it is said that the constitution in art. 5, sec. 4, declaring that "the supreme court shall have appellate jurisdiction only in all cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe;" necessitates that, in demands for equitable rights, facts as well as law should be retriable in the appellate court. We propose to examine that position.

There are two modes of action, which may be taken by a superior court, to which parties from an inferior one go for aid. The first is to hear the parties over on such case as they may then make and give a decision without thinking of the former one. The second is to try, not the party's rights anew, but the *decision* which was made below, and see if it, *the decision*, was right; and this trial may proceed, either on law brought up decided below, or on fact brought up and decided below; or on both brought up and either or both below decided.

The first we alone have in a case from a justice to the district court. The second we have in the supreme court.

The *substantive right* of taking up a "*decision*," to be tried, is called by the civil law, appeal—and whether it takes the decision up to be tried on fact, or law, or on both, as it may do, it is yet called appeal;—so that appeal don't necessarily in itself imply trial either on fact or on law, as distinguished or combined, but leaves that to be determined by the adjective provisions providing what thing shall be transmitted to be tried, whether law or fact, or both. The word appeal, and the term appellate jurisdiction, obtain as the name of the *substantive right*.

The substantive right of taking up a *decision* to be tried by the common law, whether it take the decision up to be tried on fact or law, or both, as it may do, is called "*writ of error*." The term "*writ of error*" don't necessarily imply that the decision shall be tried on law only, or on fact only; or that it shall be tried on either alone, or on both together, but leaves that to be determined by the adjective law, the provisions providing what things shall go up.

The chancellor was, as we have said, a civil lawyer, and when he gave a name to the substantive right of taking a case up for a review of *the decision*, he called it appeal—not because he desired that another result should obtain than that which would flow from the writ of error; but he had given Roman names to all procedure in his court, and so in the same spirit, he named this. Writ of error was, in his language, appeal.

The mode of conferring jurisdiction on any one to try a decision by writ of error, which was a commission from the crown to such person to do so, could not obtain, at first, when the principles of chancery had not got fixed into precedent, and there was yet no established law by which to try the decision, and when also the only tribunal considered cognizant of these principles, was the chancellor. But as soon as these decisions became fixed, and hence became law—then the commission which was actually issued to confer on some one a power to try the *decree*, was in all its elements a writ of error—that is, it secured only the trial of the *decision*.

It is true that the process called writ of error, would be less likely to transmit fact up to be re-tried. Because 1. that had been tried once by a jury, and if not done fairly, the remedy was against them, or by a new trial. And 2. there was no objection to a re-trial of the fact in the same court, because to ask it would not be asking any judge to correct his own mistakes, while to take up fact would look like defeating the right of a jury trial.

But in a chancery case, fact which was decided wrong, would not be sought to be re-tried before the very same man who was committed to the supposed error, any more than would law in the like case. Nor would the re-trial of fact in a chancery

Looking to the spirit of the cases in our own state, by which we must always be controlled, it seems to me that the report of the code commissioners may be referred to as an aid in determining questions of doubt arising under the code, but it is by no means authoritative. In this case, however, the passages quoted only speak of the spirit apparent from the whole instrument itself. *Western Law Monthly of May, 1859.*

cause, be open to the objection of defeating a jury trial, as that right was not conceded, but in clear law cases. So that it would be true, as a matter of history, that when special commissions to try *decisions* in *law*, and in *equity*, became current—that those in law cases would chiefly contain only law points—as they now do; while those in equity would contain also fact, as they now sometimes do. And yet that circumstance was only accidental, one to be demanded and defined in the commission itself. And when, at length, the appellate tribunals came to try *decisions*, without any special commission, they would try just what came up, so that if fact came, it would be tried, whether on judgment or decree, as is done now. And when later the mode of attaining such appellate jurisdiction was fixed by legislation, that legislation would determine what should go up, and it accordingly always has so done. So that the word *appeal*, don't necessitate that therein the decision tried should be tried on *facts*, nor do the words *writ of error*, necessitate that on such trial *facts* should be ignored, if they are there in a proper form. And, indeed, in each case, whether the word *appeal* is used, or *writ of error*, you can't tell without something more, what shall be tried. But for this you must go to the *adjective* law, which determines such things.

The reason why the appeal sent facts up more frequently than the writ of error, ceased, when the chancellor came to have a jury—and with the reason also, in great measure, ceased the fact; and with a full power for a binding jury trial the reason ceases altogether.

Appeal then means the substantive right of going to the supreme court, and is the equity word for writ of error, which means at common law the same substantive right—but neither of these terms do, or ever did, limit or define in themselves, what it is which shall go up for review. That is left to adjective legislation which may provide that law or fact, or both shall be so taken up, either by the petition of appeal or by the writ of error.

Again the word "*only*" as used in the constitution, is neither used to imply that in law cases you may go to the supreme court *either* by writ of error *or* by appeal, nor does it mean that you can go there in law by writ of error, *only*, and in equity, by *appeal only*. The "*only*" limits the *kind* of jurisdiction which the supreme court shall have in equity. It shall not be original as it used to be, but shall be *only* appellate. It means, whereas in some cases the supreme court has had *original* jurisdiction in chancery, now it shall have appellate "*only*," and also shall have appellate jurisdiction of all errors at law.

No writ of error is mentioned—no appliance is mentioned for securing the appellate jurisdiction—nothing is said of the appliances before in use, namely, the petition of *appeal*, or the *writ of error*—nothing is said, indicating which of these should be used—nothing prevents the legislature from providing any means it pleases. This "appellate power in chancery" is not defined—not made to apply to the *law* part, or to the *fact* part, or to either, or both. It is not limited, in its application to either, for although limited to the correction of errors, it is not said of what *kind*—whether of *law* or of *fact*—for the term is not *errors of law*—but *errors "at" law*—which may be either of law or of fact—and, indeed, were it limited to errors of law, in law cases, there would be no power in the supreme court to do what it every day does, namely, to give a new trial because the *facts* did not justify the finding of the jury. But even, if it were insisted, that the errors to be corrected, were errors of law, *only*, yet it is equally true that there is no word said of the means of getting them into the supreme court—they stand as to the mode, in the same unprovidedness of means as does the chancery. The term writ of error, as an appliance is no more mentioned, than is petition of appeal. Modes of enjoying this appellate jurisdiction are to be provided under whatsoever "*restrictions the general assembly may by law prescribe*;" that is, the term "shall have appellate jurisdiction in chancery," commits the constitution makes to no formal mode of such attainment of jurisdiction. Besides, if it were said that "appellate jurisdiction," implied a jurisdiction, to be got by appeal, and a "correction of errors at law," in cases of any kind, or of the law kind, implied a writ of error; yet, there remains the answer, that it is nowhere said *what* shall be appealed—whether law, or fact alone, or both—and this can't be implied from the mere conferring of the "appellate jurisdiction," especially when it is to be exercised "under such restrictions as the general assembly may, by law, prescribe." Besides, this is plain, the term appellate, if it should *apply*, that facts should go up as well as

CHAPTER 109.\*

ORGANIZATION OF SUPREME COURT.

[Code—Chapter 90.]

SECTION 2623. The supreme court shall be held at the capital of Court held at this state.

SEC. 2624. There shall be two terms a year, one commencing on the In June and first Monday in June, and the other on the first Monday of December. December.

law, don't define the mode of taking them up, nor say that the mode shall not be the same in both—nor what the means shall be. The legislature may provide any mode it pleases, and call it by any name—and the Code did provide and our act in its short mode does, a method certainly not in conflict with any constitutional provision; and it makes the same mode apply to law, which certainly don't impair its efficacy, as a mode of appeal in chancery. It don't ask what kind of case it is, but says if you want law only to go up, take it up, and if you want facts, also, take them up—and if you want both to go up you can take them. That is, it provides one simple mode called *appeal*, which term does not stand in contrast with *writ of error*, but has the possibilities of the technical appeal and writ of error both. Indeed it provides that in *all* cases facts may be taken to this appellate jurisdiction, so that it would seem to meet the fullest demands of the objector who clamors for a review of them. But here the objector makes a new demand—namely, that not only the *facts*, should go up but also the *testimony*, in its very terms. Now there is all the difference between testimony and facts, which there is between cause and effect. Testimony establishes facts, and there certainly is no ground for the position that the terms “appellate jurisdiction in chancery,” necessitates *its* review. Such never has been the established principle of chancery anywhere—it has now and then been the exception provided for by special enactment; and this holds not only under the general principles of equity, as acceptably administered, but also under constitutions whose implications in favor of the preservation of every chancery right are much more positive than ours.

Let us review the usage in this regard:

There never was, in England, but in the earliest times, an appeal, in the sense of a trial of the case anew. The only appeal was, for a trial of the *decree*. \* \* \*

In this country it is equally true that appellate jurisdiction in chancery, has no fixed meaning, necessitating that it act on *testimony* as distinguished from *facts*. The constitution of the United States, article three, section two, says: “The supreme court shall have appellate jurisdiction both as to *law* and *fact*.” The makers of it did not think the term appellate enough to imply power over *fact*, and so expressed the word fact. \* \* \*

Under this provision it was at first provided by congress that *appeals in equity* shall be by *writ of error*, and they were so taken for years. And in 4th Dallas, 22, the appellate jurisdiction was sought by an appeal, and it was decided that appeal did not lie, that a writ of error was the mode—simply because it was the means provided by the law, under the constitution. By this appliance, it would seem that it was not meant that *testimony* as distinguished from facts should go up. During the fifteen years that this was the mode of appeal in equity from the circuit court and district acting as circuit court—it was made the duty of the court to cause the “*facts*” of the case, on which was founded the decree, fully to appear on the record, either from the pleading and decree itself—or from a case agreed by the parties—or *stated* by the court. This was like our Code in its purpose. Not the evidence was sent up, but the result of it, and the court, if no statement of facts was sent up affirmed the decree, although the evidence was all sent up—3d Dallas, p. 184; and in 3d Dallas, p. 324, it is decided that appellate jurisdiction can be exercised only in conformity with such regulations as congress prescribes, and that a writ of error in contradistinction to an appeal is the mode so prescribed to bring equity cases up to the supreme court—and the mode of bringing up a finding of fact only and not testimony is recognized as in harmony with the constitution, which decision clearly sus-

\*This chapter is mainly the Code, as is indicated by the sections marked with brackets, and the acts which had been passed to amend it—being those of the 4th session, chapter 79, 109-94, 5th session, chapter 161, 7th session, chapter 59, 82, with an amendment allowing cases to be taken by consent to that branch of the supreme court without the appellant's jurisdiction.

- Sheriff to attend. SEC. 2625. The sheriff of the county where the court is held, or his deputy, must attend upon the court, and shall receive two dollars a day for such attendance.
- Limit of expense. SEC. 2626. The amount appropriated by the general assembly therefor, shall limit the contingent expenses, which shall be allowed said court.
- Quorum. SEC. 2627. (1551.) The presence of two judges is necessary for the transaction of business, but one alone may adjourn from day to day, or to any particular day, or until the next term.

tains the mode we commend. And, although, now in the supreme court of the United States, a statement of facts, sent up by the judge, is no longer enough—that does not follow from any meaning inherent in the terms “appellate jurisdiction,” but, because Congress, which had the power to define, as our legislature has, the thing which shall go up, has now provided that in all such cases, the *depositions* also, and *all proceedings*, shall go up, so that now, if oral testimony is taken, which may be, the same must be reduced to writing, and appear on the record. But such demand was never founded on the constitution itself.

Now, let us see how this matter has stood in Iowa. Congress, we remember, had power to and did provide the appliance of taking up cases under the words—“shall have appellate jurisdiction, \* \* with such restriction and under such regulations as Congress shall make.” Now the Constitution of Iowa also allows the jurisdiction “under such restrictions as the general Assembly may, by law, prescribe.” It might be enough to stop here, and say that the legislature has provided the mode, and had clearly the right to do so. But we will show that there is nothing in this mode in conflict with those which have been current since we became a people.

We will not go further back than Michigan, though, the same principles existed here while Louisiana and Missouri territories. By the act of Michigan, 1833, April 23, the supreme court had both *original* and appellate power, in *chancery*,—the laws of Michigan became ours in June, 1834. In July, 1836, the organic act of Wisconsin was passed, and became our constitutional law. This gave the appellate right to be enjoyed “under such regulations as may be provided by law.” In December, 1836, the legislature of Wisconsin enacted “that the supreme court shall have and exercise an appellate jurisdiction *only*, which shall extend to all matters of appeal, error or complaint, from the judgments or decrees of any of the district courts, in all matters of law and equity, wherein the rules of law, or *principles* of equity *appear*, from the *records* or *exhibits* of any such courts to have been *croneously* adjudged or determined.” This act explains the use of the word “*only*,”—it takes away the original jurisdiction then existing in that court in chancery. It also seems to contemplate only a review of *rules* of law and *principles* of equity, and very clearly ignores the right of passing on fact, as also on testimony.

We became the territory of Iowa in July, 1838, and the same provision which had been the organic law of Wisconsin, became that of Iowa, using the same terms, as to the appellate jurisdiction of the supreme court in chancery—“under such regulations as may be prescribed by law.”

But the act of Wisconsin, as to the supreme court, remained law till February 10, 1842, when the following was enacted: “That the supreme court of this territory shall exercise appellate jurisdiction *only*, as is hereinafter provided, and shall have final and conclusive jurisdiction of all matters of appeal, error, or complaint, from the judgment or decrees of any of the district courts, \* \* in all matters of law or equity, where the *rules* of law or the *principles* of equity, *appear* from the files, records, or exhibits, \* \* to have been *croneously* determined.” The “*only*” is continued for the former reason. Facts here, too, seem clearly ignored—for *rules* of law, and *principles* of equity, have nothing to do in inferring facts from testimony. In January, 1839, in the act defining proceedings in chancery, it had been enacted, that on appeal the clerk should certify up “all the papers and proofs which were in his possession,” but as the same act allowed an *oral* examination of witnesses, and also a *jury* trial of an issue of fact, it would be quite impracticable to get all the *testimony* up, and much would not be “in his possession.”

But the point is, that it was never supposed that the terms of the organic act, “appeals in chancery causes shall be allowed in all cases,” in *itself* defined what should in such appeal be passed on, but left that to the legislature, and when they restricted its value, no court declared it to be against the organic law.

In 1843, the organic act being the same, an act was passed defining again the jurisdiction of the supreme court, and is exactly the repetition of that of Feb. 7, 1842, save that it reads “jurisdiction of all matters of appeal, writs of error, upon

SEC. 2628. (1552.) When the court is equally divided in opinion, *Divided court.* the cause must stand for a re-argument, unless the third judge be legally disqualified from sitting. In such case the judgment of the district court shall stand affirmed, but the decision is of no further force or authority.

SEC. 2629. (1553.) If all the judges fail to attend on the first day *Failure to attend.* of the term, the clerk must enter the fact upon the record, and the court shall stand adjourned until the next day. The same proceedings shall

law and in *fact.*" This shows an introduction of a power to try "*fact.*" It don't limit such trial to an *appel*, but extends it as well to a writ of error, which also is a new term in such act. Appeal and writ of error are in that act applied both in the *same sense*; "appeals shall be allowed \* \* upon all final judgments and decrees, etc." In the act of February 8, 1844, the use of both of these terms in the same sense, and with a meaning only implying a means of attaining appellate jurisdiction is more apparent. "The supreme court shall have appellate jurisdiction over all \* \* judgments and decrees \* \* in law and chancery." "Writs of error shall issue \* \* upon any order, decree or judgment." "If a decree shall be rendered against two, and one die, a writ of error may be brought by the survivor." "Appeals and writs of error shall be allowed \* \* from decrees." And all through the act the writ of error seems to be applied to chancery. In an act amending the same, June 3, 1845, the writ of error is also applied to chancery proceedings.

In this state of things in 1846, the old constitution was made. Now, practically, the supreme court had tried whatever was taken up—if fact, fact was tried, if law only, that was tried.

The constitution of 1846 declared, as the new one does, that "the supreme court shall have appellate jurisdiction only, in all cases in chancery \* \* under such restrictions as the general assembly may by law prescribe." We remember now, the origin of the word "*only*," and we see that just as before they had done, under the organic acts, so now under the constitution, the legislature prescribed by law what should be reviewed, and what should be the form of the appliance. And in the Code of 1851, it was provided that a statement of the facts as found by the court, or a special verdict should go up in chancery, and that the name of the appliance should be appeal.

We trust that we have shown that the terms of the constitution only secure the substantive right of review, and leave the legislature to define what shall be reviewed—and that they in allowing only a finding of facts to go up, have not contravened any right secured by that instrument, nor contravened any right established by well defined chancery precedent. And that there is no well established right in our history as a people, that inferences from testimony as opposed to facts shall in the supreme court be reviewed.

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2. We turn now to the second main question. The objector says, law and equity should not be mixed in the same case, which may mean that a statement in law should not go with a statement in equity. The objection has been based upon the different modes of procedure—but, if we have shown that there should be a uniform mode of procedure, we have taken away that objection. But, it may mean that a defense of equity should not be made to a case of law—and of this we will say a word.

Is there any reason in the nature of law and equity, why a case of law should not be met by a defense of equity? The old reason was because a law court could not take notice of an equity case. But say it can—and what difficulty remains? Certain defenses ever so just, a law court had to ignore, because it was not a court of justice, but only of that fraction of justice called law. And so it did wrong, to let the other court do right by declaring that its judgment should be disregarded or annulled. The impediments which grew out of the dissimilarity of the formula of procedure you remove when you provide that no forms shall be required *in either*—that facts may in both be tried by a jury—that in both, either party who desires a review may take to the supreme court both the facts and the law, or either, as he likes. The old reason for going to a chancellor don't exist, because the principles which he administered are now fixed law—besides, we have no chancellor—and we do not as a matter of fact go to a different court. \* \* \* \* \*

Even the nation which introduced this system, and where its roots are surely deeper than in our soil, has partly abandoned it, and now allows, and since 1854 has done, that equitable defenses shall be allowed and heard in some law cases.

But here the objector interposes on this last question, article 5, section 6, of the

be repeated from day to day, until the fourth day of the term, when if none of the judges appear, the court shall stand adjourned until the next term.

Causes con-  
tinued.

SEC. 2630. (1554.) No process or proceeding is in any manner affected by an adjournment or failure to hold court, but all shall stand continued to the next term, without any special order to that effect.

Appellate power.

SEC. 2631. (1555.) The supreme court has an appellate jurisdiction over all judgments and decisions of any of the district courts as well in

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*new constitution.* "The district court shall be a court of law and equity, "*which shall be distinct and separate jurisdictions,*" &c.

That means, that the jurisdiction of the district court, as one of law, shall be distinct and separate from its jurisdiction as a court of equity. Now it needed no constitution to declare that. It was very well understood before. A court always has been and always will be, in trying a law case, exercising a jurisdiction distinct and separate from what it exercises in trying a chancery case—as much as in trying an action of debt, it will be exercising a jurisdiction distinct and separate from what it exercises in trying an action of trespass.

Let us look at this thing of jurisdiction a moment.

One jurisdiction may be separate and distinct from another, in the point of *locality*, as those of Henry and Des Moines counties. Or in the *subject of action*, as involving personal or real estates; in point of *quantity*, as of a justice or district court; and in various other ways.

When jurisdiction was conferred by writ, the jurisdiction of the court, on the facts of that writ was separate and distinct from the same on any other facts, or writ. To say the district court shall be a court of *law and equity*, is to say law and equity are separate and distinct, and that the court in exercising jurisdiction in one, is exercising a jurisdiction separate and distinct from that which it exercises in the other. And to add thereto, "*which shall be distinct and separate jurisdictions,*" is not to render such jurisdiction more distinct or more separate. Trying a case of replevin for a horse, is exercising a distinct jurisdiction from that which is exercised in trying a case for a cow. And so, the court, while trying a case for specific performance is exercising in the same sense, a jurisdiction, distinct and separate from what it exercises in trying a case of slander.

Jurisdiction in such use means power of adjudication—or more briefly power. And, when a court is exercising *one* power, it is for that very reason *not* exercising *another* power, and so these powers are separate and distinct. While acting under the inspiration of equitable principles, it will not be acting under the inspiration of legal ones, and this will be as true, if it be required to act under the inspiration of either, or both, in the same suit, as if so, in different suits. So that in a suit combining two causes of action, one legal and the other equitable—or in an action legal by the plaintiff, equitable by the defendant, you have, while the court is adjudicating either cause, whether on the plaintiff's or defendant's facts, as full a certainty of attaining separate and distinct exercise of jurisdiction, as if the legal and equitable cause had not been brought in the same, but in different petitions—or, as if the equitable defense had not been made in the same, but a different suit, or as if the facts constituting it had been stated not in what we call the defense, but in a separate cause of action.

Indeed the facts of the law case, and the facts of the equitable case, in the same petition, are, of necessity, as distinct as they would be, if they were stated in separate petitions. When an equitable statement of facts is interposed to an action as a *defense*, it is in so far forth, as it is an equitable defense, in so far forth, as it would be a good cause, in a bill to defeat the legal action, it is in so far forth, a plea of confession and avoidance—or a cross-demand. It concedes the plaintiff's legal right to recover—confesses his legal case, and makes an avoidance case, called equitable. And it don't put in issue then the legal facts, it makes a statement of equitable facts, which, if put in issue, will be an *equitable issue*, and the *only one in the case*.

There is as much separation and distinctness between the legal and the equitable jurisdiction—power—exercise of decisive authority, in such cases, as if the same classes of facts had been stated in a pleading between different men in different suits. We will go further and say, even the facts involved in the legal statement, and in the equitable one, the issues coming out of a denial of them are as separately and distinctly defined when they occur in the same action in different counts thereof, or in the same action as a defense to a law case, as if they were in different actions. An *equitable* remedy is intrinsically different from, and can't be confounded with, a *legal* remedy. And that, not because any constitution makes or tries to make it so.

The district court shall be a court of law—means, having the power to try legal



case of civil actions properly so called, as in proceedings of a special or independent character.

SEC. 2632. An appeal may also be taken to the supreme court from From orders. the following orders:

1. An order made affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment from which an appeal might be taken;
2. A final order made in special proceedings affecting a substantial

issues, and to award legal remedies, on a statement of legal facts. That it shall be a court of equity means, it shall have power to try equitable issues, and to award equitable remedies, on a statement of equitable facts. Now, when it adds, which shall be distinct and separate jurisdictions, it only says what is true, but is not made so, nor any more so, by that provision.

Suppose, before such last change, such section had read thus: the district court shall be a court for the trial of debt, covenant, detinue, etc., which shall be distinct and separate jurisdictions. The sentence "which shall be distinct and separate jurisdictions," would have added no intensity to the distinctness. It would not have precluded the joinder of two of these. Suppose it read, the district court shall be a court to try facts constituting rights to recover on an express promise to pay money and to try facts constituting a right to recover specific land, on an agreement to convey the same, "which shall be distinct and separate jurisdictions;" now, we insist, nobody could well urge from such words that one of such set of facts should not be joined with the other set.

If we go to the convention, we find nothing in conflict with these views; sixteen lines contains all said on a question, which more than any other legal one, has been and is now occupying the attention of Christendom. The mover of the clause thinks that the Code means "to mingle," "to combine law and equity," and as the supreme court decided prior to the adoption of the Code, and incidentally since, that law and equity could not be "mixed up together,"—so to make the matter plain, such words should be inserted. We have only to regret that even the intention of the convention remains yet rather obscure. This does not prevent the statement of facts which entitle to a remedy, called heretofore legal, in a petition with a statement of facts, entitling to a remedy formerly called equitable; provided that both statements be made in distinct and separate counts, and be not "mingled," combined, or "mixed up together." It would have been so easy, if the convention had meant to interdict the joinder which we have above suggested, to have said a cause at law and a cause in equity—or a statement of facts entitling to a legal remedy and a statement of facts entitling to an equitable remedy—shall not be stated in one action; nor shall a legal defense and an equitable defense be made in the same case. Nor shall an equitable defense be allowed to a legal claim. But there was an evil then, and yet current, to which the terms "mingle," "mix up," "combine," would apply, that is the evil of bad pleading—the evil that came of the first idea got from the Code, namely, that a plaintiff might state whatever he liked without method—without distinction of counts, and all "mixed up," and "mingled," and "combined," without any classification of the facts into distinct groups dependent on the relief which they were intended to apply. We will not say that this *must have* been the evil sought to be counteracted, for even that is not clear. But if it means that, a legal cause shall not be united in a petition with an equitable one, it spends its whole force on that interdiction, and does not apply as an argument against any thing *we have recommended*; although, it would then be an answer to that part of this *argument* which would quite ignore law as law, and equity as equity, and so unite demands for each. And if such is its meaning, we deem it a very pernicious provision, and a step back towards the past which the State did not know she was taking, and in which she goes as one blindly and alone, while her glorious sisterhood look forward and speed on.

[Here are examined the decisions which have been supposed to oppose this view, and letters given from distinguished judges approving uniformity of procedure.]

It will be remembered that in order to sustain the provisions in this act, this argument might have stopped with showing that there should be a uniformity in law and chancery, as to the mere pleadings with such uniformity extended, throughout proof, trial and appeal, only in the very few cases in which the same is specially provided, and needed not to have insisted in uniting law and equity cases in the same action, a thing not allowed in the act—but it was deemed desirable to explore the whole field of inquiry occupied by modern progress, and to put on record our views thereon, so that the concession we have been forced to make in this act to conservatism, and the supposed demands of the new constitution, may carry with it its own antidote, and may in the future open up a way for higher possibilities.

\* \* \*  
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- right therein, or made on a summary application in an action after judgment;
3. When an order grants or refuses, continues or modifies a provisional remedy; or grants, refuses, dissolves, or refuses to dissolve an injunction or attachment; when it grants or refuses a new trial, or when it sustains or overrules a demurrer;
4. An intermediate order involving the merits and materially affecting the final decision;
5. An order or judgment on habeas corpus.
- Orders by judge.** SEC. 2633. If any of the above orders are made by a judge of the district court, the same is reviewable in the same way as if made by the court.
- Make rules.** SEC. 2634. (1557.) The court may also in its discretion, prescribe rules for allowing appeals, on such other intermediate orders or decisions as they think expedient, and for permitting the same to be taken and tried during the progress of the trial in the court below; but such intermediate appeals must not retard proceedings in the trial in chief in the district court.
- Enforce its appellate jurisdiction.** SEC. 2635. (1558.) The court may issue all writs and process necessary for the exercise and enforcement of its appellate jurisdiction.
- SEC. 2636. (1560.) The opinions of the court on all questions reviewed on appeal, as well as such motions, collateral questions and points of practice as they may think of sufficient importance, shall be reduced to writing, and filed with the clerk of the court.
- Dissenting opinions.** SEC. 2637. (1561.) All dissenting opinions must be written and filed in the same manner.
- Records to show.** SEC. 2638. (1562.) The records and reports must in all cases show whether a decision was made by a full bench, and whether either, and if so, which of the judges dissented from the decision.
- General supervision.** SEC. 2639. (1563.) The supreme court has a general supervision over the district court to prevent and correct abuses where no other remedy is provided for by law.

#### *Argument Term.*

- Argument term.** SEC. 2640. The supreme court shall hold argument terms at the city of Davenport, in the county of Scott, twice a year, one beginning on the first Monday in April, and the other the first Monday of October.
- Business dispatch.** SEC. 2611. All the causes on the docket shall be heard each term, unless by the parties, for good cause shown, continued, and such as are thus continued shall go to the succeeding term of the court at the capital.
- Appeal to Des Moines.** SEC. 2642. From the counties of Scott, Clinton, Jackson, Dubuque, Clayton, Allamakee, Winneshiek, Hancock, Mitchell, Chickawaw, Floyd, Worth, Cerro Gordo, Tama, Bremer, Butler, Black Hawk, Buchanan, Delaware, Fayette, Jones, Linn, Benton, Johnson, Iowa, Cedar, Muscatine, Louisa, Washington, Des Moines, Henry, Lee, Van Buren, Jefferson and Howard, causes must be taken thereto. But with the consent of the appellee, expressed in writing on the notice of appeal, the appellant may take such appeal to the capital.
- To Davenport.** SEC. 2643. Appeals from the other counties of the state shall not go to the Davenport term, unless by consent of parties expressed in the notice of appeal.
- Law of the Davenport term.** SEC. 2644. The court at the Davenport term, shall have the same powers, and be governed by the same rules, and the duties of all the officers thereof shall be the same as at the term at the capital, so far as the same are applicable to a term which is only one for argument.

SEC. 2645. Each judge of the supreme court shall have as mileage Compensation. for the Davenport term, going and returning, ten cents for each mile by the nearest practicable route, and the clerk thereof shall have five dollars a day, for each day of the session of such term.

PRIOR LAWS. 1. An act relative to the supreme and circuit courts of Michigan territory, passed April 23, 1833; M. D., 1833, p. 179.

2. An act concerning supreme court of the territory of Michigan, passed June 28, 1830; M. D., 1833, p. 187.

3. An act to preserve supreme court decisions, passed March 3, 1831; M. D., 1833, p. 187.

4. An act providing for supreme court commissioners, passed March 25, 1833; M. D., 1833, p. 188; all the above repealed Aug. 30, 1840.

5. An act concerning the supreme court, &c., passed Dec. 8, 1836; Wis., 1st sess., No. 9, p. 23; repeals only by inconsistency and saves all antecedent consistent law; sec. 17 repealed Aug. 30, 1840.

6. An act fixing time of first session in Iowa, &c., passed Nov. 28, took effect Dec. 28, 1838; I. T., 1st sess., p. 108.

7. An act defining the jurisdiction of supreme court, &c., passed Feb. 10, 1842; I. T., 4th sess., chap. 47, p. 34; repealed by No. 8 hereof.

8. An act defining jurisdiction of the supreme and district courts, passed Feb. 3, took effect March 3, 1843; Reprint, chap. 46, p. 144, repealed to the 9th sec., I. T., 6th sess., chap. 6, p. 5.

9. An act defining the jurisdiction of the supreme court, and regulating the practice therein, passed Feb. 8, took effect Feb. 20, 1844; I. T., 6th sess., chap. 6, p. 5.

10. An act amending same, passed June 3, 1845; I. T., 7th sess., chap. 9, p. 25.

11. An act as to term of supreme court, passed Feb. 25, took effect March 17, 1847, 1st session, chap. 120, p. 180.

12. An act to re-organize the supreme court, passed Jan. 22, took effect Feb. 2, 1848; 1st sess., extra, chap. 10, p. 15.

13. An act to authorize supreme court to hold special terms, passed Jan. 9, took effect Jan. 17, 1849; 2d sess., chap. 37, p. 57.

14. An act amending same, 2d sess., chap. 79, p. 94; repealed, 3d sess., chap. 60, p. 141.

15. An act to amend act of Jan. 22, 1848, passed Jan. 15, 1849; 2d sess., chap. 79, p. 94.

16. Code of 1851, chap. 90.

17. An act to amend an act to re-organize the supreme court, 3d sess., chap. 60, p. 141.

18. The act of Jan. 22, 1848, amended; 3d sess., chap. 79, p. 182-1851.

DECISIONS UNDER THE PRIOR PRACTICE. On a judgment against a corporation, a judgment that execution issue against the private property of members, is one which may be appealed from, and such judgment can not be questioned in a proceeding to enjoin the issuance of execution thereon, 4 Iowa, 13; a party suffered to contest with the plaintiff in the original suit, a sum which he demands of the garnishee, has an appeal from a judgment against him for costs. Is such contestation allowable in one not substituted for the garnishee? 4 Iowa, 341; one not prejudiced by an error can not have it reviewed, 4 Iowa, 464; the supreme court will review the finding of district court on a question of fact when all the evidence is brought up, as on a motion for a new trial, 4 Iowa, 230; supreme court will not review objections not made in the court below, as to pleadings or proof, if the records disclose the cause of action sufficiently to allow its use as a future bar, 4 Iowa, 292; affidavits may confer jurisdiction on the supreme court to review a cause when the conduct of the inferior court has precluded any other mode, 4 Iowa, 360; where on appeal in chancery the record does not show that certain receipts were in evidence in the court below and that fact is disputed, the court may determine on the record and affidavits, or may remand with instructions that the doubtful fact be ascertained and declared up, 4 Iowa, 546; the finding of the court, or of a jury, simply as a finding, is not reviewable, if on a motion for a new trial the facts be presented, then this court looks into the evidence, 4 Iowa, 432; supreme court will not review objections not made in the court below, as to pleadings or proof, if the record disclose the cause of action sufficiently to allow its use as a future bar, 4 Iowa, 292; the supreme court will review the finding of district court on a question of fact when *all* the evidence is brought up, as on a motion for a new trial, 4 Iowa, 230; mandamus appealable, 1 Iowa, 199;

swamp land case not, by act of Jan. 25, 1855, 1 Iowa, 556; an order dissolving or sustaining attachment appealable, 1 Iowa, 459; so default cases, 6 Iowa, 3; as to re-investing the district court with jurisdiction, 1 Iowa, 35; appeal from motion, 4 Iowa, 173; no bill of exception is needed to review the court's action on a motion, 5 Iowa, 489; supervisory power, how to be exercised, 3 G., 418.

## CHAPTER 110.

### CLERK OF THE SUPREME COURT.

[Code—Chapter 91.]

- Clerks.** SECTION 2646. The supreme court may appoint and remove its clerks.
- Place of office.** SEC. 2647. Such clerk shall keep his office at the capital of the state.
- Register.** SEC. 2648. He shall keep a complete register of all the proceedings of the court, with an index of the same.
- Control opinions.** SEC. 2649. He must not allow any written opinion of the court to be removed from his office, except by the reporter, but shall permit any one to examine or copy the same, and shall, when required, make a copy for any one for a fee of six cents for every one hundred words.
- Announce decisions.** SEC. 2650. He shall promptly announce by letter, any decision rendered, to one of the attorneys of each side, when such attorneys are not in attendance at the place of court.
- Record opinions.** SEC. 2651. He shall make a record of every opinion rendered by said court, as soon as filed, and shall perform all the duties ordinarily pertaining to his office.
- Announce order of trial.** SEC. 2652. When the clerk shall have arranged the causes from the different counties for their days, he shall publish the same four weeks in some newspaper, published in the city where the court is to be held, and send copy thereof to the clerk of the district court in each county in the state, who shall post the same in a conspicuous place in his office.

## CHAPTER 111.

[Code—Chapter 92.\*]

### DISTRICT COURT.

- District terms.** SECTION 2653. (1566.) The judicial districts, and the terms of the district courts therein respectively, shall remain as at present fixed until otherwise directed—provided that in any county where, by the laws now in force, terms of the district court are holden within any incorporated city or town not being the seat of justice of such county, the said

\* This chapter remains as in the Code.

city or town shall provide and furnish the necessary rooms and places for such terms of said court free from charge to such county.

SEC. 2654. (1567.) In counties where no time is now fixed for holding a court, the judge may appoint the terms by a written notice to the clerk thereof. No time.

SEC. 2655. (1568.) The clerk shall thereupon prepare as many written notices of the time and place of holding such court as there are townships in the county, and the sheriff shall post up one of such notices in a public place in each of said townships at least three weeks prior to the time therein fixed for holding the court. Notice.

SEC. 2656. (1569.) A special term may be ordered in any county at any regular term of the court in that county. Special terms.

SEC. 2657. (1570.) Such special term may also be called at any time by the judge for the trial of those causes in which both parties consent. Same.

SEC. 2658. (1571.) The court in ordering a special term shall direct whether a grand or petit jury, or both or neither shall be summoned. Jury.

SEC. 2659. (1572.) The court may, by its rules, establish terms in any county for the making up of issues, or the transaction of any other business not requiring a jury; but the number of trial-terms above required shall not on that account be lessened. Issue; terms.

SEC. 2660. (1573.) When a county is not provided with a regular court house at the place where the courts are to be held, they shall be held at such place as the county court provides. Court house.

SEC. 2661. (1574.) If no suitable place be thus provided, the district court shall direct the sheriff to procure one. No place.

SEC. 2662. (1575.) The district judges may interchange and hold each other's courts. Exchange.

SEC. 2663. (1576.) The several district courts shall exercise general original jurisdiction, both civil and criminal, and as well in chancery as at common law, where not otherwise provided by law. They shall also have a general supervision over all inferior courts, to prevent and correct abuses where no other remedy is provided. Jurisdiction.

SEC. 2664. (1577.) The clerk of each district court shall keep a record of the proceedings of the court under the direction of the judge. He shall, from time to time, read over all entries therein in open court, which, when correct, shall be signed by the judge. Records.

SEC. 2665. (1578.) When it is not practicable to have all the records prepared and thus approved during the term, they may be read, corrected and approved at the next succeeding term, but such delay shall not prevent an execution from issuing in the mean time, and all other proceedings may take place in the same manner as though the record had been approved and signed. Entries authorized to be made in vacation, shall be read, approved, and signed at the next term of the court. Same.

SEC. 2666. (1579.) The record aforesaid is under the control of the court, and may be amended, or any entry therein expunged at any time during the term at which it is made, or before it is signed by the judge as aforesaid. Entries corrected.

SEC. 2667. (1580.) Entries made, approved, and signed at a previous term, can be altered only to correct an evident mistake. Same.

SEC. 2668. (1581.) If the judge does not appear on the day appointed for holding the court, the clerk shall make an entry thereof in his record, and adjourn the court till the next day, and so on until the Judge not appearing.

- third day, unless the judge appear, provided three days are allowed for such term.
- Adjournment.** SEC. 2669. (1582.) If the judge does not appear by five o'clock of the third day, and before the expiration of the time allotted to the term of the court, it shall stand adjourned till the next regular term.
- Judge sick.** SEC. 2670. (1583.) If the judge is sick, or for any other sufficient cause, is unable to attend court at the regularly appointed time, he may, by a written order, direct an adjournment to a particular day therein specified, and the clerk shall, on the first day of the term, or as soon thereafter as he receives the order, adjourn the court as therein directed.
- Proceedings stand continued.** SEC. 2671. (1584.) No recognizance or other instrument or proceeding shall be rendered invalid by reason of there being a failure of the term, but all proceedings pending in court shall be continued to the next regular term, unless an adjournment be made as authorized in the last preceding section.
- Same.** SEC. 2672. (1585.) In cases of such continuances or adjournments, persons recognized or bound to appear at the regular term which has failed as afore-said, shall be held bound in like manner, to appear at the time so fixed, and their sureties (if any) shall be liable in case of their non-appearance, in the same manner as though the term had been held at the regular time, and they had failed to make their appearance thereat.
- Same.** SEC. 2673. (1586.) Upon any final adjournment of the court, all business not otherwise disposed of will stand continued generally.

**PRIOR LAWS.** 1. An act relative to supreme and circuit courts of Michigan territory, passed April 23, 1833; M. D., 1833, p. 179.

2. An act establishing circuit courts in certain counties, and defining powers and duties thereof, passed April 15, 1833; M. D., 1833, p. 181.

3. An act amending same, passed April 23, 1833; M. D., 1833, p. 186.

4. An act providing special sessions, passed April 23, 1833; M. D., 1833, p. 187.

5. An act relative to officers of courts of record, passed April 23, 1833; M. D., 1833, p. 213; the above repealed Aug. 30, 1840.

6. An act regulating practice in the district courts of the territory of Iowa, passed Jan. 25, took effect May 1, 1839; I. T., 1st sess., p. 370.

7. An act defining jurisdiction of district courts, passed Feb. 10, 1842; I. T., 4th sess., chap. 47, p. 34; repealed by No. 8 hereof.

8. An act defining jurisdiction of supreme and district courts, passed Feb. 3, took effect March 3, 1843; Reprint, chap. 46, p. 144; repealed to the 9th sec., passed Feb. 8, took effect Feb. 20, 1844; I. T., 6th sess., chap. 6, p. 5.

9. An act fixing terms of district court, passed Feb. 17, took effect Feb. 24, 1847; 1st sess., chap. 58, p. 74.

10. An act fixing terms in first judicial district, passed Feb. 24, 1847? 1st sess., chap. 116, p. 174.

12. An act fixing terms of second judicial district, passed Jan. 22, took effect Feb. 16, 1848; 1st sess., extra, chap. 16, p. 20.

13. An act fixing terms in first judicial district, passed Jan. 24, took effect Feb. 5, 1848; 1st sess., extra, chap. 52, p. 51.

14. An act to amend an act of Jan. 10, 1843, as to practice as to suing by *scire facias*, passed Jan. 24, took effect March 15, 1848? 1st sess., extra, chap. 55, p. 57.

15. An act amending that of Feb. 17, 1847, passed Jan. 24, took effect Feb. 2, 1848; 1st sess., extra, chap. 56, p. 58.

16. An act fixing the terms of the district court, passed Jan. 15, 1849? 2d scss., chap. 81, p. 108.

**DECISIONS UNDER THE PRIOR PRACTICE.** Every presumption is in favor of the proceedings and jurisdiction of courts of general jurisdiction. There is no presumption in favor of the jurisdiction of a limited court, but that being shown

then every presumption is in favor of its proceedings. The jurisdictional averments of the record of a limited court are presumed true. Jurisdiction existing, error is irremediable save by appeal. Where the court has adjudicated on the fact conferring jurisdiction, such adjudication shall not be assailed collaterally, unless there was a total and not merely partial, want of such fact, 4 Iowa, 77; the district court has original jurisdiction of liquidated demands against a county, 5 Iowa, 15; by consent the record of a judgment may be altered at any time, 8 Iowa, 274; but not as to matters in parol on affidavits a year after its date, 8 Iowa, 435; jurisdiction of law and equity to be kept distinct, 3 G., 120, and 7 Iowa, 110; [see also report of Code commissioners on civil practice, page 219, and all the article on uniformity of law and chancery procedure, also note on page 450 hereof; ] verity of record of court, 4 Iowa, 77; 3 Iowa, 114; 7 Iowa, 334; collateral assault of record, 4 Iowa, 13; 2 G., 547; 1 Iowa, 492; 5 Iowa, 232; 3 G., 374; 4 G., 468; 6 Iowa, 339; the test of jurisdiction is the sum claimed, M., 316, 113, 151, 404, 493; 2 Iowa, 35; consent can not always give jurisdiction, 2 G., 374; 1 Iowa, 492; M., 238; appearance confers jurisdiction, 1 G., 95; M., 156, 438; 4 G., 563; the conferring of "final jurisdiction" inhibits appeal, 1 Iowa, 556; jurisdiction only taken away by statute, 3 G., 42; 2 G., 94; the jurisdiction of the district court is general and original, 2 G., 94; 4 G., 563; 2 G., 374; 2 G., 547; defendant must notice the terms of court when sued without an indication of them in the notice, 6 Iowa, 235; so of a rule of court which is law, 4 Iowa, 345; "next term," 6 Iowa, 235; the power of court expires with its term, 1 G., 406; 2 G., 559; 1 Iowa, 19; 4 G., 411.

See also as to sections (1569) powers of, 7 Iowa, 365 and 247; (1570) 7 Iowa, 247; (1578) as to approving judgment confessed in vacation, 7 Iowa, 139; (1579) record amendable, 6 Iowa, 494.

## CHAPTER 112.

### GENERAL PROVISIONS.

[Code—Chapter 93.]\*

SECTION 2674. (1587.) No judge of the supreme or district court shall practice as an attorney or counselor at law, or give advice in relation to any case pending, or about to be brought, in any of the courts of this state. Judges can not act as attorneys.

SEC. 2675. In 1860, and every sixth year thereafter, there shall be appointed by the governor, by and with the consent of the senate, three commissioners of legal inquiry, who shall hold their office for six years, and any vacancy, by resignation or otherwise, may be filled by the governor, subject to the approval of the senate then, or next to be in session. Commission of legal inquiry.

SEC. 2676. Each of the judges of the supreme and district court shall report to the chairman of such commission, as fast as the same shall fall under his observation, any omission, discrepancy, or other evident imperfection of the law of civil or criminal procedure. Report.

SEC. 2677. Such commission may report to the legislature at each regular session, such amendments in civil or criminal procedure, as they may deem advisable, in order to carry out the intent and general spirit of the system of practice herewith adopted. Duty of.

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\* In this chapter, sections 2675, 2676, 2677 and 2678 are substituted for 1588 of Code, which had proved quite inefficient in securing suggestion. (William Smyth, W. T. Barker and Charles Ben Darwin were placed on that commission by the governor at the last session of the legislature.) Section 1589 of the Code was repealed. Section 2679 is new. The rest of the chapter is unchanged.

- No pay.** SEC. 2678. They shall not, nor shall any of them receive, either directly or indirectly, any compensation for their services.
- Rules as to time of pleading.** SEC. 2679. The district court of any county may provide by general rule, that in actions brought, or to be brought, in such court, the time of filing an answer, reply, demurrer or motion, shall be other than that provided in this code, and such other rules as may be necessary to the end that in those counties, where the same seems to such court desirable, issues may be made up in vacation.
- Other rules.** SEC. 2680. (1590.) The said courts may adopt also such other rules as they may deem expedient, consistent with law, and may revise the same as often as they think expedient.
- Object thereof.** SEC. 2681. (1591.) The prime object of such rules shall be to carry out the purposes of the statute, to preserve as far as is consistent with law, the substance of previous remedies, dispensing with all needless forms with the view of arriving at the prompt attainment of justice.
- Writs.** SEC. 2682. (1592.) All process issued by the clerk of the supreme or any district court shall bear date on the day on which it is issued, be tested in the name of the clerk who issued the same, and be under the seal of the court.
- Proceedings public.** SEC. 2683. (1593.) All judicial proceedings must be public unless otherwise specially provided by statute, or otherwise agreed upon by the parties.
- Oaths.** SEC. 2684. (1594.) All courts have power to administer oaths, connected with any matter pending before them, either by any judge, justice or clerk thereof, or by any other person appointed for that purpose by them.
- Judge disqualified.** SEC. 2685. (1595.) A judge or justice is disqualified from acting as such except by mutual consent of parties, in any case wherein he is a party or interested, or where he is related to either party by consanguinity or affinity, within the fourth degree, or where he has been attorney for either party in the action or proceeding. But this section does not prevent them from disposing of any preliminary matter not affecting the merits of the case.
- Sunday.** SEC. 2686. (1596.) No court can be opened, nor can any judicial business be transacted on Sunday, except,  
 1. To give instructions to a jury then deliberating on their verdict;  
 2. To receive a verdict or discharge a jury;  
 3. To exercise the powers of a single magistrate in a criminal proceeding.
- Where to sit.** SEC. 2687. (1597.) All courts must sit at the places designated for that purpose, pursuant to statute, unless by common consent some other place is fixed upon.

**PRIOR LAWS.** 1. An act to require county officers to hold office at county seat, passed Feb. 18, 1847 ? 1st sess., chap. 61, p. 78.

2. An act in relation to the duties and powers of district judges, passed Feb. 22, took effect March 24, 1847 ? 1st sess., chap. 69, p. 84.

3. An act in relation to the unfinished business of territorial officers on becoming a state, passed Feb. 22, took effect March 3, 1847; 1st sess., chap. 75, p. 90.

**DECISIONS UNDER THE PRIOR PRACTICE.** Party is bound to know the time in which court sits, when fixed by statute, 6 Iowa, 235; seal should be referred to in the attestation, 2 G., 383; 4 G., 80; form of test, 4 G., 81; (1590) considered, 6 Iowa, 159, and *Hinman v. Weiser*, Dec. term, 1859; the power of supreme court to make a rule as to giving notice of appeal, commented on, 2 Iowa, 312; a rule of court can only be abolished by as solemn an act as that by which it was made; qualities of rules, 1 Iowa, 570; 5 *ibid.*, 468; to be prescribed, 1 Iowa, 570; power to make, 1 Iowa, 592; Sunday verdict, 1 G., 406; the two district courts of Lee county, 2 G.,



404; term commenced by a law repealed before its close, 4 G., 411; special te under law of 1839, 2 G., 270; under law of 1848, 2 G., 559, 270; judge interest may yet do some things in a cause, 5 Iowa, 486; should not if he has been attorne 2 G., 458; can not delegate his powers, 4 G., 104, 120; 3 G., 470; 2 G., 458; Iowa, 486.

CHAPTER 113.

[Code—Chapter 94.]

CONTEMPTS.

SECTION 2688. (1598.) The following acts or omissions are deemed Contempts. to be contempts, and are punishable as such, by any of the courts of this state, or by any judicial officer acting in the discharge of an official duty, as hereinafter provided:

1. For contemptuous or insolent behavior towards such court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority;
2. For any willful disturbance calculated to interrupt the due course of its official proceedings;
3. For illegal resistance to any order or process made or issued by it;
4. For disobedience to any subpoena issued by it and duly served, or refusing to be sworn, or to answer as a witness;
5. For unlawfully detaining a witness or party to an action or proceeding pending before such court, while going to, or remaining at, the place where the action or proceeding is thus pending;
6. For any other act or omission specially declared a contempt by law.

SEC. 2689. (1599.) In addition to the above, the supreme or district Other contempts. courts may punish the following acts or omissions as contempts:

1. Failure to testify before a grand-jury, when lawfully required to do so;
2. Assuming to be an officer, attorney, or counselor of the court, and acting as such without authority;
3. Misbehavior as a juror, by improperly conversing with a party, or with any other person in relation to the merits of an action in which he is acting or is to act as a juror, or receiving a communication from any person in respect to it without immediately disclosing the same to the court;
4. Disobedience by an inferior tribunal, magistrate, or officer, to any lawful judgment, order, or process of a superior court, or proceeding in any matter contrary to law, after it has been removed from such tribunal, magistrate, or officer.

SEC. 2690. (1600.) The punishment for contempts may be by fine, Punishment for contempt. or imprisonment, or both, but where not otherwise specially provided, the supreme and district courts are limited to a fine of fifty dollars and an imprisonment not exceeding one day, and all other courts are limited to a fine of ten dollars.

SEC. 2691. (1601.) But if the contempt consists in an omission to Same. perform an act which is yet in the power of the person to perform, he

- may be imprisoned until he performs it. In that case the act to be performed must be specified in the warrant of commitment.
- Affidavit.** SEC. 2692. (1602.) Unless the contempt is committed in the immediate view and presence of the court, or comes officially to its knowledge, an affidavit showing the nature of the transaction is necessary as a basis for further action in the premises.
- Proceedings.** SEC. 2693. (1603.) Before punishing for a contempt, unless the offender is already in the presence of the court, he must be served personally with a rule to show cause against the punishment, and a reasonable time given him therefor; or he may be brought before the court forthwith, or on a given day, by warrant, if necessary. In either case he may, at his option, make a written explanation of his conduct under oath, which must be filed and preserved.
- Same.** SEC. 2694. (1604.) Where the action of the court is founded upon evidence given by others, such evidence must be in writing, and be filed and preserved, and if the court act upon their own knowledge in the premises, a statement of the facts upon which the order is founded, must be entered on the records of the court, or be filed and preserved when the court keeps no record.
- Commitment.** SEC. 2695. (1605.) When the offender is committed, the warrant must state the particular facts and circumstances on which the court acted in the premises, and whether the same was within the knowledge of the court, or was proved by witnesses.
- Certiorari.** SEC. 2696. (1606.) No appeal lies to an order to punish for a contempt, but the proceedings may, in proper cases, be taken to a higher court for revision by certiorari.
- No bar.** SEC. 2697. (1607.) The punishment for a contempt constitutes no bar to an indictment; but if the offender is indicted, and convicted for the same offense, the court, in passing sentence, must take into consideration the punishment before inflicted.
- "A court."** SEC. 2698. (1608.) Any officer authorized to punish for a contempt, is a court within the meaning of this chapter.

DECISIONS UNDER THE PRIOR PRACTICE. What is a contempt, 6 Iowa, 245; 2 Iowa, 72; 7 Iowa, 502; what statement necessary, 2 Iowa, 551. The mode of reviewing a case of contempt is by certiorari, 6 Iowa, 245; 2 *ibid.*, 69; construction of sec. 1598, 6 Iowa, 245; the statute is all the law, 2 Iowa, 69; as to publication of newspaper articles, 6 Iowa, 245; see also as to need of notice, &c., 7 Iowa, 502; the court can punish for contempt for failure to obey an order, *Saylor v. Mockbee*, June, 1859, [see section 2992.] See also *Indiana Digest*, 145-277; *Wright*, Ohio, 78-421; 8 *Ind.*, 467.

## CHAPTER 114.

### ATTORNEYS AND COUNSELORS.

[Code—Chapter 95.]

- Who are.** SECTION 2699. (1609.) All persons who, by the law heretofore in force, were permitted to practice as attorneys and counselors, may continue to practice as such.
- Qualifications.** SEC. 2700. Any white male person twenty-one years of age, who is actually an inhabitant of this state, and who satisfies any district court

of this state that he possesses the requisite learning, and that he is of good moral character, may, by such court, be licensed to practice in all the courts of the state, upon taking the usual oath of office.

SEC. 2701. (1611.) The supreme court may, on motion, admit any practicing attorney of the district court to practice in the supreme court upon his taking the usual oath of office.

SEC. 2702. (1612.) Any practicing attorney of another state, hav- From other states.  
ing professional business in either the supreme or district court, may, on motion, be admitted to practice in either of those courts upon taking the oath as aforesaid.

SEC. 2703. (1613.) The form of the oath aforesaid shall be in sub- Oath.  
stance as follows: "You do solemnly swear that you will support the constitution of the United States, and of this state, and that you will faithfully discharge the duty of an attorney and counselor of this court, according to the best of your ability."

SEC. 2704. (1614.) It is the duty of an attorney and counselor: Duties.

1. To maintain the respect due to the courts of justice and judicial officers;

2. To counsel or maintain no other actions, proceedings, or defenses, than those which appear to him legal and just, except the defense of a person charged with a public offense;

3. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of fact or law;

4. To maintain inviolate the confidence, and at any peril to himself to preserve the secret of his client;

5. To abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;

6. Not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest.

7. Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed.

SEC. 2705. (1615.) An attorney and counselor who is guilty of a Disbarred.  
deceit or collusion, or consents thereto with intent to deceive a court, or judge, or a party to an action or proceeding, is liable to be disbarred, and shall forfeit to the injured party treble damages, to be recovered in a civil action.

SEC. 2706. (1616.) An attorney and counselor has power: Authority.

1. To execute in the name of his client a bond for an appeal, *certiorari*, or writ of error, or any other paper necessary and proper for the prosecution of a suit already commenced.

2. To bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers, but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court;

3. To receive money, claimed by his client in an action or proceeding, during the pendency thereof or afterwards, unless he has been previously discharged by his client, and upon payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

SEC. 2707. (1617.) The court may, on motion, for either party and May be required to show.  
on the showing of reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties to produce

- or prove by his own oath or otherwise, the authority under which he appears, and until he does so, may stay all proceedings by him on behalf of the parties for whom he assumes to appear.
- His lien.** SEC. 2708. (1618.) An attorney has a lien for a general balance of compensation upon any papers of his client, which have come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and upon money due to his client and in the hands of the adverse party in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party.
- How released.** SEC. 2709. (1619.) Any person interested in such matter may release such lien, by giving security, in a penalty double the amount claimed by the attorney, and conditioned to pay the amount that may be finally found due for his services.
- License revoked, &c.** SEC. 2710. (1620.) The supreme and district courts may respectively revoke or suspend the license of any attorney or counselor at law, to practice therein, and a revocation or suspension by the district court in one county operates to the same extent in the courts of all other counties.
- Causes.** SEC. 2711. (1621.) The following are sufficient causes for such revocation or suspension.
1. When he has been convicted of a felony or of a misdemeanor involving moral turpitude, in either of which cases the record of conviction is conclusive evidence;
  2. When he is guilty of a willful disobedience or violation of the order of the court, requiring him to do or forbear an act connected with, or in the course of his profession;
  3. For a willful violation of any of the duties of an attorney or counselor as herein before prescribed;
  4. For doing any other act to which such a consequence is by law attached.
- Proceedings.** SEC. 2712. (1622.) The proceedings to remove or suspend an attorney may be commenced by the direction of the court, or on motion of any individual. In the former case the court must direct some attorney to draw up the accusation; in the latter the accusation must be drawn up and sworn to by the person making it.
- Proceedings.** SEC. 2713. (1623.) If the court deem the accusation sufficient to justify farther action, it shall cause an order to be entered, requiring the accused to appear and answer on a day therein fixed, either at the same or a subsequent term, and shall cause a copy of the accusation and order to be served upon him personally.
- Trial.** SEC. 2714. (1624.) To the accusation he may plead or demur, and the issues joined thereon shall in all cases be tried by the court, all the evidence being reduced to writing, filed and preserved.
- Judgment.** SEC. 2715. (1625.) If the accused plead guilty or fail to answer, the court shall proceed to render such judgment as the case requires.
- Appeal.** SEC. 2716. (1626.) In case of a removal or suspension being ordered by a district court, an appeal therefrom lies to the supreme court, and all the original papers, together with a transcript of the record shall thereupon be transferred to the supreme court to be there considered and finally acted upon. A judgment of acquittal by the district court is final.
- Liability.** SEC. 2717. (1627.) An attorney who receives the money or property of his client in the course of his professional business, and refuses to pay or deliver it in a reasonable time after demand, is guilty of a misdemeanor.

SEC. 2718. (1628.) Where the attorney claims to be entitled to a **Exception.** lien upon the money or property, he is not liable to the penalties of the two preceding sections until the person demanding the money proffers sufficient security for the payment of the amount of the attorney's claim when it is legally ascertained.

SEC. 2719. (1629.) Nor is he in any case liable as aforesaid **provi- Same.** ded he gives sufficient security that he will pay over the whole or any portion thereof to the claimant when he is found entitled thereto.

**PRIOR LAWS.** 1. An act to regulate the admission and practice of attorneys and counselors at law, passed April 23, 1833; M. D., 1833, p. 226, modified by Wis., 1st sess., No. 24, p. 54.

2. An act providing for the admission of attorneys and counselors at law, passed Dec. 6, 1836; Wis., 1st sess., No. 24, p. 54; repealed the above Aug. 30, 1840.

3. An act to regulate the admission of attorneys, passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 71, p. 98; also Reprint, 1843, p. 75.

4. An act fixing the time of the first session of the supreme court of the territory of Iowa and for other purposes, passed Nov. 28, 1838.

5. Code of 1851, chapter 95.

6. 1610 of Code of 1851, modified by the 4th sess., chap. 6, p. 20, passed Jan. 5, 1853, took effect July 1, 1853, and again by chap. 44 of 7th sess., p. 51, passed March 12, took effect July 4, 1858.

**DECISIONS UNDER THE PRIOR PRACTICE.** Proof of authority, 6 Iowa, 500; attorney's lien, 7 Iowa, 318; a case where the confidence necessary between legal adversaries, is protected, 4 Iowa, 535; a case where sheriff had no right to retain a note handed to him by an attorney to levy on, 4 Iowa, 535; communications to counsel, M., 136; attorney as witness, 1 G., 48; charges against attorney should be specific, 3 G., 550; mode of proceeding, 7 Iowa, 499; action of attorney against client for indemnity, when prejudiced by suing in his own name, 6 Iowa, 199; general and special authority, 1 G., 117; attorney's power to receive money, 1 G., 360; nothing else, *ibid.*, 362; to sign bonds, 6 Iowa, 408; presumption in favor of, 1 G., 464; requirement to produce, 6 Iowa, 496; where to be questioned, 1 G., 464; what is not a ground, 8 Iowa, 217; want of, no ground for dismissal of suit, 3 Iowa, 271; remedy in case attorney has no authority, 2 G., 55; 3 G., 443; 7 Iowa, 321; employed in advance, 7 *ibid.*, 320; right to compensation, 1 G., 117; counties when liable, 2 G., 473; see also 1 G., 217; divorce case for wife, husband not liable for services, 3 G., 97; lien for fees, 2 G., 536; need of notice, 7 Iowa, 317; attorney may make affidavit, 4 Iowa, 355; 7 *ibid.*, 232; 8 Iowa, 318; and to confess a second judgment, 3 G., 76.

## CHAPTER 115.

[Code—Chapter 96.]\*

### JURORS.

SECTION 2720. (1630.) All qualified electors of the state, of good **Who competent.** moral character, sound judgment, and in full possession of the senses of hearing and seeing, are competent jurors in their respective counties.

SEC. 2721. (1631.) The following persons are exempt from liability to act as jurors, to wit:—All persons holding office under the laws of the United States or of this state;—all practising attorneys, physicians and clergymen; all acting professors or teachers of any college, **Who exempt.**

\* This chapter presents the law as it before stood in the Code, amended by the seventh session, chapter 133, except that a change is made in section 2732.

- school, or other institution of learning; and all persons disabled by bodily infirmity, or over sixty-five years of age, or specially exempted by any other statute from serving on juries.
- Who excusable.** SEC. 2722. (1632.) Any person may also be excused from serving on a jury when for any reason his own interests or those of the public will be materially injured by his attendance, or when the state of his own health, or the death, or the sickness of a member of his family requires his absence.
- Jury lists.** SEC. 2723. Two jury lists, one consisting of seventy-five persons to serve as grand jurors, and one consisting of one hundred and fifty persons to serve as petit jurors, and both lists composed of persons competent and liable to serve as jurors, shall be annually made in each county, from which to select jurors for the years commencing on the first day of January annually.
- Same.** SEC. 2724. (1634.) Should there be less than that number of such persons in any county, the list shall comprise all those who answer the above description.
- How selected.** SEC. 2725. On or before the first Monday in *September* in each year, the county clerk shall apportion the number to be selected from each township as nearly as practicable in proportion to the number of votes polled therein at the last general election, and shall deliver a statement thereof to the sheriff.
- Same.** SEC. 2726. The sheriff shall cause a written notice to be delivered to one of the judges of election in the several townships of the county, on or before the day of the *general* election in each year, informing them of the number of jurors apportioned for the ensuing year to their respective townships.
- Same.** SEC. 2727. The judges shall thereupon make the requisite selection, and return list of names as selected, to the county judge, with the returns of election, and further, provided that in case the judges of election shall fail to make and return said lists as herein required, the county canvassers shall, at the meeting to canvass the votes polled in the county, make such lists for the delinquent townships.
- Same.** SEC. 2728. (1638.) The judge shall thereupon file said lists in his office, and cause a copy thereof to be recorded in the election book.
- Service.** SEC. 2729. (1639.) Grand jurors shall be selected for the first term in the year at which said jurors are required, commencing next after the last day of July in each year, and shall serve for one year. Petit jurors shall be selected for each term wherein they are required.
- How drawn.** SEC. 2730. (1640.) At least twenty days previous to the first day of any term at which a jury of either kind is to be selected, the clerk must write out the names on the lists aforesaid, which have not been previously drawn as jurors during that year, on separate ballots, and the judge of the county court and sheriff having compared said ballots with the jury list and rectified the same, if necessary, shall place the ballots in a box to be provided for that purpose.
- Same.** SEC. 2731. (1641.) After thoroughly mixing the same, the clerk shall draw therefrom the requisite number of jurors to serve as aforesaid.
- Their number.** SEC. 2732. (1642.) When grand jurors are to be selected their number must be fifteen, and they shall serve for one entire year thereafter; the number of the petit jurors shall be the same unless the judge of the county court on the written direction of the judge of the district court order a greater number.
- Summoned.** SEC. 2733. (1643.) Within three days after such drawing the clerk must issue a precept to the sheriff, commanding him to summon the said

jurors to appear before the district court at eleven o'clock, A. M., of the first day of the next term thereof (naming the month and day,) unless the judge of the district court has previously directed a different hour or day for their appearance, in which case such direction must be observed.

SEC. 2734. (1644.) The sheriff shall immediately obey such pre- Sheriff's return.  
cept, and on or before the day for the appearance of said jurors must make return thereof, and on failure to do so without sufficient cause, is liable to be fined for a contempt in any amount not exceeding fifty dollars.

SEC. 2735. (1645.) If a person summoned as a juror, as aforesaid, Failure.  
fail to appear, the court may issue a rule returnable to that or the succeeding term, requiring him to appear and show cause why he should not be fined for a contempt, and unless he render a reasonable excuse for his failure to attend, the court may fine him in any amount not exceeding ten dollars and costs.

SEC. 2736. (1646.) Except when required at a special term which Grand jurors.  
has been called in vacation, the grand jury need not be summoned after the first term, but must appear at the next term without summons under the same penalty as though they had been regularly summoned.

SEC. 2737. (1647.) If the requisite number of jurors does not ap- Deficiency.  
pear by the time appointed as aforesaid, the court may at any time thereafter direct the sheriff to summon, forthwith, the number necessary to make up the deficiency.

SEC. 2738. Where from any cause the persons summoned to serve Same.  
as grand jurors, or petit jurors, fail to appear, or when from any cause, the court shall decide that the grand or petit jurors have been illegally elected or drawn, the court may set aside the precept under which the jurors were summoned, and cause a precept to be issued to the sheriff, commanding him to summon a sufficient number of persons from the body of the county to serve as jurors at the term of court then being holden, which precept may be made returnable forthwith, or at some subsequent day of the term, in the discretion of the court.

SEC. 2739. (1649.) Within ten days after the close of each term, Certificate.  
the clerk of the court must make out a certificate to each juror of the amount to which he is entitled for his services, which must be allowed by the county court and paid, as other demands against the county.

PRIOR LAWS. 1. An act concerning grand and petit jurors, passed April 23, 1833; M. D., 1833, p. 217.

2. An act concerning grand and petit jurors, passed Jan. 19, 1838; W., sess. 2d, No. 73, p. 251. The above repealed Aug. 30, 1840.

3. An act on grand and petit jurors, passed Jan. 4, took effect Feb. 4, 1839; I. T., 1st sess., p. 277; also, Reprint, 1843, p. 296.

4. An act amending same, passed Feb. 15, took effect April 1, 1844; I. T., 6th sess., chap. 24, p. 45.

5. An act further amending same, passed Jan. 17, 1846; I. T., 8th sess., chap. 27, p. 25.

6. An act regulating mode of getting jury in Lee county, passed Jan. 24, 1848? 1st sess., extra, chap. 40, p. 38.

7. An act as to fee of same, passed Jan. 25, 1848? 1st sess., extra, chap. 58, p. 60.

8. An act to provide for payment of jurors in Lee county, passed Jan. 13, took effect May 1, 1849? 2d sess., chap. 62, p. 76.

DECISIONS UNDER THE PRIOR PRACTICE. Competent jurors, 4 G., 293, 1 Iowa, 143; how selected, 4 G., 125, 293; fifteen, 3 G., 513; 1647 considered, 1 Iowa, 143; this chapter directory, 1 Iowa, 226.

## CHAPTER 116.

## LIMITATIONS OF ACTIONS.

[Code—Chapter 99.]

Limitations.	SECTION 2740. (1659.) The following actions may be brought within the times herein limited respectively after their causes accrue, and not afterwards except when otherwise specially declared, that is to say :
Two years.	1. Actions of slander, libel, malicious prosecution, injuries to the person, or for a statute penalty, within two years ;
Three years.	2. Those against a sheriff or other public officer growing out of a liability incurred by the doing of an act in an official capacity, or by the omission of an official duty, including the non-payment of money collected on execution, within three years ;
Five years.	3. Those founded on unwritten contracts, those brought for injuries to property or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years ;
Ten years.	4. Those founded on written contracts, on judgments of any courts (except those courts provided for in the next section,) and those brought for the recovery of real property, within ten years ;
Twenty years.	5. Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years.
Actions for fraud.	SEC. 2741. (1660.) In actions for relief on the ground of fraud as above contemplated, the cause of action will not be deemed to have accrued until the discovery of the fraud by the party aggrieved.
Effect of answer.	SEC. 2742. (1661.) In actions founded upon contract the above limitations shall not apply if from the answer of the defendant or from his testimony as a witness it appears affirmatively that the cause of action still justly subsists. But the answer of one of several defendants shall not prejudice the interests of others in this respect.
Open account.	SEC. 2743. (1662.) Where there is a continuous open current account, the cause of action shall be deemed to have accrued on the date of the last item therein as proved on the trial.
Commencement of action.	SEC. 2744. (1663.) The delivery of the original notice to the sheriff of the proper county with intent that it be served immediately, (which intent shall be presumed unless the contrary appears,) or the actual service of that notice by another person, is a commencement of the action.
Time of non-residence.	SEC. 2745. (1664.) The time during which a defendant is a non-resident of the state shall not be included in computing any of the periods of limitation above prescribed.
Exception.	SEC. 2746. (1665.) But when a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter.
Minors.	SEC. 2747. (1666.) The above limitation of actions for the recovery of real property shall not apply to minors so far as to prevent them from having at least one year after attaining their majority within which to commence such actions.



SEC. 2748. (1667.) If the person entitled to a cause of action die within one year next previous to the expiration of the limitation above provided for, the limitation above mentioned shall not apply until one year after such death. Death.

SEC. 2749. (1668.) If after the commencement of an action the plaintiff fail therein for any cause except negligence in its prosecution, and a new suit be brought within six months thereafter, the second suit shall for the purposes herein contemplated be deemed a continuation of the first. Failure of action.

SEC. 2750. (1669.) The above limitations and provisions shall not apply to evidences of debt intended to circulate as money, but shall in other respects be applicable to all actions brought by or against all bodies corporate and politic except when otherwise expressly declared. Bank bills.

SEC. 2751. Causes of action founded on contract are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same. But such admission or new promise must be in writing, signed by the party to be charged thereby. Admission.

See 29 E. C. L. R., p. 757; 7 Cranch, 168; 5 E. C. L. R., 90; 5 Seld., 362; 8 Johns., 407; 11 E. C. L. R., 311; 13 *ibid.*, 274 and 422; 24 *ibid.*, 530; 30 *ibid.*, 580; 32 *ibid.*, 405; 5 Seld., 85; 11 E. C. L. R., 66; 14 *ibid.*, 575; 4 Seld., 362; 2 E. C. L. R., 435; 83, 134; 23 *ibid.*, 181; 40 *ibid.*, 247; 24 *ibid.*, 446; 20 *ibid.*, 80; 1 Kern., 176.

SEC. 2752. A defendant may plead a set-off or counter-claim to any cause of action, notwithstanding such set-off or counter-claim is barred by the statute, provided that the claim pleaded as such set-off was owned by the defendant at the time the same became barred by the statute.

SEC. 2753. (1671.) The provisions of this chapter are intended to apply to causes of action which have already accrued and are not yet barred, subject to the regulations contained in the following two sections. Existing contracts.

SEC. 2754. (1672.) The times hereafter allowed for commencing actions in such cases shall not be less than one-half the periods of limitation herein respectively prescribed, except as provided in the next section. Qualifications.

SEC. 2755. (1673.) But where the period of limitation heretofore fixed by statute is not enlarged by the provisions of the first section of this chapter, the time allowed for the commencement of a suit shall in no case be greater than that fixed by the law heretofore in force as applied to those cases. Same.

SEC. 2756. (1674.) The time of limitation in relation to actions for the recovery of real estate as prescribed in this chapter, shall not commence to run in favor of a settler on any public lands until such lands have been sold by the state. Public lands.

PRIOR LAWS. 1. Limitation of real actions, 60 years, passed Feb. 26, 1821; M. D., p. 385., secs. 26 and 28; repealed Nov. 5, 1829; M. D., 1833., p. 408, made 10 years, though rather questionable if it held, as the law was of date 1833, of 60 years.

2. An act to amend an act entitled "An act for the limitation of penal statutes, criminal prosecutions, and actions at law," passed Nov. 5, 1829; M. D., 1833, p. 408.

3. An act for the limitation of suits, &c., passed May 15, 1820; M. D., 1833, p. 569.

All the above repealed Aug. 30, 1840.

4. An act limiting actions, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 325. Repealed by No. 5 hereof.

5. An act for the limitation of actions and for avoiding vexatious law suits, passed Feb. 15, took effect July 4, 1843; Reprint, chap. 94, p. 384.

DECISIONS UNDER THE PRIOR PRACTICE. Dormant judgment, how realizable? 5 Iowa, 506; time of limitation, 6 Iowa, 83; use of words "omission of official duty," 7 Iowa, 177; an action may be brought on a judgment instead of *scire facias* to revive it, 5 Iowa, 506; *scire facias* on judgment can only be brought in the county of the judgment, 5 Iowa, 506; dower, 6 Iowa, 106; sec. 1670 of Code declares the common law, 3 Iowa, 437; cited in 6 Iowa, 88, and in 7 Iowa, 132; period of, 6 Iowa, 88; mode of pleading, 6 Iowa, 518; construction, 7 Iowa, 132; effect of pleading, 3 Iowa, 434; period of limitation, 6 Iowa, 82; what "out of the state" means, 1 Iowa, 498; its application to garnishment, 4 G., 85; "hereafter" in sec. 1672 defined, 6 Iowa, 82; if a party is without the state when the statute begins to run, he may be sued within the limited time after his return whether a resident or not, 1 G., 9; the exception of the statute applies to non-residents, who have not been here, as well as to those who remain here, 1 Iowa, 498; the statute of limitations of Feb. 14, 1843, could not be pleaded within six years after it commenced running, 2 G., 181, 243; 1 G., 338; and the act of 1839, having been repealed without saving clause, by the act of 1843, it can not aid the time of barring a claim under the new act repealing it, 2 G., 181; how statute of limitations to be construed, 3 Iowa, 418, 322; where discretion of party may date the liability, such date or discretion regulates the time whence the statute begins to run, 1 Iowa, 133; sec. 1672 of Code defined, 6 Iowa, 82; the Code means to allow a party at least as much as half the time of its limitations counting from the date of its going into force, and if that time would expire before the time allowed in sec. 1659, then it allows the longer time of that section, 6 Iowa, 82; the 4th section of the statute of limitations of 1843 can not be pleaded in bar to an action of debt or a judgment from another state, 3 G., 593; nor to one rendered by a justice in this state, 4 G., 445; action against county judge on official bond under chap. 40 of 4th sess., must be brought within three years, 7 Iowa, 177; if, however, the claim is money which he has got from the sale of lots and refused to pay over, it is not barred in three years, *ibid.*; if for illegally issuing warrants, it is so barred, *ibid.*; in real actions, ten years which counts from the accruing of the cause of action, 7 Iowa, 114; all actions for real estate must now be commenced within ten years after the cause of action accrued, 8 Iowa, 380; the limitation belongs to the remedy, 4 G., 143; the statute acts on existing causes of action, as well as on those causes which arise after its passage, 6 Iowa, 106; 7 *ibid.*, 114; M., 321, 59; as to surety it commences to run from the time money is paid by him, 6 Iowa, 516; and in such case the question is, when was defendant to pay, and not when did he promise to pay, *ibid.*; if the statute constituting the bar has been repealed, it should be specially plead, 2 G., 181; demurrer will not lie even though the lapse of time enough to be a bar appears on the face of the pleading, and so the statute should be pleaded, M., 321; [but see sec. 2961;] the law in force at the time of plea pleaded governs, and not that in force at the time of the suit brought, M., 321; the limitation of possessory actions is not enlarged, but is diminished by the code, 7 Iowa, 92; the statute of limitations does not extinguish the liability, but bars the remedy which may be again revived, 3 Iowa, 418, [which seems to be deciding the statute to be one of presumption and not of repose, and so also does the case of 1 G., 347, and M., 59; see note to sec. 368 of the report of Code commissioners on civil practice, p. 315 of report;] nature of the admission, 3 Iowa, 418; it may be made either before or after the debt is barred, *ibid.*, and *Morehead v. Gallinger*, Dec., 1859; [required to be in writing by sec. 2751;] see some admissions held insufficient, 3 G., 322; what "out of the state" in chap. 94 of Reprint means, 1 Iowa, 498; and "beyond seas" in Michigan law, 2 G., 602.

## CHAPTER 117.

[Code—Chapter 100.]\*

## PARTIES TO AN ACTION.

Parties to action.

SECTION 2757. Every action must be prosecuted in the name of the real party in interest, except as provided in the next section.

Since the code, an assignee takes precisely the same interest on the assignment of every species of demand, either at law or in equity, as he did before. Hence, if the demand is such as was capable of assignment before the code was adopted, so as to carry an equitable interest to the assignee, it is such a demand as will now pass by assignment, so as to give the assignee a right of action thereon. Claims for mere personal torts, which die with the person—such as slander, assault and battery, false imprisonment, crim. con., seduction, and the like, are not assignable; but claims for taking and converting personal property, or for injury to personal property, and it seems, generally, all such rights of action for a tort as would survive to the personal representatives of the party, may be assigned, so as to pass an interest to the assignee, which he can assert in his own name in a civil action under the code, as he formerly might do in the name of the assignor, at law. *Butler v. The N. Y. & Erie R. R. Co.*, 22 Barb., 110; *Hodgman v. Western R. R. Corporation*, 7 How., 492.

A right of action for the wrongful taking and conversion of personal property is assignable; and under the provisions of the code, the assignee can recover upon the same in his own name. An assignment by a person of all his property and estate, transfers a right of action existing in his favor for the tortious conversion of personal property. *McKee v. Judd*, 2 Kern, 622.

No formality is necessary to effect the transfer of a chose in action. Any transaction between the contracting parties indicating their intention to pass the beneficial interest in the instrument from one to the other, is sufficient for that purpose. *Hastings v. McKinley*; 1 E. D. Smith.

A principal may sue in his own name upon a simple contract in writing made with his agent, and in the agent's name, of which the principal is the sole owner. This section is an enactment of the rule respecting parties which has always prevailed in courts of equity; and it should be applied, as far as practicable, according to the principles adopted in those courts. *Grinnell v. Schmidt*, 2 Sand., 705.

A dormant partner is a necessary party as a plaintiff in an action for the recovery of a partnership debt founded on a partnership contract, whether the relief sought be legal or equitable. *Secor v. Keller*, 4 Duer, 416.

Any transaction between the parties which indicates their intention to pass the beneficial interest in the instrument from one to the other is sufficient; a debt or claim may be assigned by parol. Sto. Eq., 311; 4 Taunt., 326; Rob. on Fr., 275; Blackf., 380; 3 Sme., & M., 647; *Hastings v. McKinley*, 1 E. D., Smith, 273.

\* The provisions of this chapter either exactly or substantially, may be found under the same title, in the codes of N. Y., Ohio, Ky., Ind., Mo., Wis., Minn., Cal., Oregon and in all the territories. In order to obtain the exact value of the decisions cited herein as indeed in all this *Part Third*, the codes on which the decisions are based, should in each case be consulted.

Real party, who is, 1 E. D. Smith, 273; 17 Barb., 458; 2 Sandf., 705; 4 Duer, 416; 5 Seld., 175; 6 O. S. R., 27; 3 Seld., 229; W. L. M., 1st Vol., p. 545.

See *Western Law Monthly*, Vol. 1st, p. 437; 7 Ind., 615; *Garrison v. Clark*, 11 Ind. R., 369; 10 Ind. R., 174.

Our new code of practice has simply adopted, on this subject, the former chancery rule as the general one. Ind. Dig., 632.

Even before the code, the assignee of an assignable right in action, was deemed by courts of law, as well as of equity, to have the *real interest* in the thing assigned, though not the *legal title*; and those courts in the exercise of an equitable power over their own proceedings and judgments, would protect those rights of an assignee, by order when applied to for that purpose, though the action was prosecuted in the name of the assignor; while in equity the assignee was allowed as he is now *required*, in all courts to pursue his action in his own name. The action can not be longer maintained in the name of the assignor; nor is he, in general, at all a proper party. August No. of *Western Law Monthly*, 1859.

In the *Board, etc. v. Mason*, 9 Ind. R., 97, a doubt is expressed whether one of two joint payees of a county order could assign his interest to the other, so as to enable the latter to sue in his own name: but there can be no doubt that such an assignment would vest the equitable interest, and enable the assignee, under the statute, to sue. *Garrison v. Clark*, 11 Ind. R., 369.

The whole subject as to parties, may be summed up thus: Before the new Code, there were two classes of cases, law and equity, in which the rule as to parties was different. The latter system was broader, and embraced the former.

It grew out of a necessity occasioned by the complication of the relations among men, which the narrower system did not meet. The framers of the new code determined to have but one system, and from the necessity of the case, were compelled to take the broader, in order to have a system equal to all exigencies. Hence, the old chancery books give the existing rules as to parties.

Where a promise is made by one party to another for the benefit of a third, as if A. promised B. to pay C. a sum of money, it was held at common law, in this state, though in some of the states it was decided differently, that C. could not sue A. for the money, but that the suit must be by B. for C's use—in other words, that the suit must be between the parties by and to whom the promise was made; but it was held, that in equity C. could sue; and as in our present system of pleading and practice the rules of equity prevail, it may, perhaps, be laid down that now, in this state, a person, not a party to a contract, but being the person for whose benefit it is made, may sue. Ind. Dig., 67; *Bird v. Lanius*, 7 Ind. R., 615. And it seems that the person having the legal interest in such a contract, is a trustee of an express trust, and may also sue. 2 R. S., p. 27, sec. 4; 1 Chit. Eq. Pl., 3; *Perkin's Practice*.

Possession of a negotiable promissory note is presumptive evidence of title, *Moltram v. Mills*, 1 Sand., 37; and where the plaintiff, a bank, sued on a draft payable to W. B. S., their cashier, and the complaint alleged that it was delivered to the said W. B. S., cashier "for the said bank," held, on demurrer to the complaint, that the action was well brought in the name of the bank. *Camden Bank v. Rogers*, 3 Code Rep. 45; 4 Pr. R. 63; *East River Bank v. Judah*, 10 Pr. R. 135.

When an agent made a contract in writing in his own name, without disclosing the name of the principal, it was held that the principal was the real party in interest, and might sue on the contract in his own name. *Erickson v. Compton*, 6 Pr. R., 471.

A, as agent for the plaintiff, effected a policy of insurance on the property of the plaintiff. The policy was in the name of A, as principal, and contained a clause that any loss should be paid to A, only. A loss having occurred, it was held that plaintiff might maintain an action—being the real party in interest. *Lane v. Columbus Ins. Co.*, 2 Code Rep., 65.

The real owner of a note sued on is a necessary party plaintiff to a suit to

recover the amount, and no judgment for the money can be rendered until he is a party. The payee is a proper party plaintiff also. *Carpenter v. Miles*, 17 B. M., 603.

The fact that the plaintiff has not the actual possession of the note sued upon, does not affect his right to recover upon it. It is sufficient if he have a right to the money due upon it. *Smith v. McClure*, 5 East., 476; 2 Sand., 47 a. note (1) *Selden v. Pringle*, 17 Barb., 468; *Hastings v. McKinley*, 1 E. D. Smith, 273.

Whether the plaintiff's title be legal or equitable, is immaterial, if he have the whole interest he may maintain the action. *Hastings v. McKinley*, 1 E. D. Smith, 273.

It is for the court to say, upon a given state of facts, whether a plaintiff is the real party in interest. *Williams & Yeatman v. Whitlock*, 14 Mo. Rep., 552. *Vide*, *McLaughlin v. McLaughlin*, 16 Mo. Rep., 242; *Smith v. Kennett*, 18 Mo. Rep., 154; *Walker v. Mauro*, 18 Mo. Rep., 564; *Finney v. Brant*, 19 Mo. Rep., 42; *Bergesch v. Keenil*, 19 Mo. Rep., 127. The assignee of an account may sue in his own name. *Smith v. Schibel*, 19 Mo. Rep., 140. A debt, evidenced by a note which is lost, may be assigned, so as to enable the assignee to sue in his own name. *Long v. Constant*, 19 Mo. Rep., 320. The assignee of a claim for damages upon a broken covenant of *seizin* must sue in his own name. *Van Doren v. Relfe*, 20 Mo. Rep., 455.

SEC. 2758. An executor or administrator, a guardian, a trustee of an express trust, a party with whom, or in whose name a contract is made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the suit is prosecuted. <sup>Same.</sup>

Although a public auctioneer has received his advances and commissions, and has no interest in the property sold, or its proceeds, he may maintain an action for the price where he sells the goods for another. *Minturn v. Main*, 3 Seld., 220; and *Bagert v. O'Regan*, 1 E. D. Smith, 590.

A factor or other mercantile agent, who contracts in his own name, on behalf of his principal, is a trustee of an express trust, within the meaning of the code, and is the proper party to bring an action upon the contract. *Grinnell v. Schmidt*, 2 Sand., 705.

An executor or administrator may maintain an action, either in his own name or as executor or administrator, for a debt due to the testator or intestate, at the time of his decease. If such an action be brought in his own names, the defendant can not set off a claim against the testator or intestate which existed at the time of his death. *Merritt v. Seaman*, 2 Seld., 168; *Bright v. Currie*, 5 Sand., 433.

*Vide*, *Yates v. Kimmell*, 5 Mo. Rep., 87; *Robbins v. Aynes*, 10 Mo. Rep., 538; *Craig v. Callaway* county court, 12 Mo. Rep., 94; *Linn Co. v. Holland & Beckett*, *ibid.*, 127; *Reed v. Wilson & Garner*, 13 Mo. Rep.

A person with whom, or in whose name, a contract is made, for the benefit of another, is a trustee of an express trust. *Harney v. Dutcher*, 15 Mo. Rep., 89; *Miles v. Davis & Taylor*, 19 Mo. Rep., 408.

On a promissory note given to an executor or administrator, on account of the decedent's estate, he may sue either individually, or in his representative character. *Bright v. Currie*, 5 Sand., 433; *Merritt v. Seaman*, 2 Selden, 168.

The nominal proprietor of an individual bank, who furnishes the securities to the comptroller, and to whom the circulating notes of the bank are delivered by that officer, and in whose name as proprietor, all the contracts and transactions of the bank are made and conducted, is a "trustee of an express trust," within the meaning of this section. *Burbank v. Beech*, 15 Barb., 326.

Mercantile factors or agents doing business for others, but in their own names, are trustees of an express trust. *Grinnell v. Schmidt*, 3 Code Rep., 19; 2 Sand., 706.

An auctioneer, who in his own name, sells goods for a third person, is the trustee of an express trust within this section, and may sue on the contract of sale without an assignment to him of the cause of action, *Bogart v. O'Regan*,

1 Smith, 590; but independent of this section it was always the law that an auctioneer might sue on the contract of sale in his own name, unless his principal elected to bring the action in his name. *Minturn v. Main*, 3 Selden, 224.

Who plaintiffs.

SEC. 2759. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except where it is otherwise provided in this code.

The rule prescribed by the code is applicable to all suits, whether at law or in equity. *Loomis v. Brown*, 16 Barb., 331.

Where an action is brought on an injunction bond, the subject of the action being the damages sustained by the plaintiffs in consequence of an injunction, all the obligees may join as plaintiffs, notwithstanding the claim of one of them is different in its character and amount from that of others. *Ibid.*

Different creditors of a corporation, having a common interest in the relief sought, may unite in the same complaint. *Conro v. Port Henry Iron Co.*, 12 Barb., 28.

Different persons owning separate tenements affected by a nuisance, may join in suit to restrain, by injunction, the continuance of the nuisance. *Peck v. Elder*, 3 Sand., 126

Where the parties claiming an interest are numerous, and a suit is brought for their benefit by others who are active in the prosecution, their consent to the prosecution will be presumed, unless they show some disapprobation. *Flint v. Spurr*, 17 B. M., 513.

Several creditors, having distinct and separate demands, may join in a suit in chancery against the same debtor, to have a fraudulent conveyance of property set aside, or to prevent such conveyance. *Simpson, J., Benton, etc. v. Anderson, etc.*, Mss. opin., January, 1856. *Stanton's Ky. Code.*

See also 17 N. Y. Rep., 592; 3 Sand., 126; 4 Sand., 657; 19 Barb., 664.

Plaintiff an assignee

SEC. 2760. In case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing before notice of the assignment; but this section shall not apply to negotiable instruments transferred in good faith and upon valuable consideration before due.

This section was intended to preserve the rights of the defendants, in cases where the suit was prosecuted in the name of the assignee, in the same manner as the former law preserved the equities of the parties, and protect the rights of the assignee, although the suit was brought in the name of the assignor. The effect of the provisions of the code was to leave the right of set-off unaffected. The only change made is in the form of action. *Beckwith v. Union Bank*, 1 Sand., 610.

A liquidated demand assigned in good faith, for a full consideration before it becomes due, is not subject to a set-off in favor of the debtor for a like demand against the assignor, payable to the debtor, which was in existence, but was not due when the assignment was made. *Watt v. Mayor, etc.*, 9 N. Y., 1 Sand., 23.

Where a suit was brought on account by the assignees thereof, in the name of the assignor, it was decided that a promissory note of the assignor, held by the defendant at the time of the assignment, but not then due, could not be set off against such account. *Wells v. Stewart*, 3 Barb., 40.

The party in interest is liable for the costs, as well those made before as after his interest accrued. Where a party takes an absolute assignment of a demand in suit, he takes it *cum onere*, entitled to the benefits and subject to the liabilities of the assignor. *Jordan v. Sherwood and wife*, 10 Wend., 622; *Miller v. Franklin*, 20 id., 630.

Where a bank depositor, who was an indorser on a bill held by the bank, running to maturity, and in whose favor there was a balance of account nearly equal to the bill, made a general assignment for the benefit of creditors; and soon after, and before notice of the assignment, the bill was protested, the

assignor fixed as indorser, and the amount of the bill changed to his account on the books of the bank, and the bill was held by the bank uncanceled, when notice of the assignment was given: it was held that the assignee was entitled to recover from the bank the entire sum in deposit, without any deduction for the amount of the bill. *Beckwith v. Union Bank*, 4 Sand., 610.

SEC. 2761. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff; or who is a necessary party to a complete determination or settlement of the question involved in the action. Defendant.

This section was borrowed from the chancery practice, and was intended to preserve the right and duty of a plaintiff to make parties all persons directly interested in the question or controversy stated in the complaint. *Voorhies v. Baxter*, 1 Abbott, 45.

The assignee of a mortgage may be made a defendant in an action to set aside the mortgage as usurious. *Niles v. Randall*, 2 Code Rep., 31.

Where the plaintiff in a judgment creditor's bill attempts to reach the moneys due on a mortgage, which he alleges has been fraudulently assigned by the debtor, the assignee of the mortgage must be made a party, although he resides out of the state. *Gray v. Schenck*, 4 Coms., 460.

The vendee of a party is a necessary party to an action to stay waste, intermediate the contract for sale and the completion of the sale. *Kidd v. Denison*, 6 Barb., 9.

Where an infant is a party to a contract, in an action on such contract it is not necessary to make the infant a party. *Slocum v. Hooker*, 6 Pr. R., 167.

In an action to foreclose a mortgage, every person interested in the division of the proceeds of the estate should be made a party defendant. *Denton v. Nanny*, 8 Barb., 618.

It is not necessary to join all the parties to a tort as defendants; one, or more, or all, may be sued jointly, or each separately. 6 Johns. Rep., 26, 31. Where the tort, however, consists of a verbal slander by two or more, a separate action must be brought against each; they can not be sued jointly. *Ibid.*

Where a complaint in the nature of a creditor's bill against the original debtor and his assignees, seeks to set aside an assignment made for the benefit of creditors, it is not necessary to make all the creditors parties defendant. The assignees in such case represent all the creditors interested in the trust. It would be otherwise if the action were to establish and carry out the assignment, or for portions of the trust fund. *Bank of British N. America v. Suydam*, 6 Pr., 379.

Several causes of action can properly be united in one complaint only where they each affect all the parties to the action. It is not sufficient that some of the defendants be affected by each or all of them. All the defendants must be affected by each of them to warrant the union of them in one suit. *The Lexington and Big Sandy Railroad Co. v. Goodman*, 15 How., 85.

But it has been held that the creditor of an estate can not, in a mere personal suit, join the administrator, widow and heirs, as defendants. Ind. Dig., 632.

See also *McQueen v. Chouteau's heirs*, 20 Mo. Rep., 222; *Chouteau v. Borlando*, 20 Mo. Rep., 482; 8 Indiana, 293; 6 Abb., 7; 17 N. Y. Rep., 345, 592; 4 Comst., 460; 2 Seld., 190, 82; 6 Abb., 109, 113; 5 Seld., 598; 3 E. D. Smith, 591; 15 N. Y. Rep., 471; 4 Seld., 214.

In an action for specific performance of a contract to convey several lots of land, being part of a tract owned by one of the defendants, and upon which he had given mortgages prior to the contract to sell; held, that the prior mortgages were improperly made parties defendants to the action. They should not be involved in a lawsuit in anticipation that they might foreclose and sell the plaintiff's lots first. When they undertake proceedings touching the plaintiff's rights, it will then be time enough for him to move. *Chapman v. Draper*, 10 How., 367.

SEC. 2762. (1679.) Persons having an united interest must be Joiner of parties.

joined on the same side, either as plaintiffs or defendants. But when some who should thus be made plaintiffs refuse to join, they may be made defendants; the reasons thereof being set forth in the petition.

The surviving partner and the personal representatives of a deceased partner, can not be united as defendants in an action to recover a partnership debt. The surviving partner is alone liable at law; and it is only when the remedies at law are exhausted, that relief may be had in equity against the representatives of a deceased partner. *Higgins v. Freeman*, 2 Duer, 650.

Where a receiver, appointed by the court under a creditor's bill, commences an action in equity, to reach the equitable interests of a judgment debtor, in a fund held in trust for him, the judgment debtor is a necessary party to the action against the trustee. *Vanderpool v. Van Valkenburgh*, 2 Seld., 190.

In a suit to foreclose a mortgage, one who claims adversely to the title of the mortgagor, and prior to the mortgage, can not properly be made a party defendant for the purpose of trying the validity of such adverse claim of title. *Corning v. Smith*, 2 Selden, 82.

Where the receiver of the property of a judgment debtor appointed by the court, under a creditor's bill, commences suit against the trustee of a judgment debtor, to reach the equitable interest of the latter in a fund held in trust for him, the judgment debtor is a necessary party to the suit. *Vanderpool v. Valkenburgh*, 2 Selden, 190. See also *unknown heirs of Whitney v. Kimball*, 4 Ind. R. 546; 20 Mo., 269.

One suing for more

SEC. 2763. (1680.) When the question is one of a common or general interest to many persons, or when the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

Where parties plaintiffs, or defendants, are numerous, and it is impracticable to bring them before the court in a reasonable time, one or more may prosecute or defend for all. Stiles, J., *Pettitt v. Perry*, Mss. opin., January, 1855; *Stanton's Ky. Code*.

Where a fund was devised to a trustee for the benefit of the superannuated preachers of a particular conference, it was held that the superannuated preachers of that body, so entitled to the benefit of that fund, had such an interest as would enable them to maintain an action for the proper execution of the trust for their own and the future benefit of others entitled thereto. Stiles, J., *Walker v. Paul*, Mss. opin., June, 1855; *Stanton's Ky. Code*.

A member of an unincorporated association can not maintain, in his name, for the benefit of the association, an action on a note given to, or held by the association, without showing by his complaint the articles or other instrument which gives him such right or authority. The mere fact that the society is unincorporated will not warrant such a suit; nor will a statement that the plaintiff is specially authorized to bring the suit in behalf of the company. *Habitck v. Pemberton*, 4 Sand., 657.

To enable a plaintiff to bring a suit in his own right, and on behalf of others having a common interest, it is not sufficient to allege that the other parties are so numerous that it would be impracticable to bring them all before the court, but the nature of their common interest must appear to be such as would entitle them, were they all before the court, to maintain the action in their own right, or in their own names. *Ibid.*

In an action in which an injunction is prayed for, all persons interested in the subject matter in suit must be made parties; except where the parties interested are so numerous that it would be impossible or productive of great inconvenience, to make them all parties, in which case, one of the parties interested, may sue on behalf of himself and all others interested with him; but a plaintiff suing thus must distinctly state in his complaint that he sues as well on behalf of himself as on behalf of all others equally interested with him. *Smith v. Lockwood*, 1 Code Rep., N. S., 319; 13 Barb., 218.

In what cases and for what reasons courts will permit a plaintiff to com-



mence an action in his own behalf, as well as in behalf of others. See *Bou-  
ton v. The City of Brooklyn*, 15 Barb., 375.

SEC. 2764. Where two or more persons are bound by contract, or by judgment, decree or statute, whether jointly only or jointly and severally, or severally only, and including the parties to negotiable paper, common orders, and checks, and sureties on the same, or separate instruments—the action thereon may, at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all the survivors, with any or all of the representatives of the decedents—or against any or all such representatives. An action or judgment against any one or more of several persons jointly bound, shall not be a bar to proceedings against the others.

Joint and several liability, as a distinction, ignored.

Although the several parties to a bill or note may be sued in one action, yet their being so sued does not make them jointly liable. *Alfred v. Watkins*, 1 Code Rep., N. S., 343.

At common law, when a covenant was entered into by two or more, severally and not jointly, a joint action against the covenantors could not be maintained. The principle was intended to be changed by the code, so as to permit the plaintiff to include in the same action all or any of the parties severally liable upon the same obligation or instrument. So, also, at common law, where the contract was joint and several, the plaintiff must sue each separately or all together. This principle was changed by the code. The plaintiff is now allowed, at his option, to sue any one or more in the same action. But where S. made a contract under seal, and by a separate instrument, also under seal, P. guaranteed the performance by S. of his contract, held that a joint action could not be maintained against S. and P. *De Ridder v. Schimerhorn*, 10 Barb., 638.

A promissory note and a guaranty of payment written upon it, are different instruments, and impose distinct and different obligations. A joint action, therefore, against the maker and guarantor, can not be maintained. The code does not allow a joint action against several, unless they are liable on the same obligation or instrument, in which case all or any of them may be included in the same action, at the option of the plaintiff. *Allen v. Fagate*, 11 How., 218.

SEC. 2765. 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 determination of the controversy between the parties before the court, can not be made without the presence of other parties, the court must order them to be brought in.

Bring in other parties.

Under the code, the power to thus admit parties is unrestricted even to the substitution of entirely new parties, if the claim or defense is not changed. *Hubler v. Pullen*, 9 Ind. R., 273; *ibid.*, 291; *Dearmond v. Dearmond*, 10 Ind. R., 101; *Jones v. Julian*, 12 Ind. R.

It was not very material, in chancery, whether parties stood before the court in the character of plaintiffs or defendants, as the court adjusted the equities between them all; nor can the point be very material under the code. *Perkins' practice*.

One question raised upon the trial was, that the attorney general should have been made a party; to which it was answered that the defendants, not having taken the objection, either by answer or demurrer, had waived it. The court said in effect, that, it appearing that a complete determination of the question in suit could not be had without the presence of the attorney general, he had not only the power, but it was his duty to order the attorney general to be made a party, and did so. *Davis v. Mayor, etc., of New York*, 2 Duer, 663.

This section is the controlling section in determining whether a demurrer for defect of parties is well taken or not. *Wallace v. Eaton*, 5 Pr. R., 99-102.

Notwithstanding the 36th sec. Rev. Stat., p. 699, provides, where an appeal is taken from the decision of the county court, in the matter of the probate of a will, that "all necessary parties shall be brought before the court," yet, when the record shows that the devisees, who are not before the court, are non-residents, and may have (by the 38th section *supra*,) a re-trial of the question of probate within three years, and that the controversy may be, therefore, determined without prejudice to their interests, the failure to make them parties is no ground of reversal. Duval, J., *Horton v. Horton*, Mss. opin., December, 1857. *Stanton's Ky. Code*.

When the affidavit of a garnishee and that of his creditor show that the money sought to be recovered of the garnishee belongs to one not a party to the suit, it is notice to the plaintiff, and the court should require such person to be brought before the court. *Forepaugh, etc., v. Appold*, 17 B. M., 632.

It is error to order the sale of attached effects, where the defendant has only an undivided interest with one who is not a defendant; such person should be made a party. *Talbot v. Pierce*, 14 B. M., 202.

When a determination of the controversy between the parties before the court can not be made without the presence of other parties, the court must order them to be brought in. *Johnson's Heirs v. Chandler's Heirs*, 15 B. M., 589.

One who was statutory guardian filed his petition to sell real estate belonging to his wards; was appointed commissioner to sell, and gave bond for due payment to his wards. Suit was instituted against the guardian and his surety, upon the bond given, by order of the circuit court, and recovery had; held, that the sureties in the bond given in the county court, were not indispensable parties, and the recovery was right. *Ibid.*, 590.

Other party  
made.

§ SEC. 2766. When in an action for the recovery of real or personal property, any person having an interest in the property applies to be made a party, the court may order it to be done by the proper amendment.

A person not a party but having an interest, can not be made a party to an action on contract to recover money. This section must be confined to actions for the recovery of real or specific personal property. *Judd v. Young*, 7 Pr. R., 79.

The provision allowing a third person to be made a party, extends only to actions for the recovery of real or personal property, and not to an action in the nature of a creditor's bill. *Tallman v. Hollister*, 9 Pr. R., 508.

Interpleader.

SEC. 2767. Upon affidavit of a defendant before answer in any action upon contract for the recovery of personal property, that some third party without collusion with him, has, or makes a claim to the subject of the action, or on proof thereof as the court may direct, the court may make an order for the safe keeping, or for the payment or deposit in court, or delivery of the subject of the action to such person as it may direct, and an order requiring such third person to appear in a reasonable time and maintain or relinquish his claim against the defendant, and in the mean time stay the proceedings. If such third party, being served with a copy of the order, fails to appear, the court may declare him barred of all claim in respect to the subject of the action against the defendant therein. If such third person appears, he shall be allowed to make himself defendant in the action in lieu of the original defendant who shall be discharged from all liability to either of the other parties, in respect to the subject of the action upon his compliance with the order of the court for the payment, deposit, or delivery thereof.

An order of *interpleader*, under this section, can only properly be made when the whole controversy turns upon the *right of property*; that is, upon the question whether the plaintiff in the suit, or the claimant whose substitution as the defendant is desired, is the true owner of the debt, fund, or other property for which judgment is demanded. Where the plaintiff relies on and has averred

in his complaint, a special promise or contract to pay the value of the property sold to the defendant, and the same property is claimed by a third person as being the real owner, the latter can not be substituted or made a defendant in the action, because it would deprive the plaintiff of his *legal remedy*; and might involve the sacrifice of his legal rights without affording him any equivalent or compensation. Where a plaintiff seeks to recover a debt arising upon *contract*, the claimant who seeks to be substituted a defendant, must, in the language of the code, be "a third person, not a party to the suit making a demand for the *same debt*." A demand by such third person for the identical property as owner, and that the plaintiff had no authority to make the sale to the defendant in the action, is not ground for interpleader. As owner he must seek his remedies against the defendant or those into whose hands the property may have passed. In such a case if the defendant in the action has not rendered himself absolutely liable upon his promise, and the sale of the property made to the plaintiff through whom the defendant derived title, was fraudulent and void, the title of the true owner may be set up by the defendant as a full defense. *Sherman, agt. v. Partridge*, 11 How., 154.

See also, 9 How., 193; 8 How., 425; 24 Barb., 154; 14 How., 883; 8 Abb. R., 354.

SEC. 2768. The provisions of the last section shall be applicable to **Sheriff.** an action brought against a sheriff, or other officer, for the recovery of personal property taken by him under an attachment or execution, or for the proceeds of such property so taken and sold by him. And the defendant in any such action shall be entitled to the benefit of these provisions against the party in whose favor the attachment or execution issued, upon exhibiting to the court the process under which he acted, with his affidavit that the property, for the recovery of which, or its proceeds, the action was brought, was taken under such process.

SEC. 2769. In an action against a sheriff, or other officer, for the **Substitution.** recovery of property taken under an attachment or execution, the court may, upon the application of the defendant and of the party in whose favor the process issued, permit the latter to be substituted as the defendant, sureties for the costs being given.

If defendant be substituted, and security for costs be not given at the time of substitution, it will be regarded as waived, and not afterward required, unless there has been some surprise. *Gunn v. Gudehus*, 15 B. M., 449.

SEC. 2770. An action to recover the possession of specific personal property taken under a landlord's attachment, when it is brought by the tenant or his assignee or under-tenant, may be against the party who sued out the attachment; and the property claimed by such action, may, under the writ therefor, be taken from the officer who seized it, when he has no other claim to hold it than that derived from the writ. The indorsement of a levy on the property made upon the process by the officer holding it, shall be a sufficient taking of the property to sustain the action against the party who sued out the writ. **Landlord's attachment.**

SEC. 2771. When a married woman is a party, her husband must **Married woman.** be joined with her, except that

1. When the action concerns her separate property, or is founded on her own contract, she may sue and be sued alone.

2. When the action is between herself and her husband, she may sue and be sued alone. And in no case need she prosecute or defend by guardian or next friend.\*

\* Regarding this section the commissioners in their report, say: The substantive laws of Iowa, with justice, and but proper humanity, concede to married women certain rights in property. These rights, to be of any value, must be accompanied with adjective rights, which will secure their enjoyment. The right to sue, follows

A husband is an indispensable party in all cases where the wife is a party "except that where the action concerns her separate property, she may sue alone." Stiles, J., *Beaumont v. Miller*; Mss. Opin., June 1858. *Stanton's Ky. Code*.

Where money belonging to a married woman and which has never been in her husband's possession, is lent by her, with his assent, and a promissory note given to her for the amount, she may maintain an action thereon without joining her husband as co-plaintiff. Where a female, prior to her marriage, comes into the possession of money which she invests, and after her marriage she keeps the same in form of a chose in action, payable to her with the express consent of her husband, it remains her property, and an action upon the security is properly brought in her name alone. *Smart v. Comstock*, 24 Barb., 411.

In an action to foreclose a mortgage, executed by husband and wife, on the lands of the wife, and to enforce payment on the bond executed by both, it was held that the action was properly brought against both husband and wife. *Conde v. Shepherd*, 4 Pr. R., 75; *Conde v. Nelson*, 2 Code R., 58.

In an action for the partition or sale of real estate of the husband, held in common, the wife is a necessary party, and must be joined. *Ripple v. Gilborn*, 8 Pr. R., 456.

An inchoate right of *dower* is an interest which results from the marital relation, and does not belong to the wife as her separate estate. *Ackerson v. Vollmer*, 11 How., 42.

In an action of slander for words spoken of a married woman, where the words are actionable *per se*, the husband is a necessary party as plaintiff—otherwise if the words are not actionable *per se*; then the husband must sue alone. *Klein v. Hentz*, 2 Duer, 633. A husband and wife are properly joined as defendants in an action for a tortious injury to personal property, although the injury was committed by the sole act of the wife, without the knowledge or assent of the husband. *Matthews v. Feistal & wife*, 2 E. D. Smith, 90.

Separate property of a *femme covert* is that of which she has the exclusive control, independent of her husband, and the proceeds of which she may dispose of as she pleases. That character is imparted to the property by the instrument which invests her with the right to it. *Johnson & wife v. Jones*, 12 B. M., 329; *Petty v. Malier*, 14 B. M., 247.

If there is a joint interest in the husband and wife, the husband should join, or the suit would be defective. *Smith v. Kearney*, 9 Pr. R., 463.

Wife well joined with husband in suit for her clothing; *W. L. M.*, 1st Vol., p: 451.

See also 14 How., Pr. R., 456; 9 *ibid.*, 466. 8 *ibid.*, 395, 468; 12 Barb., 9; 2 Duer, 633, 16 How., 195; 5 O. S. R. 580.

Wife sued alone. SEC. 2772. When sued alone, judgment shall be enforced against her separate property.

Wife suing alone. SEC. 2773. When suing alone, judgment may be enforced against

necessarily from the right of property. The only reason why, under the common law, she could not sue at law was, that as she had no rights of property, she had no occasion to do so—as in progress of humanity, she began to have rights conceded to her—the right to sue, also arose, and as it was not recognized by common law, she had to go into a court of chancery to enjoy it. It would have been easier to have enacted a statute, allowing such suit at law; but there were many reasons why in that age, the equity court in such affairs was best. But all these have passed away, and as she is to have substantive rights which Iowa has already said, we can not see why she should not have all the rights logically sequent thereto, the same as any body else. She also formally had to sue by next friend, and so forth, because she was incapable of making a contract, and had no property to pay costs with, if cast in the suit. But, these reasons no longer exist, and the disabilities based on them, should also logically cease.

Besides, if she trades and becomes liable, what sense is there in not allowing her creditor to sue her, as any other person, ignoring the fact of marriage, as much as in the case of a man, a fact which has no longer anything to do with the liability.

her separate property, or her husband being brought in by rule, execution may issue against him also, unless for cause he show that he is not interested in the suit by the wife.

SEC. 2774. If husband and wife are sued together, the wife may defend for her own right; and if either neglect to defend, the other may defend for such one also. Each defend for other.

Where husband and wife are sued jointly, the wife will be allowed to defend separately where she alleges an equitable right to an allowance in the property sought to be subjected. *Stiles J., Ferris v. Parsons, Mss., Opin., January 1856. Stanton's Ky. Code.*

SEC. 2775. In an action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to join thereto claims in his own right. Joinder of causes.

SEC. 2776. When a husband, being a father, has deserted his family, the wife, being a mother, may prosecute or defend in his name, any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had. Deserted wife.

SEC. 2777. The action of an infant must be brought by his guardian or next friend; but the court has power to dismiss it if it is not for the benefit of the infant, or to substitute the guardian of the infant or other person as next friend. Action by infant

SEC. 2778. The defense of an infant must be by his regular guardian, or by a guardian appointed to defend him, where no regular guardian appears, or where the court directs a defense by a guardian appointed for that purpose. No judgment can be rendered against an infant until after a defense by a guardian. Defense of infant.

Where infants appear in court on their own petition, to be made parties' process is not necessary; that the court appointed a guardian, *ad litem*, to answer, was sufficient. *Burch & wife v. Breckenridge, etc., 16 B. M., 491.*

To make an infant a party defendant to a suit, it is indispensable that a summons be served on the infant, unless the infant be legally before the court in some other mode and no judgment can be rendered against him until a defense by a guardian, *ad litem.* *Pond v. Doneghy, 18 B. M., 560.*

SEC. 2779. The appointment can not be made until after service of the notice in the action as directed by this code, and may then be made by the court or judge thereof, or during vacation by the clerk of the district court; but the court shall have power to remove such guardian and appoint another instead, whenever the interests of the infant requires such a change. Guardian.

SEC. 2780. The appointment may be made upon the application of the infant if he is of the age of fourteen years, and applies at or before the term to which the notice is served. If he is under the age of fourteen, or does not so apply, the appointment may be made upon the application of any friend of the infant, or on that of the plaintiff in the action. Application of infant.

SEC. 2781. The action of a person of unsound mind, must be brought by his guardian, or if he has none, by his next friend. When brought by his next friend, the action is subject to the power of the court in the same manner as the action of an infant so brought. Insane plaintiff

SEC. 2782. The defense of an action against a person of unsound mind, must be by his guardian or a guardian appointed by the court to defend for him, when no guardian appears, or when the court directs a defense by a guardian. The guardian to defend may be appointed at Insane defendant.

- the application of any friend of the defendant, or on that of the plaintiff, and no appointment can be made until after service of the notice, as directed in this code, and no judgment can be rendered against him until after a defense by guardian.
- Insane pending suit.** SEC. 2783. Where a party is found to be of unsound mind during the pendency of an action, the fact being stated on the record, if he is plaintiff, his guardian may be joined with him in the action as such; if he is defendant, the plaintiff may, on ten days' notice thereof to his guardian, have an order making the guardian a defendant also.
- Prisoner.** SEC. 2784. No judgment can be rendered against a prisoner in the penitentiary, until after a defense made for him by his attorney, or if there is none, by a person appointed by the court to defend for him.
- Co-partnership.** SEC. 2785. A co-partnership may sue or be sued in its firm name; and when so sued the individual property of any member of such firm, may, on *scire facias*, be made liable to the judgment, unless he show cause to the contrary. A co-partnership may also sue or be sued in the individual names of its members.\*
- Name on instrument.** SEC. 2786. (1692.) When an action is founded on a written instrument, suit may be brought by or against any of the parties thereto, by the same name and description as those by which they are designated in such instrument.
- Bond.** SEC. 2787. When a bond or other instrument given to the state or to any officer or person, is intended for the security of the public generally, or of particular individuals, suit may be brought thereon in the name of any person intended to be thus secured, who has sustained any injury in consequence of a breach thereof; or by such party in the name of the obligee, the body politic may sue in the name of the obligee in the bond, and in case a motion is allowable, such party may, in the same manner, make such motion.
- Defendant described.** SEC. 2788. (1694.) When the precise name of any defendant can not be ascertained, he may be described as accurately as practicable, and when the name is ascertained it shall be substituted in the proceedings.
- Corporations.** SEC. 2789. (1695.) Corporations, foreign or domestic, may bring suit in the courts of this state in their corporate name.
- Seduction, party.** SEC. 2790. An unmarried female may prosecute, as plaintiff, an action for her own seduction, and recover such damages as may be found in her favor.
- Same.** SEC. 2791. A father, or in case of his death or desertion of his family, or imprisonment, the mother, may prosecute as plaintiff for the seduction of the daughter; and the guardian for the seduction of the ward, though the daughter or ward be not living with, nor in the service of the plaintiff at the time of the seduction, or afterwards, and there be no loss of service; but when the action is brought by the guardian, the damages recovered shall inure to the benefit of the ward.
- Loss of service of child.** SEC. 2792. A father, or in case of his death or imprisonment or desertion of his family, the mother, may prosecute as plaintiff an action for the expenses and actual loss of service resulting from the injury or death of a minor child.

But the infant must sue for the injury to himself, 15 Barb., 249.

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\* On this section the commissioners say :  
We recognize in a co-partnership, a party other than, and different from any of, or all its members—having a purse of its own—that a creditor of it has a right to sue it, and get a judgment against it and levy on its goods. Such a mode of suing has sometimes its advantages.

SEC. 2793. The state shall commence and prosecute suits according State plaintiff. to the laws of the land, as in cases between individuals, except that no security shall, in such case, be required.

SEC. 2794. No action shall abate by the transfer or assignment of Transfer of interest during suit. any interest therein during its pendency. In case of the marriage of a female party, the fact being suggested on the record, the husband may be made a party with his wife, whenever necessary. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer or assignment is made to be substituted in the action, proper orders being made as to security for costs.

When *pendente lite*, in an action on contract, the plaintiffs sell and assign the subject matter of the action to a third person, he will not be substituted as plaintiff, on motion of the plaintiffs to the record, and without notice to him. The alleged purchaser is the person to move for substitution; and he should do so on notice to the plaintiffs as well as to the defendant. Even in such a case, it is not a matter of course to order a substitution without imposing any conditions. *Howard v. Taylor*, 11 How., 380.

Since the decision of the court of appeals, in *McKee v. Judd*, (2 Kern., 622,) all demands arising from injuries to property are assignable; and when assigned, the action is properly brought in the name of the assignee. *Foy v. Troy & Boston R. R. Co.*, 24 Barb., 382.

If the complainant assign his interest whilst the suit is pending, the assignee must be brought in. *Gamble & Johnston v. Johnson*, 11 Mo. Rep., 597.

The assignee of a cause of action, assigned after action brought, is liable to the defendant for costs, if he (the assignee) proceed in the action after the assignment, (Cow., 17;) and in such case he takes the demand *cum onere*, and is liable for the costs which had accrued *before*, as well as those which arose *after* the assignment. 10 Wend., 662; *ibid.*, 630, 632.

The right of the plaintiff may be assigned during the action, and the suit progress in his name, or the name of the assignee may be substituted for that of the plaintiff. *Warner v. Turner*, 18 B. M., 759.

When the assignee is substituted for the plaintiff, and the court is satisfied with his solvency, and requires no security for the costs, and the defendant does not object to the action of the court, his objection will not be heard in the court of appeals. *Ibid.*

See also, 2 E. D. Smith, 24; 2 Duer, 607; 6 How., 220; 7 How., 268.

DECISIONS UNDER THE PRIOR PRACTICE. As to parties to bills in chancery, see 3 G., 443; 2 G., 55; 1 Iowa, 23; 3 G., 472; M., 272; 1 Iowa, 369; *Tucker v. Silver*, Dec. term, 1859; *Gludson v. Whitney*, Dec. term, 1859; 3 Iowa, 194; 6 *ibid.*, 5; 8 *ibid.*, 79; 3 G., 443; *Collier v. Collins et al.*, June, 1859; 8 Iowa, 17; 8 *ibid.*, 297; *Clemens v. Elder*, Dec., 1859; parties in road cases, 7 Iowa, 315; administrator of joint contracts not joinable with the survivors, *Wapello Co. v. Bigham*, Dec., 1859; maker and guarantor of note, joinder of? 7 Iowa, 466; recovery against all or none of joint parties, 7 Iowa, 493; actions must be brought in the name of the real party in interest, 5 Iowa, 540; Landlord's right to off-set for rent against assignee of agreement to pay for improvements, *Zugg v. Turner*, June term, 1859; when agent is proper plaintiff, 5 Iowa, 535; 6 *ibid.*, 170; the transferee without indorsement of a note made payable to order can not sue in his own name, 4 Iowa, 360; the assignee of a promise may sue in his own name, 5 Iowa, 513; if an action be brought by one having the legal interest in a note, a defense against the party beneficially interested may be made by the defendant, 5 Iowa, 540; the assignee of a note takes also the mortgage securing it, and may sue in his own name to foreclose, 4 Iowa, 438; a party suffered to contest with the plaintiff in the original suit a sum which he demands of the garnishee, has an appeal from a judgment against him, for costs; is such contestation allowable in one not substituted for the garnishee? 4 Iowa, 341; see 3 Iowa, 337; 6 *ibid.*, 97; 8 Iowa, 82; rule of common law as to joinder of husband and wife not changed by Code of 1851, 4 Iowa, 420; an abandoned wife self-dependent may sue and be sued as sole woman, 4 Iowa, 321; for an injury to the person or character of the wife during coverture, she must at common law join with the husband; for *what* injury he suffers thereby, he may sue alone, and Code has not changed the law, 4 Iowa, 423; union of breach of promise with

reduction, 3 Iowa, 337; what kind of promise must be proved, and how, *Thurston v. Cavenor*, June, 1859; if on judgment against a corporation a judgment be rendered making the private property of members liable, an execution thereon should run against the *members*, not naming them, leaving to the sheriff to find them, 4 Iowa, 17; if a note be made to A by name of X, A can not sue in such name for it? dictum, 5 Iowa, 540; transfer of interest pending suit, *Terry v. Page & Startzman*, June term, 1859, and 8 Iowa, 65; under the following sections of the Code of 1851, see also the cases cited as follows: (1676) assignee of judgment, 1 Iowa, 147; deserted wife, 4 Iowa, 328; rights of defendant when assignee sues, 5 Iowa, 540; how minor appears, 5 Iowa, 158; an association and not plaintiff had the interest, 4 G., 107; one sued for the use of another, 2 Iowa, 159; and also 3 Iowa, 447; unnegotiable instrument, 3 Iowa, 93; (1678) defendant holding sheriff's certificate in case of foreclosure of equity of redemption, 4 G., 136; mortgagor having sold all interest need not be made party, 4 G., 108; (1679) administrator, 3 Iowa, 365; not multifariousness, 3 G., 443; no misjoinder, 3 Iowa, 171; all incumbrancers must be parties in foreclosure, 3 Iowa, 194; as to proper parties, 3 Iowa, 297; (1680) demurrer for want of proper parties, 1 Iowa, 369; (1681) attachments, facts as to all defendants, 4 G., 550; construed by common law, 7 Iowa, 495; non-joinder, how objected, 4 G., 252; misjoinder, 1 Iowa, 263; (1682) pleadings, &c., 3 G., 228; (1683) dissenting suggestion, 1 Iowa, 305; (1684) one holding sheriff's certificate may become party in foreclosure, 4 G., 136; (1693) suit on county treasurer's bond by school fund commissioner, 5 Iowa, 150; (1694) "heirs of," not sufficient designation, 4 G., 283; (1696) unmarried, 3 Iowa, 337; evidence and damages, 6 Iowa, 100; (1697) 3 Iowa, 337; 6 *ibid.*, 97; 8 Iowa, 82; (1698) a case under sec. 1485 of Code of 1851, 4 Iowa, 518; see 3 G., 26, and 3 G., 472.

## CHAPTER 118.

### PLACE OF BRINGING SUIT.

[Code—Chapter 101.]

#### Place of suit.

**SECTION 2795.** Actions for the following causes must be brought in the county in which the subject of the action, or some part thereof is situated:

1. For the recovery of real property or of an estate therein, or for the determination in any form of such right or interest.
2. For the partition of real property.
3. For the foreclosure of a mortgage of real property, or for the sale of real property under any incumbrance or charge.
4. For injuries to real property.
5. For the possession of personal property.

In an action for the foreclosure of a mortgage, the "proper county" for the place of trial is where the mortgaged premises are situated, although the money may be loaned and the mortgage executed and delivered to the mortgagee in another county. *Miller v. Hull*, 3 How., 325.

An action to have a conveyance of land declared fraudulent, and that it be held in trust for another, is an action to determine an interest in real property. *Wood v. Hollister*, 3 Abb., 14; and see *Mairs v. Remson*, 3 C. R., 138.

The supreme court may compel the specific performance, by a resident of the state, of a contract for the conveyance of land, lying without its jurisdiction. It has the same jurisdiction in this class of cases as that possessed by the former court of chancery. This jurisdiction is not taken away by the statute, which enacts that actions for the recovery of real estate or an interest therein, or for the determination of a right or interest in real property, must be tried in the county where the land lies. This provision of the code is not applicable when the land which is the subject of the action lies out of the state. *Newton v. Bronson*, 3 Kern., 587.



SEC. 2796. Actions for the following causes must be brought in the Same. county where the cause, or some part thereof, arose :

1. An action for the recovery of a fine, penalty, or forfeiture imposed by a statute, except that when the offense for which the claim is made was committed on a water course or road, which is the boundary of two counties, the action may be brought in either of them.

2. An action against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue or under color of his office, or against one who by his command or in his aid, shall do anything touching the duties of such officer, or for neglect of official duty.

3. An action upon the official bond of a public officer.

This section held not to apply to officers of the United States, and that they must, under the general statute of the state, as to private individuals, be sued in the county where they reside. *Freeman v. Robinson*, 7 Ind., 321.

SEC. 2797. An action when aided by attachment may be brought in any county of the state, wherever any part of the property sought to be attached may be found, when the defendant, whose property is thus pursued, is a non-resident of this state. If such defendant is a resident of this state, such action must be brought in the county of his residence, or that in which the contract was to be performed, except that if an action be duly brought against such defendant in any other county by virtue of any provisions of this chapter, then such action may, if legal cause for an attachment exist, be aided by an attachment. Case of attachment.

SEC. 2798. (1704.) When by its terms a contract is to be performed in any particular place, action for a breach thereof, may be brought in the county wherein such place is situated. Place of contract.

SEC. 2799. An action against a railroad company, or an owner of a line of mail stages, or other coaches, for an injury to person or property, upon the road or line, or upon a liability as a carrier, may be brought in any county through or into which said road or line passes. Common carrier.

SEC. 2800. (1701.) Except where otherwise provided herein, personal actions must be brought in a county wherein some of the defendants actually reside. But if none of them have any residence within this state, they may be sued in any county wherein either of them may be found. Place of person.

A railroad company must be treated as an inhabitant and a freeholder in each county where its track is laid.

It is a resident of every county through which its road passes, (15 Barb., 560,) and a resident of the county where the office of the company is located and its general business carried on. *Convoe v. Nat. Pro. Ins. Co.*, 10 Fr. R., 403.

SEC. 2801. When a corporation, company, or individual has an office or agency in any county for the transaction of business, any suits growing out of or connected with the business of that office or agency, may be brought in the county where such office or agency is located. Corporation.

SEC. 2802. If a suit be brought in the wrong county, it may be there prosecuted to a termination, unless the defendant, before answer, demand a change of venue to the proper county. In which case the court shall order the same at the costs of the plaintiff, and may award the defendant a reasonable compensation for his trouble and expenses in attending at the wrong county. Result of suit in wrong county.

DECISIONS UNDER THE PRIOR PRACTICE. In a personal action the petition need not state where contract was to be performed, *Crouch v. Crouch*, Dec., 1859; action for specific performance is local, *Johns v. Orcutt*, Dec., 1859; where there is no

service and jurisdiction is got by attachment, action should be in a county where is some of the property attached, *Heidrich & Gillespie v. Brandon*, Dec., 1859; specific performance, 3 Iowa, 221; trespass local, M., 248; 2 Iowa, 160; sec. 1704 only applies to cases of personal service, *ibid*; note secured by mortgage may be sued where it could be if not so secured, *Breckenridge v. Brown*, and *Same v. Scott*, both Dec., 1859; a corporation is a person under section 1701, 5 Iowa, 519; a corporation (railroad) resides in every county through which its road runs, or in which its corporate powers are exercised, 5 Iowa, 519; motion to change venue for suit in wrong county not the appliance with which to object to an improper joinder, 7 Iowa, 465; on such motion the legality of the joinder can not be tried, 8 Iowa, 349; a justice can not find error in the transmission to him of a case by change of venue, 1 Iowa, 96; time of change, 1 Iowa, 580; 2 G., 136; section 1704, permissive, not mandatory, 7 Iowa, 467; section 1705 is permissive, not mandatory, 5 Iowa, 268 and 519; the interest of a mortgagee not enough to give venue, 6 Iowa, 240; breach of close so relates to realty as to give venue, 2 Iowa, 160; as to proof of locality of land and as to judicial notice thereof, 3 G., 509; right of plaintiff to dismiss, of defendant to costs, 1 Iowa, 568; objection must be made in district court, else disregarded in supreme, 7 Iowa, 3.

## CHAPTER 119.\*

[Code—Chapter 102.]

### CHANGE OF VENUE.

- When granted.** SECTION 2803. A change of venue in any civil action, may be had in any of the following cases :
1. Where the county in which the suit is pending is a party thereto.
  2. Where the judge is a party, or is directly interested in the suit, or is connected by blood or affinity, with any person so interested, nearer than in the fourth degree.
  3. Where either party files an affidavit, stating that the inhabitants of the county are, or the judge is so prejudiced against him, or that the adverse party or his attorney, has such an undue influence over the inhabitants of the county, that he can not obtain a fair trial. Where it is made to appear to the judge that a jury of twelve men can not be obtained in the county where said action is pending, then upon application of either party, a change of venue shall be granted to the nearest county in which a jury can be obtained.†
- Change of venue granted.** SEC. 2804. The application for a change of venue may be made, either to the court or to the judge in vacation, and if made in term time, shall not be awarded until issue be made up, unless objection be to the court; nor shall such application be allowed after a continuance, except for a cause not known to the affiant before such continuance, and after one change, no party is entitled to another, for any cause in existence, when the first change was obtained.
- To whom application. only one change.** SEC. 2805. The venue shall be changed to some other county in the same district, unless the objections are to the judge, or unless the objection made is claimed to hold to all the other counties of the district, and shall be to the most convenient county to which no objection is made.
- Where to.** SEC. 2806. (1709.) If the change is ordered by the judge in vaca-
- Duty of judge.**

\* The general spirit of this chapter remains the same, and yet every section but one has been in some degree modified.

† The last clause in this section was enacted as a separate law, March 30, 1860, took effect July 4, 1860; Laws of the Eighth General Assembly, Chapter 83.

tion, he must immediately transmit to the clerk, where the cause is pending, the affidavit, if any, and the order for the change.

SEC. 2807. In such case, as well as where the order is made in open court, the clerk must forthwith transmit to the clerk of the proper court, strongly enveloped and sealed, 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, but if less than all of several plaintiffs or defendants take such change, the clerk shall so transmit not the original papers, but a copy thereof instead, and shall retain the original papers in his office, and as to those who take no change, the cause shall proceed as if no change had been taken by any co-party. Duty of clerk.

SEC. 2808. 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 without fee, and proceeded in as though it had originated therein. Case docketed.

SEC. 2809. The costs occasioned by such change of venue, including those of the transcript and transmission, and those growing out of the preparation of the other party for trial, shall, unless such change be taken under subdivision 2 of section 2803, be taxed against the applicant and not as a part of the costs of the case, and the clerk may require payment of the costs of the transcript and transmission, before the case is transmitted as aforesaid. Costs.

SEC. 2810. If change of venue be taken in vacation, and the applicant therefor has not procured the transmission of the papers to the proper county, before the first day of the next term thereafter, then such party shall be held to have waived his change of venue, and the cause shall be retained in the court where pending for trial therein, unless such non-transmission be the entire fault of the clerk. And if such change be taken during a term of court, unless the cause be so transmitted as aforesaid, or the costs of the clerk therefor be paid or secured by the morning of the second day thereafter, or before said cause be reached for trial, if sooner reached, then such cause shall be retained for trial in the court where pending, and tried as if no change had been prayed. Waiver of change.

PRIOR LAWS. 1. An act to provide for changing the venue in civil and criminal cases, passed Jan. 18, took effect Feb. 18, 1839; I. T., 1st sess., p. 457, repealed by No. 2 herof.

2. An act to provide for changing the venue in civil and criminal cases, passed Feb. 13, took effect July 4, 1843; Reprint, chap. 156, p. 638.

3. An act amending same, passed June 10, took effect July 1, 1845; I. T., 7th sess., chap. 20, p. 38.

DECISIONS UNDER THE PRIOR PRACTICE. A change of venue can not be by the court conditioned on the claimants giving a bond for the additional costs incurred by such change, 4 Iowa, 540; a change of venue may be conditioned on the payment into court of the costs occasioned by such change, 4 Iowa, 540; a change of venue from the judge, waived, does not preclude one from the inhabitants of the county, 4 Iowa, 540; an application for change of venue after a continuance, should show a reason for its delay, and if sworn to by the attorney, should show a reason why, 5 Iowa, 268, [see section 2804]; the right to a change of venue after its grant may be waived by an appearance, and trial under the objectionable jurisdiction, 4 Iowa, 540; presumption as to change, 2 Iowa, 433; any one may swear as well as party, 4 G., 417; defines "convenient," 2 Iowa, 433; jurisdiction determines on granting change of venue, 4 G., 415; who pays costs of transcript, 2 Iowa, 435; what must be transmitted, 4 G., 322; costs include those of the term, 2 Iowa, 435.

## CHAPTER 120.

[Code—Chapter 103.]

## THE MANNER OF COMMENCING ACTIONS.

Notice.	SECTION 2811. (1714.) Actions originating in the district court are to be commenced by serving the defendant with the notice hereinafter described.
Kind of.	SEC. 2812. Such notice must be signed by the plaintiff or his attorney, and must inform the defendant of the name of the plaintiff, and that on or before a date therein named, a petition will be filed in the office of the clerk of the district court of the county wherein suit is brought, naming it and stating generally the nature of the claim, or claims, if more than one, without the need of stating the facts constituting the cause thereof (as for example on account for a promissory note—for work—for goods sold—for assault and battery—for slander—for the recovery of personal or real property, or in some other such general way,) and if the action is for money, how much is claimed—and that unless he appears thereto and defends, before noon of the second day of the term, at which said defendant is required by law to appear—naming it—or at such other time, as may be by general rule of such court prescribed, default will be entered against him, and judgment rendered thereon. If the defendant fail to appear, judgment shall not be rendered for a larger amount than the sum therein claimed and costs.
Petition not filed.	SEC. 2813. If the petition is not filed by the date thus fixed, and ten days before the term, the action will be deemed discontinued.
By whom notice served.	SEC. 2814. The notice may be served by any person not a party to the action.
Defendant to appear, when?	SEC. 2815. The defendant, if served otherwise than by publication, shall be held to appear at the next term after service, provided— <ol style="list-style-type: none"> <li>1. He be served within the county where suit is brought in such time as to leave at least ten days between the day of service and the first day of the next term.</li> <li>2. He be served without the county, but within the judicial district, so as to leave at least fifteen such days.</li> <li>3. He be served elsewhere within the state so as to leave twenty such days.</li> <li>4. He be served without the state so as to leave ten such days for every one thousand miles or fraction thereof, extending between the county of suit and the place of service, which distance shall be judicially noticed by the court. If not so served, he shall be held to appear at the second term thereafter.</li> </ol> <p>The statute nowhere requires a summons to be returnable on the first day of the term; but it must be served ten days before that day, that is the Friday week before the Monday on which the term commences. See <i>Blair v. Manson</i>, 9 Ind. R., 357; <i>ibid.</i>, 544; <i>ibid.</i>, 236.</p>
How notice served.	SEC. 2816. The notice shall be served as follows: <ol style="list-style-type: none"> <li>1. By reading the notice to the defendant or offering to read it in case he neglects or refuses to hear it read, and in either case by delivering him personally a copy of the notice, or if he refuses to receive it, offering to deliver it.</li> </ol>

2. If not found within the county of his residence, by leaving a copy of the notice at his usual place of residence, with some member of the family over fourteen years of age.

3. By taking an acknowledgment of the service indorsed on the notice, dated, and signed by the defendant.

SEC. 2817. If served personally, the return must state the time and manner and place of making the service, and that a copy was delivered to defendant, or offered to be delivered. If made by leaving a copy with the family, it must state at whose house the same was left and that it was the usual place of residence of the defendant—and the township, town or city in which the house was situated, the name of the person with whom the same was left, or a sufficient reason for omitting to do so, and that such person was over fourteen years of age, and was a member of the family. Return.

The term "family" is not confined to persons under the control, or in the employ of the defendant. Thus, if a son take his widowed mother to reside with him, she is a member of his family within the meaning of the statute. *Ellington v. Moore*, 17 Mo. Rep., 424.

SEC. 2818. If notice is served out of the county where suit is pending, either within or without the state, return may be made by mail and the postage thereon taxed among the costs. Return by mail.

SEC. 2819. If notice is placed in the hands of the sheriff of the county wherein action is brought, he must note thereon the date when thus left with him, and must proceed to serve the same without delay, if possible, within his county, and must file the same with his return thereon immediately thereafter in the office of the clerk of the district court. If placed in the hands of the sheriff of any other county, he must serve the same if possible within his county at once, and return the same by mail to the party from whom he received it, with his return thereon, immediately thereafter. Sheriff's duty.

SEC. 2820. If a notice be not duly filed by the sheriff, or if the return thereon is defective, the officer making the same may be fined by the court not exceeding ten dollars, and shall also be liable to the action of any person aggrieved thereby. But the court may permit an amendment according to the truth of the case. Fine for bad return.

SEC. 2821. Notice shall not be served on Sunday, unless the plaintiff make oath thereon that personal service will not be possible unless then made, and a notice indorsed with such affidavit shall be served by the sheriff, or may be served by another, as on a secular day. Sunday service.

SEC. 2822. (1724.) The plaintiff may notify either of the defendants that no personal claim is made against him, in which case a copy of that notice must accompany the return. If after such notice and return such defendant unreasonably defend, he must pay costs to the plaintiff. Notice to defendant of no claim.

SEC. 2823. If service be made within the state, the truth of the return is proven by the signature of the sheriff, or his deputy, when made by either of them in his own county, and the court shall take judicial notice thereof. If made without the state or by one not such officer within the state, the return may be proven by the affidavit of him making the same, certified by one empowered to administer oaths. Return how proven.

SEC. 2824. (1726.) If a county is defendant, service may be made on the county judge or clerk of the county court. If any other civil corporation, upon a trustee or other officer thereof. County defendant.

SEC. 2825. (1727.) When an action is brought against a corporation of any other description, service may be made upon either of its Corporation defendant.

officers, or on any clerk or agent engaged in the active management of the ordinary business of the corporation.

Same.

SEC. 2826. If brought against a corporation having no officers, or a partnership, service may be made upon any member thereof, or upon any agent employed in the general management of their business.

Service on agent

SEC. 2827. When a corporation, company, or individual, has, for the transaction of any business, an office or agency in any county, other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of, or connected with, the business of that office or agency.

Where a summons is returned served on A. B., agent of a corporation named, it will be presumed, until the contrary is shown, that the service was regular. 11 Ind. R., 339.

A person acting in New York, under a power of attorney, for an insurance company located at Utica, authorizing such person to effect insurances on behalf of said company, held to be such *managing agent*, of said company as to authorize the commencement of an action against such company by serving the summons upon such person. *Bain v. Globe Insurance Co.*, 9 Pr. R., 448.

To authorize legal service of summons and complaint upon a foreign corporation, where it is made upon its managing agent in this state, the managing agent must be one whose agency extends to all the transactions of the corporation—one who has, or is engaged in, the management of the corporation, in distinction from the management of a particular branch or department of its business. *Brewster v. Michigan Central Railroad Co.*, 5 Pr. R., 183.

An action can not be legally commenced against a railroad corporation (for loss of baggage, or anything else) by the service of a summons on a baggage master in the service of such corporation. He is not such a managing agent as the law requires. *Flynn v. Hudson River Railroad Company*, 6 Pr. R., 308.

Minor.

SEC. 2828. When the defendant is a minor under the age of fourteen years, the service must be made on him, and also on his father or mother or guardian, and if there be none of these within the state, then on the person within this state having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed. When the infant is over fourteen years of age, service on him shall be sufficient.

A judgment can not be rendered against an infant until after defense by guardian, nor can a guardian for such infant be appointed to defend until after service upon the infant. *Stiles J., Tribble v. Chilton*, Mss. opin., June, 1857. *Stanton's Ky. Code.*

If infants appear in court upon their own petition, and ask to be made parties, process is not necessary. It is sufficient if the court appoints a guardian *ad litem* to answer for them. *Burch and wife v. Breckenridge, etc.*, 16 B. M., 491.

Although the record does not show that an infant was over fourteen years of age, or that he had no guardian, or that the widow upon whom the process was served was the mother of the infant, yet if these facts appear from the officer's return, it will justify the circuit court in rendering judgment in the action. *Wheat, C. J., Webber etc., v. Webber*, Mss. opin., June, 1858. *Stanton's Ky. Code.*

Insane.

SEC. 2829. When the defendant is a person of unsound mind, service must be made upon him and upon his guardian, and if he have no guardian, then upon his wife or the person having the care of him, or with whom he lives, or the keeper of the asylum in which he may be confined.

SEC. 2830. When the defendant is a prisoner in the penitentiary, a **Prisoner.** copy of the petition must be with the notice delivered to the prisoner, and a copy of the notice shall also be delivered to his wife, if he have any.

SEC. 2831. Service may be made by publication in either of the following cases: **Notice by publication.**

1. In actions brought for the recovery of real property, or an estate or interest therein.
2. In an action for the partition of real property.
3. In an action for the sale of real property under a mortgage lien or other incumbrance or charge.
4. In actions to compel the specific performance of a contract of sale of real estate, or in actions to establish or set aside a will, where in such cases any or all of the defendants reside out of this state, and the real property is within this state.
5. In actions brought against a non-resident of this state, or a foreign corporation having in this state property or debts owing to such defendant, sought to be taken by any of the provisional remedies, or to be appropriated in any way.
6. In actions which relate to, or the subject of which is real or personal property in this state, when any defendant has or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the state or a foreign corporation.
7. In all actions where the defendant being a resident of the state has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a notice, or keeps himself concealed therein with the like intent.
8. Where the action is for a divorce.

SEC. 2832. Before service can be made by publication, an affidavit **File affidavit** must be filed that personal service of notice can not be made, within this state, on the defendant to be served by publication. When such affidavit is filed the party may proceed to make service by publication.

SEC. 2833. The publication must be made by publishing the notice required in section 2812, without addition, four consecutive weeks, **Publication how made.** which last publication shall be at least ten days before the next term of court, in some newspaper issued at least weekly, and printed in the county where the petition is filed, and if there be none printed in such county, then in such paper printed at the next nearest county of this state, which paper shall, in either case, be determined in writing by the clerk of the court on the affidavit, which affidavit shall be filed in the case.

SEC. 2834. Service by publication shall be deemed complete when **When complete.** the proper affidavit shall have been filed, and the notice published in the manner and for the time prescribed in the preceding section, and the affidavit of such publication shall have also been filed, which affidavit may be made by any person knowing the fact, and the defendant shall be held to appear at the term which next succeeds such completed service, without regard to the number of days intervening.

SEC. 2835. Actual personal service of the notice either within or **Actual service.** without the state, supersedes the necessity of publication.

SEC. 2836. In actions where it shall be necessary to make an **Unknown person.** unknown person defendant, the petition shall be sworn to, and shall state what interest such person has or claims to have, how the same was derived or is claimed to have been derived, as exactly as possible, that

the name and the residence of such person are unknown to plaintiff, and that he has sought diligently to learn the same, and thereon proceedings may be had against such person without naming him, as follows :

Notice in such case.

SEC. 2837. The court shall approve a notice collected from the averments of the petition, which notice shall contain the name of the plaintiffs, a description of the property, and all the allegations of the petition concerning the interest of the unknown person and the mode of devolution thereof, the relief demanded, also the name of the court and the term at which appearance must be made. Said notice must be entitled in the full name of the plaintiff against the unknown claimants of property, and shall be signed by the plaintiff's attorney.

Publication.

SEC. 2838. The court, on its approval of said notice, shall indorse the same thereon and order that the said notice be published in some newspaper of this state, designating such paper as shall be most likely to give notice to such unknown person.

Service complete.

SEC. 2839. Such notice shall be filed in the cause, and its contents, without more, shall be published in the paper designated, at least weekly for six successive weeks, and at the end of said time, service shall be deemed complete, and such unknown person in court at the next term thereafter.

Mode of appearance.

SEC. 2840. The mode of appearance may be :

1. By delivering to the plaintiff or the clerk of the court a memorandum in writing to the effect that the defendant appears, signed either by the defendant in person or by his attorney, dated the day of its delivery, and to be filed in the case.

2. By announcing to the court an appearance, which shall be entered of record.

3. By an appearance, even though specially made, by himself or his attorney, for any purpose connected with the cause; or for any purpose connected with the service, or insufficiency of the notice. And an appearance, special or other, to object to the substance or service of the notice, shall render any further notice unnecessary, but may entitle the defendant to a continuance, if it shall appear to the court that he has not had the full timely notice required, of the substantial cause of action stated in the petition. But if the petition contains more than one cause of action, a mere appearance shall not be deemed an appearance to any cause except such as the defendant shall have had due notice of, according to section 2812 hereof and such causes shall be dismissed.\*

Sometimes a defendant, after appearing and pleading, by leave of the court, withdraws his appearance.

Such withdrawal carries with it the pleadings he may have filed, and leaves the case as though he had failed to appear at all, and it stands in court upon the plaintiff's complaint. *Carver v. Williams*, 10 Ind. R., 267. But simply failing to appear at the trial does not have the effect to withdraw an answer filed. *Ibid.*

\*Few things can be more absurd since the introduction of the notice instead of the summons, than the thing called special appearance in court by the defendant, to tell the court that he is not there. If the defendant is there, by reason of the notice, it has served its office. But to ask to quash the notice, as it is called, is a sheer misconception of its office. If that has brought him to court, he can make no objection to it—he can only make objection to be compelled to answer, on pain of default, on the ground that such notice did not give him sufficient time—or sufficient appraisal of time, court, parties, &c.; nor were these aided by any accompanying petition, and, therefore, he wants that time now, inasmuch as that, now, for the first time on coming to court, he has learned the facts which he should have been apprised of several days before. *Report on Civil Code*, p. 297.



SEC. 2841. When the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows : Procedure in case only part be served.

1. If the action be against defendants jointly indebted upon contract, he may proceed against the defendants served, and if he recover judgment it may be entered against all the defendants thus jointly indebted, so far as that it may be enforced against the joint property of all, and the separate property of the defendants served, and it shall not be valid against those not served until on *scire facias* they have had full opportunity to show cause against the judgment.

2. If the action be against defendants severally liable, he may without prejudice to his rights against those not served, proceed against the defendants served in the same manner as if they were the only defendants.

3. Or the plaintiff may continue till the next term, and proceed to bring in the other defendants ; but at such second term the suit shall proceed against all who have been served in due time, and no further delay shall be allowed to bring in the others, unless all that appear shall consent to such delay.

SEC. 2842. When a petition has been filed affecting real estate, the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title, if the real property affected be situated in the county where the petition is filed. Notice to affect land.

SEC. 2843. When any part of real property, the subject of an action is situated in any other county than the one in which the action is brought, the plaintiff must, in order to affect third persons with a constructive notice of the pendency of the action, file with the clerk of the district court of such county, 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 from the time of such filing only, shall the pendency of the action be constructive notice to subsequent vendees or incumbrancers thereof, who shall be bound by all the proceedings taken after the filing of such notice, to the same extent as if a party to the action, and the clerk of such county must immediately, on receipt of such notice, index and record the same in the incumbrance book. If in an other county.

DECISIONS UNDER THE PRIOR PRACTICE. "Thirty dollars as money due on a promissory note" is descriptive enough of the cause of action though an endorsee sues on the note. 4 Iowa, 565.

"Certain parcels of real estate" is description enough of land in a notice of an action for injury to land, and the time of the injury need not be in the notice averred, 4 Iowa, 554.

An order quashing a notice and continuing a cause, may be appealed from, 4 Iowa, 565 and 4 Iowa, 345.

As to style of notice, 4 G., 42 ; petition may be filed after time fixed in notice, 1 Iowa, 81 ; statement thereof, 1 Iowa, 296 ; subpoena, 1 Iowa, 366 ; how notice must state time of court, 4 *ibid.*, 346 ; when writs returnable, 2 G., 467 ; variance between writ and declaration, 2 G., 365. Filed after time stated in it, 3 Iowa, 296 ; same, 1 Iowa, 80 ; what is waiver and what sufficient time, 3 G., 126 ; see 1 G., 13.

Forms abolished—substance retained, 1 Iowa, 546 ; collateral facts not to be set out, 1 Iowa, 591 ; pleading should be in English, 5 Iowa, 374 ; sense of the notice, 4 G., 382 ; need not run in the name of "the state of Iowa," 4 G., 42 ; directed to full name, and returned by initials presumed right, 7 Iowa, 56 ; designation of the court therein, 4 G., 42 ; the certainty therein required, 4 Iowa, 553 ; 7 Iowa, 56 ; 1 *ibid.*, 300 ; 8 *ibid.*, 116 ; it must state a time when defendant must appear, *Mobley v. Phillips*, June 1859 ; see alternative time, 4 G., 123 ; see departure from matter of petition, *Peddegord v. Whittam*, Dec. term, 1859 ; on the second day of the next term, certain enough, 6 Iowa, 235 ; if notice defective, cause continued, 4 G., 123 ; return

should state age of person, 7 Iowa, 56; the "family" of sec. 1721, Code, means that, wherein the defendant resides, and may not be his own, 3 G., 575; service on one member of a firm binds all, 8 Iowa, 516; as to contradicting return, see M., 303; what return must state, 5 Iowa, 388; what record should show as to notice, 6 *ibid.*, 3; manner of service to be shown, 6 *ibid.*, 78; it must state all facts needed to make notice, 6 *ibid.*, 172; a bad return, 1 *ibid.*, 85; of service in case of depositions, 4 G., 263; left with clerk at store, bad, 3 G., 576; construction of a return, 7 Iowa, 44; what return must state, 7 *ibid.*, 58; nothing presumed in return, 2 G., 479; what constitutes residence, 2 G., 535; when service to be completed, 3 G., 357; return may be amended, 2 G., 493; only when served personally need the return show whether a copy of the petition was demanded, 5 Iowa, 388; on a return of not found, the officer is presumed to have used due diligence, 5 Iowa, 388; the diligence used need not be stated in a return of not found, 5 Iowa, 388; left at his usual place of residence is same as left at his house in effect, 5 Iowa, 388; when service is to be obtained by copy left under section 1721, the place must be the usual place of residence of the party to be served and person with whom left, must be a member of such person's family; an objection to the jurisdiction on bad notice, is not waived by proceeding to defend under protest, 4 Iowa, 158; a defendant cited to answer on a day later than that of the rule can not be defaulted before the day to which he was cited, 4 Iowa, 346; rules of court as to time of answering are law and one cited to answer must know the proper time of doing it, 4 Iowa, 346; that there was ground for publication and for a default after publication are jurisdictional facts and must appear of record, 6 Iowa, 331; 4 G., 534, 266, 465; proof of service, if by one not sheriff of the county, 7 Iowa, 261; insufficient service don't defeat a cause, only continues it, 1 Iowa, 80; [but see section 2840;] good and bad returns, 7 Iowa, 43; 6 *ib.*, 78; 4 *ib.*, 158; M., 357; 2 G., 479; 7 Iowa, 434; 5 *ib.*, 387; 6 *ib.*, 171; 1 *ib.*, 85; [see sections 2817, 2820;] as to service of copies, see 7 Iowa, 1-56; 6 Iowa, 1; M., 178; and before service can be made by copy, the return must show that defendant was not found, *Chittenden v. Hobbs*, Dec. 1859; [the report on civil practice provided for service of copies of petition with notice, but the legislature changed it, and in so doing seem to have deprived a resident of the right to a copy on demand, which right existed under the code;] sheriff can not amend original notice in supreme court, 1 Iowa, 85; without notice or appearance no jurisdiction, 6 Iowa, 396; 3 G., 99, 215; when agreement can not give jurisdiction, 2 G., 374; pleading waives all defects in process and in its service, M., 21, 156; 1 Iowa, 86; 2 G., 467; 3 G., 575; 6 Iowa, 274, 276; 4 G., 297; M., 113, 223; 1 G., 469; asking a continuance is an appearance, M., 156; 4 G., 439, 382, 441; 1 Iowa, 86; see also 2 G., 464, and *Chittenden v. Hobbs*, Dec. term, 1859; waiver of service in writing, M., 359; entry of appearance by attorney, 7 Iowa, 320; appearance presumed general, M., 403; effect of record, 6 Iowa, 274, 516; 3 G., 199; appearance under proper protest and saved objection no waiver of irregularity, 4 Iowa, 158; voluntary appearance, 4 Iowa, 568; special appearance, 4 G., 346; appearance waives irregularity, *ibid.*, 229; unless special, *ibid.*, 345; appearance for continuance a waiver, 4 *ibid.*, 439; what special appearance may urge, 4 G., 441; waived, unless objected below, 4 *ibid.*, 563; as to entry of appearance, 3 G., 199; signing bond, not an appearance, 3 *ibid.*, 215; an appearance to the attachment is one to the notice, 3 G., 575; publication, 6 Iowa, 183; publication must be ordered by court, 4 G., 326, 465, and 534; proof of facts justifying publication, must appear of record, 3 G., 357; no collateral assault allowed on insufficient notice by publication, 2 G., 94; void, unless statute conformed to, 2 G., 241; what the affidavit of sending copy should state, *Foley v. Connelly*, Dec., 1859; 4 G., 324; 4 G., 534; under chapter 240 of 6th session, residents as well as others may be served by publication under proper circumstances, *Lyon v. Comstock*, Dec., 1859; notice of publication not good unless ordered by the court after due return of the notice, 4 G., 534, 465, 324; [but this is no longer true under sections 2832 and 2833, nor under 2836 and 2837, of Code of Civil Practice;] the term of publication must have been completed ten days before the term of court, 3 G., 357; [see section 2833; the report of the Code of Civil Practice provided for six weeks' publication ending any day before the term, as in section 2834, but the legislature changed 2833, by making "six," "four," and inserting all the matter between "weeks," and "in some newspaper," and thus made the discrepancy observed between sec. 2833, and the last line of sec. 2834;] a claim though unliquidated against a county may be sued at once without presentation to the county judge, 5 Iowa, 381; section 1727 does not consider venue at all only the mode of serving in an action to be brought in any proper county, 5 Iowa, 519; no jurisdiction unless affidavit when served by another than sheriff, 7 Iowa, 262; sec. 4 G., 266; what "papers" are meant, 2 Iowa, 436; affidavit needed, 7 Iowa, 262.

CHAPTER 121.\*

JOINDER OF ACTIONS.

SEC. 2844. Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, provided that they be by the same party, and against the same party in the same rights, and if suit on all as to venue may be brought in that county, may be joined in the same petition, but the court to prevent confusion therein, may direct all, or any portion of the issues joined therein, to be tried separately, and may determine the order thereof.†

Join any causes except ordinary and equitable.

Under the code there is but one form of action allowed. But there are causes of action that can not be properly joined in the same petition; [as for example an equitable and an ordinary one,] but the plaintiff may, at any time before the cause is submitted to the jury, or the court, strike out any cause of action and, by amendment, submit for decision, a distinct cause of action from that stated in the original petition. *Hord v. Chandler*, 13 B. M., 404.

SEC. 2845. The plaintiff may strike from his petition any cause of action, or any part thereof, at any time before the final submission of the case to the jury or to the court, when the trial is by the court.

Plaintiff may strike out cause.

The plaintiff has a right to strike from his petition any cause of action at any time before the final submission of the case to the jury, or to the court. By amending his petition, he may submit a distinct cause of action from that in his original petition. *Hord v Chandler*, 13 B. M., 404.

SEC. 2846. The court at any time before the defense, shall on motion of the defendant, strike out of the petition, any cause or causes of action improperly joined with others.

So may court.

Misjoinder of actions is no cause of demurrer. A motion to strike out is the proper remedy. *Stiles, J., Hart v. Cundiff*, Mss. opin., January, 1855. *Stanton's Ky. Code*.

SEC. 2847. All objections to the misjoinder of causes of actions shall be deemed to be waived, unless made as provided in the last section.

Waiver.

\* Section 2844 is substantially that of England and Maryland. The other sections of this chapter are common to all the states using the new system. In some, as in Kentucky, the misjoinder is assailable by motion, in most of them, however, as in Ohio, by demurrer.

† This is substantially the law of the Code, section 1751, though its phraseology is that of the 41st section of the English act of 1852, and of the Maryland act. The old reasons which presided over joinder based upon the fact that jurisdiction was obtained by the original writ, and that only one judgment could be pronounced in a cause, precluded any joinder, inconsistent with the unity of the judgment. And as in actions which partook of the nature of social as well as individual wrongs, the judgment was for the state by way of fine as well as for the individual by way of compensation, such cause could not be joined with one purely individual. But we have provided that any number of judgments may be pronounced in one adjudication—and thus removed that old impediment. Hence the only question of joinder with us rests on simple policy. This chiefly concerns the plaintiff, and he should be left to use his own sense, in guiding him either to unite a slander suit with a promissory note, or to keep them distinct. The court can, if it likes, order cases, the joinder of which it don't favor, to be disunited and tried separately. The English commissioners on this subject, say that the good sense of the plaintiff will be a better guide than can any rule else, to determine what causes should be united. Because it was held by some who reasoned on exploded analogies that tort and contract could not be joined under our present code, section 1751, we have used language removing the doubt. *Report on Civil Code*.

tion, and all errors in the decision of the court thereon are waived, unless excepted to at the time.

Where there is a misjoinder of several causes of action in the petition, under the rules prescribed by the civil code, unless exceptions for that cause be taken in the circuit court, the irregularity will be deemed to have been waived. *McKee v. Rope*, 18 B. M., 555.

What done with such causes.

SEC. 2848. When a motion is sustained on the ground of misjoinder of causes of action, the court, on motion of the plaintiff, shall allow him, with or without costs, in its discretion, to file several petitions, each including such of said causes of action as might have been joined, and an action shall be docketed for each of said petitions, and the same shall be proceeded in without further service, and the court shall determine, by order, the time of pleading therein.

## CHAPTER 122.\*

### PLEADING.

[Code—Chapter 104.]

#### TIME OF PLEADING.

Demur or answer when.

SECTION 2849. The defendant shall, in an action commenced by ordinary proceedings, demur or answer, or do both, as to the original petition, before noon of the second day of the term.

Demur or reply.

SEC. 2850. In such action, the plaintiff shall demur or reply as to the original answer, or do both, before noon of the third day of the term, and as to an amended or supplemental answer, or an answer in the nature of an answer over, after motion or demurrer by the party answering, before noon of the second day after the day on which such answer shall have been filed.

Demur to reply.

SEC. 2851. The defendant shall, if the original reply be filed before noon of the third day of the term, demur thereto before noon of the fourth day of the term, and to an amended or supplemental reply, before noon of the second day after the day on which such pleading shall have been filed.

Equitable proceedings.

SEC. 2852. In an equitable action, the defendant shall demur before noon of the second day of the term, and shall answer in the same time, if the notice shall have been served sixty days before such term, and if not, then in sixty days from the day of completed service.

Demurer therein.

SEC. 2853. If the answer, the action being commenced by equitable proceedings, is filed on the second day of the term, the plaintiff may demur before noon of the third day thereafter, and must reply thereto on or before the fiftieth day after said filing.

\* While this chapter is based upon the corresponding chapter in the Codes of the new system as in force in New York, Ohio, Kentucky, Missouri, Wisconsin, and the other states before named, it goes into greater detail than any of those: 1, because the need thereof had been suggested by the decisions of those states; 2, such detail was deemed necessary to avert the construction which had been given to chapter 104 of the Code of 1851, and 3, such detail was thought necessary in order to limit the number of rules which otherwise must be made to supply its generality.

SEC. 2854. The defendant must demur to an equitable reply before noon of the second day of the term, after the filing thereof. To reply.

SEC. 2855. If any pleading is by any rule or order, or for any legal reason, filed after the time herein fixed, then the adverse party shall have, in which to file his subsequent pleading, the same number of days as would have been allowed him had such late pleading been filed in the time herein fixed. If pleading be delayed.

SEC. 2856. The appearance term shall not be the trial term for equitable actions, except in cases in which notice shall have been served sixty days before such term, and in which also the answer shall be merely a denial, and the proof documentary. Trial term.

SEC. 2857. The day on which the judge actually opens court, shall be for the purpose of timing the pleadings, considered the first day of the term. First day.

SEC. 2858. Every pleading must, however, be filed on or before the cause is called for trial, although the time allowed for such pleading shall not then have elapsed. Pleading closed before trial time.

SEC. 2859. Taking into consideration in each case, the business of the attorney, and also the opportunities in such county afforded the client to have consulted him before the term, the court, for good cause shown, may, on request, extend the time of filing any pleading beyond the time herein fixed, but shall do so with due regard to making up the issues at as early a day as under the circumstances is possible. Extension of time.

SEC. 2860. The court shall have the power to tax against the losing party to any motion or demurrer contemplated in this chapter, the sum of five dollars, or any smaller sum, depending on the merits of the controversy raised by such motion or demurrer, as costs, in favor of the party who thereon succeeds. But after the filing of any such motion or demurrer, and before the same is called up for argument, such motion or demurrer may be confessed, and the proper amendment made without the costs contemplated in this section; but a second confession of a motion or demurrer to a like pleading, shall not exempt from the costs contemplated in this section, but shall incur them as would an adjudication. Costs for bad pleadings.

SEC. 2861. When a petition, answer, or reply shall be adjudged insufficient in whole or in part upon demurrer, or the whole or some part thereof stricken out on motion, the proper party may file a further like pleading within such time as the court may then direct, and the same shall hold as to the answer or reply of a party whose demurrer is overruled, and in either case, in default of such pleading being so filed, the court shall proceed with the cause in the same manner as if no such original pleading had been filed. Same.

SEC. 2862. If such second petition, answer, or reply be filed, and in like manner be adjudged insufficient, or the whole or some part thereof in like manner stricken out, the party filing such second pleading shall be taxed ten dollars, or some smaller sum, in the discretion of the court, as costs, and file a like pleading instanter; or in default thereof, the court shall proceed with the cause in the same manner as if no second pleading had been filed. Same.

SEC. 2863. If a third petition, answer, or reply be adjudged insufficient, as above, or the whole or some part be stricken out, the party filing such pleading shall be taxed fifteen dollars, or a smaller sum, in the discretion of the court, as costs, and no further petition, answer, or reply shall be filed, but judgment shall be rendered as for want of such pleading. Same.

Motion described.	SEC. 2864. All motions assailing any pleading shall be in writing, and filed in the case, and shall specify the causes on which they are founded, and no cause not so specified shall be argued or considered in support of the motion.
Time of.	SEC. 2865. Motions assailing pleadings for any of the objections stated in this chapter, shall be regulated as regards the time of filing them as demurrers are.
No motion after a motion.	SEC. 2866. A motion after a motion, or a demurrer after a demurrer, to the same pleading, shall not be allowed; but each motion and each demurrer shall state all the objections to any pleading which are intended to be made to it, except that a demurrer, on the ground of insufficient statement of facts to constitute a cause of action, defense, set-off, counter-claim, cross-demand, or reply, may be filed at any time before answer or reply, unless the points thereof have been already made, or could have been made in a prior demurrer.
Motion suspends pleading.	SEC. 2867. A motion assailing any pleading, or any count thereof, for any of the objections stated in this chapter, shall suspend the necessity of any other pleading to such pleading or count, until the motion shall have been determined, whereupon the court shall direct on or before what time the next pleading shall be filed: the same shall obtain as to a demurrer.
To be filed.	SEC. 2868. All pleadings, including demurrers, and all motions made in writing, shall be filed with the case.
When argued.	SEC. 2869. No motion or demurrer shall be argued until the morning after that on or before which the same shall have been filed, as provided in the preceding section, unless by consent, or unless the case be sooner reached.
Not withdrawn.	SEC. 2870. A motion or demurrer once filed shall not be withdrawn, without the consent of the adverse party entered thereon, or of the court; in which last case the court may award to the other party, costs, as imposed on adjudication thereof, and shall fix the time of filing the next pleading.
Notice book.	SEC. 2871. The filing of a pleading in the clerk's office, and notice thereof on the notice book, within the time allowed, shall be equivalent to a filing in open court.
Forms abolished.	SEC. 2872. All technical forms of actions and of pleading, all common counts, general issues, and all fictions are abolished, and hereafter the forms of pleadings in civil actions, and the rules by which their sufficiency is to be determined, are those prescribed in this code.*

\* Every plaintiff's right to recover depends upon the existence of a *state of facts*. A statement of these *facts* is the thing required.

This is a more difficult requirement than was made by the former system of pleading. Under that there were a few forms into which all causes must come. The question for the lawyer first to settle in the preparation of the papers, was not so much whether the facts constituted a good cause of action, as into which of the forms it would legally fall. This question, where not one of nicety, could often be determined by a glance at a few of the leading facts, without an intimate acquaintance with the minor ones, or with the real character of the cause of action. This form, too, had itself grown into a fact, and *implied facts*, which with it, need not to be stated, but now without it must be stated, either to constitute a cause of action, or to constitute *the* cause of action, which means the cause shown for the substantial *relief* demanded.

The advantage of a statement of *facts* is very great. It is a guide to the proof. It allows an excellent opportunity of testing a case on the law, by a demurrer, saves much writing in case of a bill of exception, also in cases of instructions, since these are chiefly but an extension of the legal propositions of a pleading into their elemental facts, which should generally be stated rather in the pleadings themselves. We do not say no hypothetical instructions are needed under the new system, but that the tendency will be to render fewer of them necessary. And the record will

The code has not changed the common law rule of pleading, that a man may waive the tort and sue on the contract. *Hinds v. Tweddle*, 7 Pr. R., 278.

All forms and rules of pleading are abolished, and the rules for testing the sufficiency of a pleading are those prescribed by the code. *Royce v. Brown*, 3 Pr. R., 390; *Buddington v. Davis*, 6 How. Pr. R., 402; *People v. Ryder*, 2 Kern, 437; *Allen v. Patterson*, 3 Seld., 476, 478; *Eno v. Woodworth*, 4 Comst., 249; *Mann v. Morewood*, 3 Sandf., 557; *Brackett v. Wilkinson*, 13 How. Pr. R., 102; *Stewart v. Travis*, 10 How. Pr. R., 148; *Adams v. Holley*, 12 How. Pr. R., 326. In the case of *Trustees of School*, section 16, &c., v. *Oudin*, 8 Ohio St. R., 293, 297-8, the supreme court, per J. R. SWAN, J., said:

“We suppose the common law rule, as to the construction of pleadings under the code, is entirely abrogated. If pleadings shall be in ordinary language, as contradistinguished from technical language, they must be construed as meaning what is generally understood by ordinary language; and, hence, there can be no established technical mode of stating a cause of action or defense. So, too, the rules of the common law, as to the sufficiency of pleadings, are abrogated; and in their place are substituted the few and simple rules of the code. Thus the rules of common law pleading, which illustrate and vindicate the law, that the facts which constitute a cause of action shall be set forth in the declaration, may be applicable to a petition under the code. But the language to be used in stating a cause of action is prescribed by the code; and the common law rules in that respect are entirely inapplicable.”

*Western Law Monthly.*

SEC. 2873. The pleadings are the written statements of the parties of the facts constituting their respective claims and defenses. Pleadings what.

SEC. 2874. The only pleadings allowed are:

1. The petition of the plaintiff.
2. The demurrer or answer by the defendant.
3. The demurrer or reply by the plaintiff.
4. The demurrer by the defendant.

How many pleadings.

The only pleadings allowed in suits in equity are the petition of the plaintiff, the answer or demurrer by the defendant, and the demurrer or reply by the plaintiff. The plea in abatement in this case can be regarded in no other light than a substantial answer to the petition. *Stone's adm'r v. Powell*, 13 B. M., 343.

The code should be observed as a rule of practice. *Ibid.*, 343.

#### *The Petition.*

SEC. 2875. The first pleading by the plaintiff is the petition. The petition must contain:

1. The name of the court and the county in which the action is brought.
2. The names of the parties to the action, plaintiffs and defendants, followed by the word “petition,” if the proceedings are ordinary, and by the words “petition in equity,” if the proceedings are equitable.
3. A statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action.
4. A demand of the relief to which the plaintiff considers himself

then remain a monument of the law on such facts decided, which under the form of pleading of the dark ages, it never could do.

Nothing has evinced a more total mis-conception of the endeavor of the new system of pleading, than the idea in some quarters current, that the general denial of the Code, was of the same value as the general issue at common law. There could be no true function of good pleading secured while the general issue was allowed to plant its ambuscades, and nearly thirty years ago, in Great Britain, it was shorn of its extended application and reduced to a common sense and quite limited significance, and we abolish it altogether. *Report on Civil Code*, p. 299.

entitled, and if such demand be for money, the amount thereof must be stated.

5. Where the petition contains more than one cause of action, each must be stated wholly in a count by itself, and must be sufficient in itself; but one prayer for judgment may include a sum, based on all counts looking to money remedy.

9. In a petition by equitable proceedings, each cause of action shall also be separated into paragraphs, numbered as such for more convenient reference, and each paragraph shall contain, as near as may be convenient, a complete and distinct statement.

It is a general rule that it is unnecessary to aver anything in the complaint that is not required to be proved. *The Union Mutual Insurance Company v. Osgood*, 1 Duer, 708.

Every fact which the plaintiff must prove, to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred, or stated. This rule of pleading in an action for a legal remedy is the same as formerly, in this, that facts, and not the evidence of facts, must be pleaded. *Allen v. Patterson*, 3 Selden, 478.

A statement in a complaint, of a contract, and, that it then became, and was, and continued to be the duty of the defendant, to use due care, and to erect and keep lights, etc., is not sufficient to constitute a cause of action without a statement of the facts from which such duty arises. *The city of Buffalo v. Holloway*, 3 Selden, 493.

The pleader may use his own language, but the necessary matter must be there, and be stated in an issuable and intelligible form, capable of trial. Facts must still be set forth according to their legal effect and operation, and not the mere evidence of those facts, nor arguments, nor inferences, nor matter of law only. Nor should pleadings be hypothetical, nor in the alternative. The same general principles govern pleadings in equity. *Boyce v. Brown*, 7 Barb., 85.

In a petition against the assignor of a note, which the assignee has failed to recover of the obligor, it is necessary to set out the consideration of the assignment as well as the reason why the amount was not recovered of the obligor. *Elliott v. Thoelkeld*, 16 B. M., 344.

An averment of due notice will not be sustained by evidence of facts excusing notice. *Garvey v. Fowler*, 4 Sands, 665. All the facts which constitute the cause of action must be stated in the complaint, and every fact on which the right of action depends, must be deemed *constitutive* in the sense of the code. *Ibid.*

The plaintiff alleged that his eye was injured by having got poison into it, which was deposited in a trough by the defendant, for a malicious purpose, or by the burning of the animal poisoned thereby, etc. Held bad on demurrer, as being in the alternative, as not being a natural or proximate cause of the act of the defendant, and that he is not liable, and that the demurrer can not be said to admit the one cause more than the other. Duvall, J., *Johnson v. Williams*, Mss. opin., December, 1857. *Stanton's Ky. Code.*

Where the complaint alleges "the sale and delivery of goods," it is not necessary to allege a promise on the part of the defendant, to pay, etc. A statement of the facts constituting a cause of action, in ordinary language, etc., is sufficient; that is, all the facts which, upon a general denial, the plaintiff would be bound to prove to entitle him to a judgment. *Glenny v. Hitchins*, 2 Code Rep., 56; 4 Pr. R., 98; 3 Code Rep., 153.

In an action of assault and battery, the statements in the complaint of the business and employment of the parties, and the object and intent of the assault, together with the statement that it caused the plaintiff to be ridiculed, and so forth, held not to be immaterial or irrelevant, although not essential to entitle the plaintiff to maintain his action, they are material on the question of damages, and may be proved. *Root v. Foster*, 9 Pr., R. 37.

To say that S. has failed "to fulfill his obligations by virtue of said instrument," is no more than saying he has broken his contract, or that the plaintiff is entitled to judgment. It involves no question of fact; it is merely the



plaintiff's inference from a state of facts which he has not thought fit to disclose. *Van Schaacks v. Winne*, 16 Barb., 95.

Allegations in a pleading should be positively made, in order to prevent immaterial issues and confusion, and the words, "as the plaintiff is informed and believes," following the allegations of the complaint, were stricken out as redundant. *Truscott v. Dale*, 7 Pr. R., 221.

The allegation that F., the president of the telegraph company, drew his bill on G. F. D., treasurer of said company, does not amount to an averment, that F. as president drew the bill on G. F. D., as treasurer of the telegraph company. The adjuncts, president and treasurer, are only *descriptio personam*, and does not show the bill to be that of the company. *Crenshaw, C. J., Tanner v. Woolfolk*, Mss. opin., September, 1856. *Stanton's Ky. Code*.

The facts which are required to be stated, as "constituting the cause of action," can only mean real, traversable facts, as distinguished from propositions or conclusions of law; since it is the former, not the latter, that can alone, with any propriety be said to constitute the cause of action. *Mann v. Morewood*, 5 Sand., 566.

A statement in the body of a petition, which shows that an individual is a necessary party, does not make him a party. His name must be in the style of the action, which is, the names of the parties, plaintiffs and defendants, at the head of the petition. *Crenshaw, C. J., Wilkes, Sheridan, etc. v. Morehead*, Mss. opin., September, 1856. *Stanton's Ky. Code*.

The words, "facts constituting a cause of action," mean those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of the fact. *Wooden v. Strew*, 10 Pr. R., 50.

The facts which the code requires to be set forth, are not true propositions, but physical facts, capable, as such, of being established by evidence, oral or documentary, and from which, when so established, the right to maintain the action, or the validity of a defense, is a necessary conclusion of law—a conclusion which the court will draw, and which it is quite unnecessary the pleader should state. *Lawrence v. Wright*, 2 Duer, 674.

A petition asking redress for an injury arising from negligence, or want of skill in the performance of a lawful act, should state such facts as would have authorized the action on the case; and a petition claiming redress for an injury done with force, such facts as would have authorized the action of trespass. *Kauntz v. Brown*, 16 B. M., 584.

A complainant should state the facts of the case full enough to enable the court on proof or admission of the facts set forth, to grant the relief sought. *Tallman v. Green*, 3 Sand., 438.

The plaintiff must aver every fact necessary to show a right to recover, and every such necessary averment must be proved in some way. *Murdock v. The Chenango Co. Mut. Ins. Co.*, 2 Coms., 216.

The plaintiff is to state in his complaint the facts which constitute his cause of action, and nothing more. *Clark v. Harwood*, 8 Pr. R., 472.

The ode of Practice requires that the plaintiff's petition must contain a statement of the facts constituting his cause of action, with scarcely any other requisition, but that it be made in ordinary and concise language, without repetition. *Hill for use of Wintersmith v. Barrett, etc.*, 14 B. M., 84.

The code makes no change in the law which determines what facts constitute a cause of action, except that by reducing all forms of action to the single one by petition, it changes the question, whether the plaintiff's statement of his cause shows facts constituting a cause of action in trespass, assumpsit, or other particular form, into the more general question, whether the petition shows a right of action in any form. *Ibid.*, 85.

The code does not authorize a recovery upon any statement of facts, which before its adoption, did not authorize a recovery in some form of action, and therefore former precedents, rules and adjudications may be resorted to as authoritative, except so far as they relate to the distinctions between the different forms of actions, or to formal and merely technical allegations. *Ibid.*, 86.

In a suit upon an appeal bond, the petition should state so much of the bond and condition, and so much of the decree appealed from, and make such averments as will show a breach of the condition and a cause of action. If the decree was for a surrender of property, that the plaintiff was deprived of

its use, etc.; if to pay costs and damages—aver that the decree was affirmed' and that costs and damages were awarded, and what they were. *Collins v. Blackburn*, 14 B. M., 254-5.

A petition to enforce a vendor's lien, must aver, either that the vendor has complied with his contract, or is able to do so. *Simpson, J., Noe, etc. v. Daugherty*, Mss. opin., December, 1857. *Stanton's Ky. Code*.

It is necessary for the plaintiff, who sues for the purchase money of land, to allege his ability to comply with the contract as vendor, otherwise he has no right, in a court of equity, to demand the payment of the purchase money. Held, however, that the allegation that the plaintiff has the legal title of the land sold, is sufficient, though it would be better to allege the fact of his ability, etc., more distinctly. *Simpson, J., Simpson's adm'r v. Dunlap*, Mss. opin., December, 1857. *Stanton's Ky. Code*.

Where a plaintiff sues as receiver, he should at least state the place of his appointment, and distinctly aver that he was appointed by order of the court. *White v. Low*, 7 Barb., 204; *Chataque Co. Bank v. White*, 2 Selden, 236.

The defendant in such a suit has a right to insist that the facts constituting the appointment of the plaintiff, as set out, shall be sufficient to show one has been made, and that these facts be so set out as to be triable. *Ibid.* [But see section 2923.]

In actions to recover damages for the detention of personal property, it is not necessary to set forth the plaintiff's title, otherwise than by a general averment of ownership; and under such an averment, if controverted, the plaintiff may give evidence of the manner in which he acquired title. *Heine v. Anderson*, 2 Duer, 318.

It is not necessary in a petition to state the facts and circumstances by which the ultimate fact relied on is to be proved. See *v. Cox*, 16 Mo. Rep., 166; *McMartin v. Adams, ibid.*, 268; vide *Boon v. Miller*, 16 Mo. Rep., 457; *State v. Thomas*, 17 Mo. Rep., 503. A plaintiff can only recover on the cause of action alleged in his petition. *Link v. Vaughn*, 17 Mo. Rep., 585; vide *Page & Bacon v. Snow*, 18 Mo. Rep., 126; *Perry v. Barrett, ibid.*, 140. An averment that a party "used and occupied premises with the permission of the owner, thereby becoming his tenant," is a sufficient averment of indebtedness. *Walker v. Mauro*, 18 Mo. Rep., 564. A party suing upon a bond must state his title in his petition. It is not sufficient to aver that he is the legal holder. *Smith & Kinzer v. Dean*, 19 Mo. Rep., 63. Law and equity being now blended, an equitable title arising out of a contract for the sale of land is a good defense to an action instituted to recover possession of land. *Tibeau v. Tibeau*, 19 Mo. Rep., 78; vide *Ramsours v. Campbell*, 19 Mo. Rep., 358. A statement in a petition, that the plaintiff sued in the capacity of administratrix, is a sufficient allegation that she is administratrix. *Duncan v. Duncan*, 19 Mo. Rep., 368. It is not necessary that facts should be stated in a pleading according to their legal effect. (*Pye v. Rutter*, 7 Mo. Rep., 548; *Muldrow v. Caldwell*, 7 Mo. Rep., 563; *Moore & Hunt v. Platte County*, 8 Mo. Rep., 467;) *Page v. Freeman*, 19 Mo. Rep., 421. A plaintiff is entitled to all the relief that he could formerly have obtained, both from a court of law and equity, upon the facts. *Rankin v. Charless*, 19 Mo. Rep., 490. Courts do not take judicial notice of city ordinances. If a party rely on an ordinance, he should set it out in his pleading. *Mooney v. Kennett*, 19 Mo. Rep., 551. A party seeking equitable relief under the new system, must state facts which would have been a ground for such relief under the old system. *Jones v. Brinker*, 20 Mo. Rep., 87; *Carman v. Johnson, ibid.*, 108; *Maguire v. Vice, ibid.*, 429. In declaring upon a note, it is not necessary to set out a consideration in the petition. *Caples v. Branham*, 20 Mo. Rep., 244. If a complainant rely upon a disability as exempting him from the operation of the statute of limitations he should set it up in his bill. *Keeton v. Keeton*, 20 Mo. Rep., 530.

General damages are such as necessarily result from the injury complained of, and may be recovered without any special averment in the complaint. But such damages as are the natural but not the necessary result of the injury, are special, and must be averred in the complaint. *Vandenslice v. Newton*, 4 Comst., 130. And in an action for a breach of contract the plaintiff is confined in his recovery to the breach alleged, and can not recover on any other

grounds. *Briggs v. Vanderbilt*, 19 Barb., 222. Damages, costs and expenses, when given as the penalty against a party for the non-performance of a contract, mean the necessary, natural and proximate damages resulting from such non-performance, and not some remote, accidental or special injury to the party to whom the right of action accrues. *Groat v. Gillespie*, 25 Wend., 383; and see *Bagert v. Burkhatton*, 2 Barb., 525. Whenever special damages are recovered, it must be on a distinct and definite statement in the complaint. *Low v. Archer*, 2 Kern., 282.

The contract of the maker of a note is to pay it according to the terms of it. The contract of the indorser is, that the maker will pay on presentment according to the terms of the instrument, or on his default, he, the indorser, on due notice of such demand and non-payment, will pay. The complaint, therefore, in order to conform to the code, should state facts enough against the maker to show his liability to pay, and enough against the indorser to charge him with the debt. In the latter case, not only the making and indorsement of the note should be stated, but also the demand of the maker at the time and place prescribed for that purpose, and notice of such demand and non payment to the indorser. This demand must be on the third day of grace, and notice of demand and refusal given afterwards on the same day or the next. The complaint in this case does not show a demand of the note at the place where it was payable, nor does it show notice of such demand and non-payment, as against the indorsers; a demand at the place appointed in the note for payment was necessary. As against the maker this was of no consequence; but as the plaintiffs have chosen to unite both makers and indorsers in the same action, their statement of facts should have been full enough to show the liability of both. *Per Willard, J., Spellman v. Weider*, 5 How., 5.

A party seeking to enforce in our state and courts a contract, which by its laws are forbidden, and declared void, must aver and prove where it was made, and that by the laws of that place it was authorized and valid. *Thatcher v. Morris*, 1 Kern., 437.

An allegation in the complaint "that payment of said note was duly demanded at maturity and refused, and the same was thereupon duly protested for non-payment, and notice thereof duly given to the said indorsers" is deemed sufficient. See *Woodbury v. Sackrider*, 2 Abb., 404; *McCall's Forms*, 220.

Degrees of negligence are matters of proof and not of averment. The general allegations of negligence, want of care and skill, &c., are sufficient, whether the defendant is liable for ordinary or only gross negligence. *Nolton v. Western R. R. Co.*, 15 N. Y. R., 444.

Whether on a given state of facts the transaction constitutes an account stated, is a question of law. *Lockwood v. Thorne*, 1 Kern., 170.

A complaint must state all the issuable facts constituting the cause of action. In an action for the recovery of possession of personal property, a demand and refusal are necessary, where the defendant becomes possessed of the property by the delivery of the wrong-doer, and merely detains it. And this is applicable to a defendant in possession who is assignee of the wrong-doer in trust for creditors. *Fuller v. Lewis*, 13 How., 219.

It is never necessary in pleading to state matter which the court is supposed to know, and of which it is bound to take notice, and therefore it is unnecessary to state mere matter of common or public statute law. *Shaw v. Tobias*, 3 Comst., 188.

The plaintiff brought his action on a contract for the payment of money made by the defendant with another, and alleged his title to the cause of action as follows: that he (the plaintiff) "is now the sole owner of the said demand against the said defendant." *Held insufficient*—merely an allegation of a conclusion of law. Some fact or facts should be stated, showing how the plaintiff became the owner of the demand. *Thomas v. Desmond*, 12 How., 331.

A complaint stated that the defendant made "his contract in writing," and set forth a copy thereof, in which the defendant "for value received, promised to pay;" but the complaint did not aver any consideration for the contract, in direct terms. It also stated that such contract became the property

of the plaintiff by purchase, without stating when, from whom, or upon what consideration. *Held*, that these defects are not of such a substantial nature, as to be available, under the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action, but that the remedy is by motion, to make the faulty pleading more definite and certain. That proceeding has taken the place of demurrers for want of form. *Prindle v. Caruthers*, 15 N. Y. R., 425.

And it is still the rule that the omission to state a necessary fact, in the petition or other pleading of a party, may be cured by an allegation of the same fact in a subsequent pleading of the other party in the same action. *Bates v. Graham*, 1 Kernan, 237. This is a rule of the common law, still acted upon under the code.

It may be necessary to aver more than will need to be proved. 1 vol. W. L. M., p. 102.

As to what administrator must state, see 1 vol. W. L. M., p. 155, but see also section hereof, 2923.

Although the special prayer of the petition is for the sale of land, which could not, upon the allegations, be granted, yet, under the general prayer for all other proper relief, plaintiff would be entitled to judgment *in personam*, upon proof sufficient. *Stiles, J., Welch v. Owen*, *Ms. opinion*, June, 1856.—*Stanton's Ky. Code*.

The general prayer formerly of importance in a bill in chancery, is of no consequence in a complaint in any action under the code. *Marquat v. Marquat*, 2 Kernan, 336.

If the defendant has answered, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. In case no answer has been put in, the relief granted can not exceed that demanded in the complaint. In the former case the demand of relief in the complaint becomes immaterial. The case made by the complaint, and the limits of the issue alone determine the extent of the power of the court. The expressions of the statute include the statement of the right of the plaintiff, and its infringement by the defendant. *Marquat v. Marquat*, 2 Kern., 241. That the prayer of the complainant is too broad, or embraces too much, is not among the causes for which a defendant may demur. *Address v. Shaffer*, 12 How., 441.

The complaint should state, in the conclusion, the relief sought, and the amount claimed. It need not be the true sum, but there can be no recovery beyond that laid. The conclusion may, at any time, be amended by leave of the court. *Billingsley v. Dean*, 11 Ind. R., 331.

A complaint stating facts which show that the maker of the note was entitled to its possession, and alleging that the defendant wrongfully converted and disposed of it to his own use, is sufficient after verdict. *Decker v. Matthews*, 2 Kern., 313.

Defects in pleading are cured by verdict, in the same manner and to the same extent as before the code. *Decker v. Matthews*, 2 Kern., 821; 1 Saund., 228, *a. n.*; *Brown v. Harmon*, 21 Barb., 505; *Clark v. Dales*, 20 Barb., 42. This, too, is a rule not in opposition to the code, and therefore not necessarily excluded by it; and as it is a dictate of reason and justice, it is still acted upon by the courts, within the principle already stated as to the applicability of former rules, in pleading under the code. W. L. M.

#### *The Demurrer.*

#### **Demurrer.**

SEC. 2876. The defendant may demur to the petition only where it appears on its face, either,

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, plaintiffs, or defendants, or,
5. That the petition does not state facts sufficient to constitute a cause of action, or that it states some fact which avoids the cause of action, or,

6. For causes stated in sections 2918, 2920, 2961, 2963, of this chapter.

A party can only demur where the ground of demurrer appears on the face of the complaint. In so demurring, the party must state the ground of demurrer on which he relies, and can only obtain judgment for the cause stated in the demurrer. Whenever the matter of objection does not appear on the face of the complaint, then it may be set up in the answer. *Wilson v. Mayor of New York*, 15 How., 500. Where an answer is merely defensive—that is, where it asks no affirmative relief, a demurrer to it will not lie. *Mead v. Florence*, 9 How., 396.

A party now, whatever his taste might lead him to adopt, can be only indulged in such pleadings as the code prescribes; whatever is not expressly authorized by its provisions is no longer a pleading. A demurrer in any other than the cases prescribed by the code would be a nullity. *Simpson v. Loft*, 8 Pr. R., 235.

A party can demur only in the cases prescribed by the code. He can not except for insufficiency or impertinence. The doctrine of exceptions belonged to the practice of the court of chancery, and has been swept away. *Willard, J., Royce v. Brown*, 3 Pr. R., 395.

We must forget all old rules respecting demurrers, and regard a demurrer now as a pleading created, with its character and office defined by the code. *Gridley, J., Manchester v. Stones*, 3 Pr. R., 410.

If the prayer of the complaint is too broad, or embraces too much, it is not among the causes for which a defendant may demur. Nor is surplusage in the complaint a ground of demurrer. *Andrews v. Shaffer*, 12 How., 441. A demurrer can only be adopted in the particular cases prescribed by the Code of Procedure. However defective the complaint may be, or however far short it may come of complying with any or all of the general rules of pleading laid down in the chapter "upon pleadings," the defendant can not demur unless the objection falls within one or more of the six grounds enumerated in the section of the act. *De Witt v. Swift*, 3 How., 280. Mere irrelevancy in an answer is not a ground of demurrer. *Watson v. Husson*, 1 Duer, 242. Under the code, a demurrer will in no case lie for duplicity; and the only mode for a party to avail himself of such objection is by motion to strike out or compel the party to elect. *Gooding v. McAllister*, 9 How., 123; and see *Welles v. Webster*, 9 How., 251; and *Robinson v. Judd*, 9 How., 378.

It is objected that after taking issue upon the principal fact in the complaint, it is too late to allege matter in abatement. This is clearly an error. If the matter in abatement constitute a defense, it must be stated in the answer. There can not be two answers, and the answer may set forth as many grounds of defense as the defendant shall have. A defect of parties, apparent in the complaint, is ground for demurrer. If not so apparent, it may be set up in the answer. *Bridge v. Payson*, 5 Sand., 210.

A demurrer does not admit the items of an account set forth in a petition, so as to do away with the necessity of proof. If judgment be given on demurrer to such a petition, and the defendant refuse to answer, an inquiry of damages becomes necessary. *Darrah & Pomeroy v. Steamboat Lightfoot*, 15 Mo. Rep., 187.

Where the cause of action alleged in the complaint is a contract made in a foreign state, and such contract is void by the laws of the state in which it is made, and it does not appear on the face of the complaint what is the law of the foreign state, the proper mode of taking advantage of the law, of such foreign state, is by answer, stating what is the law of such foreign state. A demurrer can not be sustained. *Humphrey v. Chamberlain*, 1 Code Rep., N. S., 387.

Where, in an action by a corporation or a natural person, the want of legal capacity to sue exists, or is supposed to exist, but that fact does not appear on the face of the complaint, the objection must be taken by answer. It can not be raised by demurrer. *Union Mutual Ins. Co. v. Osgood*, 1 Duer, 707.

That the plaintiff has not legal capacity to sue is cause of demurrer, if the fact appears on the face of the petition, and in such a case, a failure to demur

amounts to a waiver of the objection. Not so where it is alleged in the answer, and proved on the trial. *Petty v. Malier*, 14 B. M., 248.

If the plaintiff's petition does not show a promise, *in writing*, made by one or the undertaking of another, no judgment can be rendered for failing to perform such promise, 3 Mar., 445; 8 B. M., 423, though the defendant should fail to plead and rely upon the statute. *Smith v. Fah*, 15 B. M. 446.

It is not good ground of demurrer, that an amended petition in a suit by ordinary petition, departs from the cause of action set out in the original petition. *Hord v. Chandler*, 13 B. M., 403.

A demurrer is not the appropriate mode of raising the question, whether the proceedings should have been at law or in equity. It is only applicable to the question of jurisdiction, when the question is whether the court has jurisdiction either at law or in equity. *Trustees of Lebanon v. Forrest, etc.*, 15 B. M., 172.

Where B., after setting up new matter in answer to an action by A., brought a cross-action against A., founded on the same matter as his answer, and A. moved in the first action that B. should elect either to abandon his answer or his cross-action; held, that the motion should have been in the cross-action, for a reference to inquire, whether the cross-action was for the same cause as the new matter set up in the answer; and if so, then for an order dismissing the cross-suit. *Farmers' Loan and Trust Co. v. Hunt*, 1 Code Rep., N. S., 1.

If a party in his petition in equity fail to show that he is entitled to the special relief asked for, and shows a right to any relief, even in a court of law, a demurrer to the petition should not be sustained to the whole claim, but the case transferred to the common docket. *Foster v. Watson, etc.*, 16 B. M., 387.

An *objection* to a complaint for the non-joinder of parties, can not be taken by *special demurrer*, unless the complaint shows that the party for whose non-joinder the demurrer was interposed was living when the suit commenced. It is not enough that the complaint is silent on the subject, the fact must appear *affirmatively*. Where the fact does not appear on the face of the complaint the objection should be taken by *answer*, analogous to a former plea in abatement. *Branard v. Jones*, 11 How., 569.

The defense of non-joinder of a party jointly liable, must be taken advantage of by answer or demurrer, or it is waived. If the objection is by answer, the non-joinder must be alleged. The objection can not be taken advantage of under a denial of the allegations of the complaint. *Mayhugh v. Robinson*, 10 Pr. R., 162.

The rule that the complaint must show a *joint* cause of action against all the defendants, is only applicable at *law*, and never did apply in equity. Where a good cause of action in an equity suit is stated in the complaint, against one of several defendants, though not as against the others, a *joint demurrer*, against all of the defendants is improper. If the defendants who are unnecessarily made parties, alone demur, the demurrer may be sustained; but the defendant against whom a good cause of action is alleged can not for that reason demur. *Eldridge v. Bell*, 12 How., 517; and see *Phillips v. Haggadon*, 12 How., 17; and *Brownson v. Gifford*, 8 How., 389.

A defect of parties should be relied on in the defendant's answer, otherwise it is to be regarded as waived. *Smith v. Fah*, 15 B. M., 446.

If a pleading is correct in substance, but not in form, the remedy is by motion, not by demurrer. *Howell v. Fraser*, 6 How., 221. When the charge in a complaint in an action of slander is general, and the answer alleges that the charge is true, the defect should be cured, not by demurrer, but by motion, to make the answer more definite and certain. *Van Wyck v. Guthrie*, 4 Duer, 268.

When a demurrer is to the whole complaint, if one of the plaintiffs might have judgment separately, it is bad. *Peabody v. Washington Co. Mutual Ins. Co.*, 20 Barb., 339.

A demurrer to an answer to an ordinary petition, under the code of practice, involves the sufficiency of the petition; if that be bad, it is unnecessary to decide on the sufficiency of the answer. *Martin v. McDonald*, 14 B. M., 547.

On demurrer to any pleading subsequent to the complaint, either party

may attack any previous pleading for a defect in substance, and such as could be reached by general demurrer. *Stoddard v. Onondaga Annual Conference*, 12 Barb., 575.

Upon a demurrer to an answer, the sufficiency of the complaint may be considered and adjudged upon. *Fry v. Bennett*, 1 Code Rep., N. S., 238.

Where the petition does not state facts sufficient to constitute a cause of action, the objection is not waived by failure to demur or answer in the court below, and is available here. Stiles, J., *Fible v. Caplinger*, 13 B. M., 466. *Goddard v. Maddock*, M.s. opin., December, 1854. *Stanton's Ky. Code*.

The language here used must be taken to mean, that a defense of another action pending, when available may be set up by demurrer, when it shall appear on the face of the complaint, and by answer, when it does not. Per Edmonds, J., in *Burrows v. Muller*, 4 Pr. R., 51-2.

When there are in fact two actions pending between the same parties for the same cause, but that fact does not appear on the face of the complaint, the defendant can not demur. He must put in an answer of the same action pending. *Hornfager v. Hornfager*, 1 Code Rep., N. S. 412.

When a party is suing in two courts for the same cause of action, he may be compelled to elect in which court he will proceed. *Hammond v. Baker*, 1 Code Rep., N. S., 105.

The pendency of a prior suit in the courts of the United States, or the courts of a sister state, never was a defense to an action in this state, and the code has not changed the rule in this respect. *Cook v. Litchfield*, 5 Sands, 330.

The pendency of a suit in another state, for the recovery and collection of the same debt, could not affect the right of the plaintiff to prosecute an action for the debt in this state. Simpson, J., *McMicken v. Hammond*, Mss. opin., January, 1857. *Stanton's Ky. Code*.

The improper joinder of parties is not a ground of demurrer, even if it appeared on the face of the complaint that such improper joinder existed. It is only for defect or want of parties that a demurrer lies. *Gregory v. Oaksmith*, 12 How., 134. A demurrer will not lie for misjoinder of parties. *Peabody v. Wash. Co. Mutual Ins. Co.*, 20 Barb., 339.

A defect of parties, plaintiffs or defendants, is a valid ground of demurrer, but the objection that the petition shows a misjoinder of parties, either plaintiffs or defendants, can only be taken advantage of by a motion to strike out the name of the party thus improperly joined. *Dean, etc. v. English*, 18 B. M., 136.

In actions sounding in tort, where it appears by the complaint that all the proper parties are not made, a demurrer will lie for the *non-joinder* of the proper parties defendant, but not for the *misjoinder* of some, who have been made defendants with others who are properly sued. If a party is properly sued, he may insist that another ought to be sued with him. But he has no right to object that another, who is sued with him, is improperly made a defendant. *Brownson v. Gifford*, 8 How., 389.

Defect of parties appearing may be taken advantage of by demurrer. If it does not appear, it may be taken by suggestion in the answer; if such objection is not insisted upon by demurrer or answer, it will be regarded as waived; and the court may, if the rights of those not made parties can be safe, determine the controversy between those before it. If there are indispensable parties, the court should require them to be brought in. *Johnson's heirs v. Chandler's heirs*, 15 B. M., 589.

A defendant who is properly joined as a party defendant can not demur to the complaint because others are improperly or unnecessarily made defendants. *Pinekney v. Wallace*, 1 Abbott, 82; *Voorhies v. Baxter*, ib., 44.

If husband and wife are improperly joined as plaintiffs, the objection must be taken by demurrer or answer; an answer on the merits will be considered as a waiver of the objection. *Ingraham v. Baldwin*, 12 Barb., 9; and see *Baggott v. Boulges*, 2 Duer, 160.

It is entirely optional with the defendant whether he will demur or not, for the reason that the complaint does not state facts sufficient to constitute a cause of action; and his election not to avail himself of that right does not

preclude him from taking advantage of the error at any other stage of the case. *Gould v. Glass*, 19 Barb., 185.

The failure to demur does not waive the right of the defendant to object on the trial for the first time, that the complaint does not state facts sufficient to constitute a cause of action. *Higgins v. Freeman*, 2 Duer, 650; *Montgomery County Bank v. Albany City Bank*, 3 Selden, 464.

Where a defect of jurisdiction of the subject matter is shown by the petition, it is not waived by an omission to demur; but the objection may be made at any time. 3 Seld., 464.

Where the petition in ordinary proceedings sets forth no cause of action, and the defect is not cured by answer, advantage may be taken of the error by motion in arrest of judgment, or by writ of error. *Fible v. Caplinger*, 13 B. M., 446.

Specify grounds.

SEC. 2877. The demurrer must distinctly specify and consecutively number as the grounds of objection, some matter of error, intended to be argued as a defect in the pleading; unless it do so it shall be disregarded; and it shall not be enough to state the objection in the terms of the preceding section, except that a demurrer to an equitable petition for the fifth reason of section 2876 may be stated in the terms thereof.\*

When answer.

SEC. 2878. When any of the matters enumerated in section 2876 do not appear on the face of the petition, the objection may be taken by an answer. If no such objection is taken either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection that the petition does not state facts sufficient to constitute a cause of action, or states a fact which avoids the cause of action.

This provision forbids the taking of the objection by answer, if the defect appears upon the face of the petition, so that it might be taken by demurrer. *Dennison v. Dennison*, 9 How. Pr. R., 246.

Matter in abatement constituting a *defense*, should be pleaded or set up in the *answer*, unless it is apparent on the face of the complaint; then a *demurrer*, is the proper remedy. *Mayhew v. Robinson*, 10 How., 162. "A dilatory defense, which a plea in abatement is considered to be, is not favored; but he who is entitled to avail himself of it must interpose it promptly, according to established forms. Here the facts were fully disclosed by the complaint, and the defendant could have demurred. The authority to object by way of answer is, in terms, limited to cases where the fact does not appear in the prior pleading. When, therefore, section 148 declares that if the objection is not taken by demurrer or answer, it shall be considered as waived, it means that if it be not taken by demurrer where that mode is proper, or by answer, in cases where that is the appropriate method, it is waived. This construction will give full effect to all the language, and will, besides, compel the defendant to take his ground with the promptness inculcated by the rule of pleading to which I have referred. Per Denio, J., *Zabriskie v. Smith*, 3 Kern., 336.

Not demur and answer same matter.

SEC. 2879. The defendant may demur to one or more of the several causes of action alleged in the petition and answer, as to the residue.

An answer and demurrer to the same cause of action is irregular in practice, and the defendant might have been compelled to elect by which he would stand. *Howard v. Michigan Southern Railroad Co.*, 3 Code Rep., 115; 5 Pr. Rep., 206.

\* This is not the general demurrer, because it must assign a reason other than the general one of want of sufficient facts. It is not the special one as understood after the time of Elizabeth, because that was aimed at form. It is a demurrer peculiar to the new system, having the elements of both, as formerly known. The motion in this system serves the function of the special demurrer of the old system, so far as objections are yet allowed to be made to defects not substantial. *Report on Civil Code*.



Where a defendant demurs and answers to the same cause of action, or to the whole of a complaint, the plaintiff can not treat the demurrer as a nullity, nor move for judgment; but he should move to strike out the answer and demurrer, or that the defendant elect by which he will abide. *Spellman v. Weider*, 5 Pr., 5.

*Answer.\**

SEC. 2880. The answer shall contain :

1. The style of the court, the name of the county, and the name of the plaintiffs and defendants, but when there are several plaintiffs and defendants, it shall be only necessary to give the first name of each class, with the words—and others.
2. A general denial of each allegation of the petition, or else of any knowledge or information thereof sufficient to form a belief, which latter may be by this or any equivalent statement,—of the truth of no allegation of the petition has this defendant knowledge or information sufficient to form a belief; or,
3. A specific denial of each allegation of the petition controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.
4. A statement of any new matter constituting a defense, in ordinary and concise language, without repetition.
5. A statement of any new matter constituting a set-off, or a counter-

\* Upon the answer more than upon any other pleading stands the reform system. In no part of the pleadings had sense been so much outraged, and the principles of pleading so much violated. The object of pleading was to let each party know what facts the other relied on. Formerly the plaintiff stated his facts and the defendant traversed, that is denied them; the *traverse* then had the meaning our *denial* has now. The plaintiff then knew that he had to prove his facts to recover, and knew that the defendant, under such defense, could prove nothing but that his *facts* were not true. While this usage lasted, each knew what the other meant to rely on, but soon the defendant began to get the privilege of pleading what was called a general issue. This was never a denial, as the *traverse* had been, of any *fact*. It was rather a denial of some legal conclusion from some fact in the petition, or of the legal conclusion drawn from all the facts thereof, namely, the liability, or the guilt of the defendant. That is to say, it was a denial of the legal conclusion which the whole facts of the plaintiff went to establish. If the plaintiff in the *early times* of pleading plead well, there was in his declaration no legal conclusion, save when he asserted as a result of the facts stated, that the defendant was liable to him in so much, or guilty—and this general issue was mainly a denial of this legal conclusion. It denied no fact so as to advise the plaintiff what *fact* he would need to prove. It plead no *fact* so as to apprise the plaintiff what *fact* the defendant meant to rely upon. This absence of liability or of guilt might be based on any one of twenty diverse facts, and any one of these might be shown under this issue, so that the plaintiff could not tell which he must prepare to meet and refute, and must be surprised and defeated, or else must prepare for every possible one. Thus pleading lost its sceptre of common sense and sound logic.

It is not true, that under any general issue, every fact of defense could be proved, but the spirit of its departure from reason is truly hereby characterised.

Under the old rules of pleading, the language needed, oftentimes, to be technical, and was not meant to be understood by a jury, any more than when it was French or Latin, and the jury needed generally to be told by the court what the pleadings meant. The object is, to use now, ordinary language which juries can understand, and to construe the same by the ordinary, and not the technical meaning.

An allegation under the old system that A. promised B. to the court and lawyers meant, that A. made a promise to B., and that there was a good consideration therefor, and that there was a total absence of all circumstances in the transaction which would defeat a legal capacity to make it, as that A. was not an infant, and was not insane, &c.—while the same words only meant to the ordinary mind that an actual promise was made. Such an allegation now would have only one sense, the ordinary one, and lawyers, and court, and jurors, would all understand it alike and equally well. *Report on Civil Code, page 302.*

claim, or a cross-demand, or a cross-petition, in ordinary and concise language, without repetition.

6. The defendant may set forth in his answer as many causes of defense, set-off, counter-claim, or cross-demand, whether legal or equitable, as he may have.

A defendant is required, in all cases, to plead any new matter, constituting either an *entire* or *partial* defense, and can not give such matter as evidence in mitigation of damages, when not set up in the answer. The complaint alleged that the plaintiff did labor and service for and at the request of the defendant, which was worth \$650, and concluded with an averment that there was due to the plaintiff on account of such service, over and above all payments and set-offs, \$134, and a demand of judgment for that sum, with interest. The answer consisted only of a general denial of all the allegations of the complaint; *held*, that evidence of payment as a defense to the action, or of partial payment in mitigation, was inadmissible on the trial, because neither was pleaded. *McKyring v. Bull*, 16 N. Y. R., 297.

It can hardly be that the legislature intended that when a party could not make a full defense to an action, and could not therefore with truth allege facts constituting a full defense, or fully deny the case made by the plaintiff, that he should be denied the privilege of alleging in his answer, and establishing by proof a partial defense, or alleging and proving mitigating circumstances. If this was not intended, then the statute should be construed as giving authority to spread facts as constituting a partial defense, or tending to reduce the claim of the plaintiff, upon the record, by way of answer, as a ground of defense, or as a defense; otherwise, a return must be had to the former practice, which permitted partial defenses to be given in evidence without plea or notice, for the legislature never intended so to alter the law, that a party who could not make a full defense should not be heard to make any; but, in the language of another, "should be bound hand and foot, and handed over to a jury." Per W. F. Allen, J., *Bush v. Prosser*, 1 Kern., 352.

The word "*defense*" in the code, is not there used in its legal, technical sense. It has no application to that part of the answer which contains *denial only* of the facts stated in the complaint; but it is used in reference to the statement of *new matter*; and it must be such new matter as constitutes a *defense*. Now the question arises, whether this new matter must constitute a complete *bar* to the action, in order to make a good defense? In other words, in an action on a money demand, can the defendant plead *partial payment*? there being now no general issue where part payment or set-off can be shown when the answer contains simply a *denial* of the complaint. *Held*, that there is no way by which a defendant can now avail himself of the defense of *partial payment*, without pleading it. And it *seems* that the defendant should not plead *full payment* in bar, in order to avail himself of partial payment as a defense; but state the facts constituting the new matter. *Houghton v. Townsend*, 8 How., 441.

And where in an action on an account the action merely denied the allegations in the complaint; *held*, that the defendant could not insist upon an award made upon the account as a bar to the suit, although the fact of the award appeared from the plaintiff's evidence. *Brazill v. Isham*, 2 Kern., 9.

But in an action for the conversion of property, an answer which denies each and every allegation in the complaint, is a denial not only of the conversion, but of the plaintiff's title; and under it, evidence that the plaintiff had no title to the property is admissible. *Robinson v. Frost*, 14 Barb., 536.

Payment is new matter and must be thus answered. *Hubber v. Pullen*, 9 Ind. R., 273. See *ibid.*, 288.

The payment need not be shown to have been made in money; but any thing that the party has accepted as payment, constitutes payment. Ind. Dig., 622.

As now, in complaints, the relief prayed may be in the alternative in cases where, under the former chancery practice, such prayer of relief was proper; so in answers setting up new matter, relief may be thus prayed where it might have been in answers in chancery. See Adam's Eq. Top., p. 689; Howard's (N. Y.) Code, p. 243; *Helm v. Swiggert*, 12 Ind. R. *Perkins' Practice*.

A pleading which sets up usury, either as a ground of defense, or substantive cause of action, must set it up in clear and distinct terms, and the terms of the usurious contract, and the *quantum* of usurious interest or premium must be specified, and distinctly and correctly set out; and where in an action on a promissory note, the answer alleged that "said note was usurious in its inception," and the payee knew it was executed fraudulently, and to sell usuriously above the rate of seven per cent. per annum, to wit, one and a half per cent. per month: Held, that this was not a sufficient allegation of usury to allow evidence to be given of it. *Gould v. Horner*, 12 Barb., 601.

In an action for a tort, (except libel or slander,) the defendant can not set up matter in mitigation of damages; but if they exist, he may give evidence of them on trial, or assessment of damages. *Rosenthal v. Brush*, 1 Code Rep. N. S., 228; *Schneider v. Schultz*, 4 Sand., 664.

An answer which alleged "that the plaintiff who prosecutes the action is not the real party in interest therein, nor is he an executor, or administrator, or a trustee of an express trust, or a person expressly authorized by statute to sue without joining with him the person for whose benefit the suit is prosecuted," held, bad, on demurrer, for the reason that it did not state the facts on which the defendant relied to sustain his allegation, that the plaintiff had no right to sue. *Russell v. Clapp*, 3 Code Rep., 64; 4 Pr. R., 347.

To authorize a defense on the trial, that the plaintiff is not the real party in interest, the answer must not only allege the facts which show that to be the case, but should negative the exceptions; thus, where, in an action on a promissory note, payee against maker, the answer set up that "the plaintiff is not the sole owner and holder of the note, but holds the same jointly with another," and "therefore the said plaintiff is not individually entitled to recover against the defendant," the answer was held to be insufficient. It should have gone further, and negatived that the plaintiff was a trustee of an express trust, as to the other joint owners' interest, or otherwise entitled to sue without joining the same joint owner. *Tompkins v. Acer*, 10 Pr. R., 309.

New matter, in avoidance, should confess, directly or by implication, that, but for the matter in avoidance, the action could be maintained. An answer of new matter in avoidance can not, therefore, be pleaded hypothetically. Thus, in an action for slander, the defendant can not, as one defense, deny that he uttered the defamatory words, and then suggest, hypothetically, that if he did, he uttered them in reference to a certain contract. *Porter v. McCreaty*, 1 Code Rep., N. S., 88; *Sayles v. Wooden*, *ibid.*, 409; 6 Pr. R., 84; *Buddington v. Davis*, *ibid.*, 401; *Lewis v. Kendall*, *ibid.*, 59.

The action was for rent. The answer denied the hiring and occupation, and set up a surrender of the premises to the plaintiff, and other defenses. On the cross-examination of one of the plaintiff's witnesses, it was sought to show that the witness and not the plaintiff was the owner of the premises, and entitled to the rent, if any were due. The appellate court held such proof not admissible under the pleadings, and that the defendant should have raised the point in his answer, that the plaintiff was not the real party in interest, if he intended to rely upon it. *Jackson v. Whedon*, 1 Smith, 142.

A defense should not be stricken out, because it contains matter which may be proved under a general denial. It was never a good ground of general demurrer, that a plea amounted to the general issue. The objection might be taken, but, being regarded as a mere matter of form, it was only available when taken by special demurrer. The code has retained no such ground of demurrer. The question in every such case now is, whether the matters stated constitute a defense, and not whether they might have been proven under some other form of pleading. *Hollenbeck v. Clow*, 9 Pr. R., 292.

The code has given no sanction to the revival, in any form, of a general issue, under which facts in their nature constituting a defense, although not avowed in the answer, may be given in evidence upon the trial; and facts tending to prove that a promissory note, or any other contract was void in its origin, on the ground of usury, fraud, duress, etc., are in their nature as certainly matters of defense, as facts subsequently arising; and there exists, consequently, the same necessity for averring them specifically in the answer. The system of pleading which the code has introduced, rests upon very sound

and obvious principles. The answer must distinctly aver all those facts, which, when the case of the plaintiff is admitted or proved, the defendant must prove in order to defeat a recovery. *Cattig v. Smith*, 1 Duer, 266.

In *Baker v. Bailey*, 16 Barb., 57, it is said general issues are abolished, and the pleader must set forth the very facts on which he places his defense. Formerly, under the general issue of *non est factum*, the defendant might prove control, lunacy, illegality of consideration, deed obtained by fraud, erasure, and many other defenses. Now he must set forth the facts, which constitute his defense, in each of the above cases. See *Houghton v. Townsend*, 8 Pr. R., 443; *Garvey v. Fowler*, 4 Sand., 665.

An answer to a complaint for a balance due for goods sold and delivered, which denies that the plaintiff "ever sold to the defendant any goods which had not been paid for by the defendant;" and also, that "if the plaintiff ever sold any goods to the defendant, they were sold on credit, and not to be paid for in nine years from the day of sale," is bad. In the first there is nothing that amounts to either a denial of the sale and delivery, or an allegation of payment. It is a mere attempt at hypothetical pleading. In the second, the answer is in terms, hypothetical—no allegation is denied—no new matter is alleged—of course no issue is tendered. *Hamilton v. Hough*, 13 How., 14.

To a complaint, which charged a defendant with digging a ditch across the sidewalk, and carelessly permitting the same to remain open and uncovered; and, in consequence, the plaintiff's wife fell into said ditch—the answer beside a general denial, and as a separate defense, alleged that if such a ditch was dug, it was done without his knowledge, and that said ditch, if any, was well guarded, and if plaintiff's wife fell in, it was her own fault. On motion, the court struck out such allegation as being hypothetical. *Wise v. Fanning*, 9 Pr. R., 543.

In an action to foreclose a mortgage, brought by the assignee of the mortgage, the defendant put in an answer, denying that the mortgagee, for a valuable consideration, paid by the plaintiff, duly assigned, transferred and delivered the mortgage to the plaintiff and alleged that the same, if ever sold by the mortgagee, was, in fact, sold to B., one of the defendants, and that if any assignment was ever executed by the mortgagee to the plaintiff, the same was only so in form, and that B. furnished the money to purchase the same, and that he was the true party in interest, and that the suit should have been brought in his name; held that the answer was defective, because it set up matter in avoidance without admitting, that, but for the matter in avoidance, the action could be sustained, because it was hypothetical; because it set up matter in avoidance, and, at the same time, denied the allegation it sought to avoid, and because it attempted to show argumentatively, that the mortgage had been paid, without asserting the fact. *Arthur v. Brooks*, 14 Barb., 543.

An answer is defective that states a legal conclusion, and fails to set out the facts on which such conclusion is based. *Simpson, J., Grey v. Williams*, adm'rs., Mss. opin., Feb., 1857. *Stanton's Ky. Code*.

An answer which without denying any fact stated in the complaint, merely says that "the defendant denies that the plaintiff is entitled to the sum of money demanded in this action, or any part thereof," will be struck out on motion. *Drake v. Cockroft*, 10 How., 377; and see *Bridge v. Payson*, 5 Sand., 210.

General averment that defendant does not owe the money sued for, or any part thereof, is not sufficient. He must answer the petition by stating the facts upon which he relies. *Sapington v. Jeffries*, 15 Mo. Rep., 628. Vide *Doan v. Moss*, 20 Mo. Rep., 297.

A denial of indebtedness is not a sufficient answer to a petition which sufficiently charges that the indebtedness arose out of breaches of a specific contract. The breaches must be denied. *Enqler v. Bate*, 19 Mo. Rep., 543.

An allegation in a petition, not material to the plaintiff's right of action, is not admitted by a failure to deny it in the answer. Thus the value of an article for which a plaintiff seeks to recover, is not admitted if not denied. *Wood v. Steamboat Fleetwood*, 19 Mo. Rep., 529.

Where a defendant in ejectment relies on his legal title, he can not at the trial avail himself of a merely equitable defense. *Kennedy v. Daniels*, 20 Mo. Rep., 104.

An answer is bad that merely alleges that the note sought to be recovered was obtained by fraud, and omitting to state any facts showing the existence of such fraud. *McMurray v. Gifford*, 5 Pr. R., 14.

In an action on a promissory note, an answer that the defendant is not indebted in any manner and form, as in the complaint alleged, is not a sufficient answer. *Pierson v. Cooley*, 1 Code Rep., 91.

The rule laid down as to general denials being insufficient on demurrer, in 16 B. M., 335, and in *Francis v. Francis*, 18 B. M., 60, applies to the reply to a counter-claim or set-off. Stiles, J., *Mercantile Ins. Co. v. Phillips*, Mss. opin., Sep., 1857. *Stanton's Ky. Code*.

The general allegation in the answer that the defendant is not indebted as alleged in the petition, is not deemed responsive to the material allegations of the petition, and presents no obstacle to a recovery. *Haggard v. Hays' adm'rs*, 13 B. M., 175; *Welch v. Owens*, Mss. opin., June, 1856. *Stanton's Ky. Code*.

The petition was for goods and merchandise, sold and delivered by the plaintiff to the defendant. The answer denied, "that he is to the best of his knowledge and belief indebted to the plaintiff as stated in his petition." The answer controverts neither the sale nor the delivery, nor the value of the goods, but simply denies that he is indebted, as stated in the petition. Every item in the account might be correct, except a single one, of inconsiderable value, and yet the answer in its present form be literally true. Such generality and vagueness of pleading is opposed to the provisions of the civil code regulating the subject. The demurrer to the answer was properly sustained. *Francis v. Francis*, 18 B. M., 60.

The answer to a petition to recover damages for a loss by the goods being cast overboard by the carrier, to be good, must show all the facts necessary to a justification of the jettison. The averment that the loss occurred by the danger of the river, being a mere conclusion of the law from the facts, is not sufficient. *Bentley, v. Bustard*, 16 B. M., 686.

The general statement that the defendants do not owe, and ought not to pay, the amount of the bill, "for they do not admit the regular protest and notice," etc., as charged in the petition, is no proper response to the petition, because it neither denies any allegation of fact, nor states any new matter constituting a defense. *Clark, etc. v. Finnell, etc.*, 16 B. M., 335.

Where a defendant wishes to rest his denial upon his ignorance, he must aver that he has neither knowledge nor information sufficient to form a relief. An averment of the want of knowledge, without more, is not sufficient. *Ketchem v. Zeraga*, 1 Smith, 554.

An answer which denies, on oath, that the defendant has any knowledge or information, sufficient to form a belief, that the payee indorsed and delivered the note to the plaintiff, intended to meet a corresponding allegation in the complaint is a material part of the issue, and comes within one of the alternatives allowed by this section. *Sherman v. Bushnell*, 7 Pr. R., 171.

In an action on two promissory notes, the complaint alleged the making the notes, and that they were duly transferred to the plaintiff, and that he was the holder and owner thereof. The answer admitted the making the notes, and "that as to the transfer of the notes to the plaintiff, and as to his being the holder and owner, the defendant had no knowledge or information sufficient to form a belief." Held to be a good answer. *Snyder v. White*, 6 Pr. R., 321.

An answer which alleges that the plaintiff "is not the lawful owner and holder of the note" described in the complaint, is insufficient to admit evidence that the plaintiff is not the owner or holder. So, an answer, which avers that the note sued on, "was by a mistake given for a greater sum than was due from the maker to the payee, to wit, a sum sufficient to cancel the balance claimed to be due on the said note," is insufficient to admit evidence to show a mistake in the amount, the defendant alleging nothing but a conclusion of law, without setting out the facts by which it is supported. *Sealey v. Engell*, 17 Barb., 530.

Facts proved but not pleaded, are not available to the party proving them. *Field v. The Mayor, &c.*, 2 Seld., 179.

The code does not dispense with cross-pleadings between co-defendants

where relief is sought by one against another beyond the matter set out in the original petition. And where one co-defendant, in his answer, claims of another an amount greater than is alleged in the original petition to be due from the latter, he should be apprised, by process or rule on the answer, of such demand. *Stiles J., Hunt v. Tomlinson*, Mss. opin., Jan. 1856. *Stanton's Ky. Code*.

Where an answer is filed to an ordinary petition, containing a valid equitable defense, no judgment for the plaintiff can be rendered, until some disposition has been made of the answer; and the issues that may arise upon it, which are exclusively equitable in their character, are to be tried in the manner such issues were tried before the adoption of the code. *Bosley v. Mattingly*, 14 B. M., 91.

The code of practice permits, but does not require, an equitable defense to be made to an action to recover a legal demand. The defendant permitting a judgment to pass upon a legal demand, may thereafter have relief from the judgment, by proceeding, by petition in equity. *Dorsey v. Reese*, 14 B. M., 157.

Form of statement.

SEC. 2881. Matter of defense as distinguished from set-off, counter-claim, or cross-demand, is either negative, as for example, that which contradicts, in whole or in part, some fact-proposition of the petition, or it is affirmative; as for example, that which states new matter either to avoid some fact-proposition of the petition, or to avoid the legal conclusion of the petition, and all such negative matter, whether wholly or partly so, should be stated in one division of the answer.

Same.

SEC. 2882. Each affirmative matter of defense shall be stated in a distinct division of the answer, and must be sufficient in itself and must intelligibly refer to that part of the petition to which it is intended to apply.

No prayer.

SEC. 2883. In the defense part of an answer or reply, it shall not be necessary to make any prayer of judgment.

Distinctness.

SEC. 2884. Each matter of set-off, counter-claim or cross-demand, or cross-petition, must be specially stated in a distinct division.

Equitable matter.

SEC. 2885. An equitable division must be also separated into paragraphs and numbered as is required in regard to an equitable cause of action in the petition.

Set-off.

SEC. 2886. A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising on contract, or ascertained by the decision of a court.

Co-maker or surety.

SEC. 2887. A co-maker or surety when sued alone, may, with the consent of his co-maker or principal, avail himself by way of set-off, of a debt or liquidated demand due from the plaintiff at the commencement of the suit to such co-maker or principal, but the plaintiff may meet such set-off in the same way as if made by the co-maker or principal himself.

New party.

SEC. 2888. Where it appears that a new party is necessary to a final decision upon a set-off, the court shall permit the new party to be made, if it also appears that owing to the insolvency or non-residence of the plaintiff, or other cause, the defendant will be in danger of losing his claim unless permitted to use it as a set-off.

Counter-claim.

SEC. 2889. The counter-claim must be a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contracts or transactions set forth in the petition, as the foundation of the plaintiff's claim, or connected with the subject of the action.\*

\* This counter claim is that of the new system. There are objections to it. A better might be suggested, but we fear to try the experiment, especially as this has

In an action by a landlord, to recover the rent reserved by the lease, the tenant, the defendant, can not set up, as a counter-claim, a mere trespass by the landlord, and destruction of personal property on the demised premises. Such a trespass is not a cause of action arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, nor connected with the subject of the action. *Drake v. Cockroft*, 10 Pr. R., 377; 1 Abbott, 203.

In an action by the lessor for the rent reserved, the lessee may *recoup* damages sustained by the breach of an implied covenant for quiet enjoyment. *Mayor, &c. v. Mabie*, 3 Kern, 151; and see *Davidson v. Remington*, 12 How., 310; *Van de Sande v. Hall*, 13 How., 458.

In an action to recover for the price of personal property sold, an answer by the defendant setting up a breach of warranty, in respect to the quality of that property, and claiming to *recoup* to that extent, is a *counter-claim*, and if not *replied to*, will be considered as admitted on the trial. *Lemon v. Trull*, 13 How., 248.

In an action upon a note for the price of a horse, the defendant can plead the damages for a breach of the warranty of soundness, as a counter-claim, and, if the proof warrants it, can have judgment for the excess. Simpson, J., *French v. Saile*, Mss. opin., January, 1855. *Stanton's Ky. Code*.

A defendant may set up by way of counter-claim, a claim for damages resulting from the unsoundness of a negro, sold to him as sound, in an action for the purchase money. Crenshaw, C. J., *Morehead v. Hulsell*, Mss. opin., January, 1857. *Stanton's Ky. Code*.

Where the defendant alleges matter, which, if true shows that the plaintiff never had a cause of action against him to the amount claimed in the complaint, such as the payment of a large portion of the promissory notes while in the hands of the payee; such matter does *not* constitute a *counter-claim*, and requires no reply. The defendant must prove his payments, therefore, where no reply is put in. *Davidson v. Remington*, 12 How., 310; and see *Vassear v. Livingston*, 3 Kern, 252; *Silliman v. Eddy*, 8 How., 122; *Putnam v. De Forest*, 8 How., 146; *Simpson v. Loft*, 8 How., 234; *Potter v. Smith*, 9 How., 203; *Briggs v. Briggs*, 20 Barb., 177; *Gleason v. Moen*, 2 Duer., 639; *Houghton v. Townsend*, 8 How., 441; *Williss v. Taggard*, 6 How., 433; *Dening v. Kemp*, 4 Sand., 147; *Kneedler v. Sternberg*, 10 How., 67.

Damages arising from a breach of contract may be set up by way of counter-claim. *Page v. Ford*, 12 Ind. R.

The cases in the supreme court of this state are—*Miles v. Elkin et al.*, 10 Ind. R., 329, and *Slayback v. Jones*, 9 *ibid.*, 470, where the previous cases are cited. *Stockton v. Graves*, 10 Ind. R., 294.

In the latter case it is said: "It would seem that where a party was sued touching the subject-matter of a contract, he might set up by way of counter-claim in such suit, any demand he might have for unliquidated damages growing out of such contract; while if not sued on that contract, but some other, then he might set up, by way of set-off, his claim for damages growing out of the former contract, in the suit upon the second. In other words, the same matter may be set up as a counter-claim, in a suit upon the contract, or as a set-off in a suit upon another contract." *Perkin's Practice*.

A judgment may be obtained by a defendant against a plaintiff on a counter claim. *Jones v. Julian*, 12 Ind. R.; *Gordon v. George*, *ibid.* See also 7 O. S. R., p. 95, recoupment.

A party sued upon a contract, has a right to rely upon any failure of the

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become so well settled by decisions. The word has been railed at by opponents of the new system—but it has now got a well defined meaning. New words are necessary to create new rights of pleading. The danger of old ones is the freight of old associations, which one can not avoid introducing by their use, any one of which may at any time rise up and defeat the new use, though ever so carefully guarded. And yet it is not true as some have said, that this word was before quite unknown to common law, we find it used in 1717 in Brown's Cases in Parliament, p. 587. *Report on Civil Code*.

plaintiff to comply with the same contract by way of counter-claim. *Simpson, J., Dale v. Masters*, Mss. opin., June, 1857. *Stanton's Ky. Code*.

The interposition and proof of the counter-claim, secures to the defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill, would have secured to him, on an allegation and proof of the same facts, and this provision of the code relates to only such causes of action as exist against the plaintiff and might, in their nature, be the basis of an action against him at the suit of the defendant. *Gleason v. Moen*, 2 Duer, 642.

The code authorizes the assertion of a counter-claim by one of several defendants. The only restriction as to such counter-claim, is, that it shall be a cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim. It is not necessary that it be founded on contract, or arise out of the contract set out in the petition; it is sufficient, if it arise out of the transaction set out in the petition, or is connected with the subject of the action. *Tinsley v. Tinsley*, etc., 15 B. M., 460.

The value of a growing crop of corn taken by the plaintiff, is a good counter-claim in a suit upon an injunction bond, given by defendant in a proceeding to enjoin a judgment recovered on a writ of forcible detainer against him. *Ibid.*, 460-1.

In an action against several defendants who are jointly and severally liable, either of them may set off promissory notes, executed by the plaintiff, or avail himself thereof by counter-claim. *Briggs v. Briggs*, 20 Barb., 477.

When the defendants answer certain facts, constituting a valid counter-claim and prayer for relief, it must be regarded as a counter-claim, though not so denominated. The cognomen is not necessary. *Stiles, J., Brannaman v. Palmer*, Mss. opin., January, 1856. *Stanton's Ky. Code*.

New party in counter-claim.

SEC. 2890. When it appears that a new party is necessary to a final decision upon a counter-claim, the court may either permit the new party to be made, by a notice to reply to the counter-claim in the answer, or may direct that it be stricken out of the answer, and made the subject of a separate action.

Cross demand.

SEC. 2891. A statement by way of cross-demand is any new matter constituting any cause of action in favor of the defendant, or all the defendants if more than one, against the plaintiff, or all the plaintiffs, if more than one, and which the defendant or defendants might have brought when suit was commenced, or which was then held, either matured or not, if matured when so plead.\*

Cross petition.

SEC. 2892. When a defendant has a cause of action, affecting the subject matter of the action, against a co-defendant, or a person not a party to the action, he may make in his answer a cross-petition against the co-defendant or other person.

The defendants thereto, may be notified as in other cases, and defense thereto shall be made in the time and manner prescribed in regard to the original petition, and with the same right of obtaining provisional remedies applicable to the case.

The prosecution of the cross-petition shall not delay the trial of the

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\* The set off and counter claim do not constitute the whole of the claims which a defendant may have against a plaintiff. Nor do they fill as large a field as the cross action of our code, of 1851, section 1740. They constitute a necessary class of cross-claims and stand upon a basis so peculiar as to demand the application to them of some separate rules as is here done. The rules allowing of the making of new parties, as in sections 2888, and 2890, should not be extended to a cross demand. This cross demand should only be allowed between the original parties, and between them it should be allowed. The code of 1851, section 1740, contemplated as wide a field as is covered by our set off, counter-claim and cross-demand. The change is only in the classification for the purpose of extending some special rules to each class. The allowance of this cross demand is based on the idea of settling all the differences between the parties in one controversy. *Report on Civil Code*.



original action, when a judgment can be rendered therein that will not prejudice the rights of the parties to the cross-petition.

SEC. 2893. The guardian of an infant or person of unsound mind, or attorney for a person in prison, must deny in the answer all the material allegations of the petition, prejudicial to such defendant. Guardian to deny.

SEC. 2894. When the facts stated in the answer, or any division thereof are not sufficient to constitute a defense, set-off, counter-claim, or cross-demand, the adverse party may demur, and shall be held therein to the same certainty in the statement of his grounds therefor, as obtains in a demurrer to the petition. Demurrer and answer.

A demurrer does not lie to an answer, which sets up no new matter, but merely denies the allegations of the complaint. *Smith v. Green*, 2 Sand., 702; *Ketchum v. Zerega*, 1 Smith, 557; *Thomas v. Harrop*, 7 Pr. Rep., 57; *People v. Banker*, 8 *ibid.*, 261.

*Reply.*

SEC. 2895. There shall be no reply except upon the allegations of a counter-claim, or set-off, or cross-demand, in the answer. No reply except

SEC. 2896. When the answer contains new matter constituting a set-off, counter-claim or cross-demand, the plaintiff may reply to such new matter. 1. Denying generally or specifically, each allegation controverted by him, or any knowledge or information thereof, sufficient to form a belief as in case of answer, or—2. He may allege in concise and ordinary language, any new matter not inconsistent with the petition, constituting a defense to the set-off, counter-claim or cross-demand. To new matter of set-off, &c.

Where the complaint avers in an action on contract, the sale and delivery of a bill of goods on a certain day, whereby the defendant is now indebted, &c., and the answer avers that they were purchased on a credit of six months, and that the credit has not expired, it is not new matter in the answer requiring a reply, but a *special denial*, that the defendant is indebted as alleged in the complaint. 12 How., 455.

SEC. 2897. Any number of defenses, negative or affirmative, are pleadable to a set-off, counter-claim or cross-demand. Number of defenses.

SEC. 2898. All the negative matter of the reply, whether wholly or partly so, shall be stated in one division—and each affirmative matter of defense in the reply, shall be sufficient in it-elf, and must intelligibly refer to the part of the answer to which it is intended to apply. A division of equitable matter must also be separated into paragraphs and numbered as required in case of such matter in the answer. Form of statement.

SEC. 2899. When the facts stated in the reply do not amount to a sufficient defense, the defendant may demur, subject to the same requirements of certainty in statements of grounds thereof, as obtain in demurrer to the petition. Demurrer to reply.

A departure from the complaint in a reply to the answer, is not a cause of demurrer under the code. *White v. Jay*, 3 Kern., 83.

If the parties go to trial upon a reply which is a departure, without objection, they may be bound by the result of such trial. *Prenatt v. Runyon*, 12 Ind. R.

*General Principles of Pleading.*

SEC. 2900. The opposite party shall be deemed to join in a demurrer, whenever he shall not amend the pleading to which it is addressed. Deemed to join in demurrer.

SEC. 2901. In all cases in which a denial is made by answer or reply, concerning a time, sum, quantity, or place alleged, the party denying shall declare whether such denial is applicable to every time, sum, Must qualify denial.

quantity, or place, or not, and if not, what time, sum, quantity or place, he admits.

Numbering.

SEC. 2902. The counts of the petition must be consecutively numbered as such, and so must the divisions of the answer as such, and of the reply as such.

Matter separated.

SEC. 2903. If the matter of the petition, answer or reply, is not put into distinct counts or divisions and numbered as herein contemplated, or if one such division contains in the petition more than one cause of action, or if one division in the answer contains more than one affirmative defense, or set off, or counter-claim, or cross-demand, or if one division in the reply contains more than one affirmative defense to any set-off, counter-claim, or cross-demand, the party so neglecting to divide and number, may, on motion, be ordered to divide and number, and the party so pleading double in the contemplation of this section, may be on motion, ordered to elect on which part of such double count or division he will stand, and to strike out the rest of it—or to re-divide such count or division, made bad by such duplicity.

The distinction between demands or rights of action which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Where there are several items of account for goods sold or work performed at different times, there must be either an express contract or the circumstances must be such as to raise an implied contract embracing all the items, to make them a single or entire demand. *Secor v. Sturgis*, 16 N. Y. R., 548.

Verification.

SEC. 2904. Every pleading must be subscribed by the party, or his attorney, and when any pleading in a case shall be verified by affidavit, all subsequent pleadings except demurrers shall be verified also, and in all cases of verification of a pleading the affidavit shall be to the effect that the affiant believes the statements thereof to be true.\*

\* This does not mean as our Code now does, that such pleadings shall be used as testimony on the trial—but is only to secure a truthful statement of action or defense. The system of verification, exists under two forms—one is that if one pleading is verified, the other must be—the other is that all must be. The former is the law of California, Wisconsin, Minnesota—was recommended in the Code of the district of Columbia and is the law of New York. The commissioners of that state recommended and persisted in recommending the full verification of all pleadings. This same system is recommended in both the late reports of the commission of Minnesota.

The verification of *all* pleadings is the law of Ohio, of Oregon, of Missouri and of Kentucky, except that in Kentucky pleadings in *some* cases need not be verified—which we also provide.

The commission recommended full verification, that is that all pleadings be verified, but concurred with the judiciary committees in their recommendation of half verification as that is called here used, in the hope that its use would soon lead to the adoption of the full verification. For the reasons given for verification and the letters commending its value; where used, see report on Civil Code, p 237; we cite a very little therefrom, as to the objection of *novelty*. The report says, p. 251:

In the infancy of pleading the thing sought to be secured by verification (namely, truthfulness of statement) was secured by other means.

When that ceased to be longer true, then the pleadings were not in such shape as to allow of verification, nor did they become of a shape to allow verification until the new system introduced the requirement that *facts* should be stated.

The establishment of these propositions removes the objection, that this thing of verification, never having been before used, is a startling and dangerous innovation.

Verification is needed to secure the very objects of all pleadings. These, are such a statement of the real points of dispute, as that each party may come prepared to contest them—as that the court may know them—and as that the record may show them, and thus establish the law. Originally the plaintiff, before he could bring into court a defendant had to obtain an original writ, which stated generally to the defend-

SEC. 2905. Where a corporation is a party, the affidavit may be made by any officer thereof.

SEC. 2906. When there are several parties united in interest, the affidavit may be made by any one of them.

SEC. 2907. If the pleading be founded on a written instrument, the payment of money only, and such instrument be in the possession of the agent or attorney, the affidavit may be made by such agent or attorney.

ant, the cause of action, and the applicant could not obtain from the chancellor, such writ, until he had *sworn* to the facts constituting the cause of action.

"When the claim was matter of account, it was, at once, compulsorily referred to auditors, assigned by the court, whose jurisdiction was summary, whose investigations were conducted by examination of the parties, on *oath*, and whose adjudications had all the effect of the judgment of the court, and if the claim, although not matter of mere account, was one of simple debt, which must involve privity of contract, and must rest on credit, and depend, in most instances, on the personal communications of the parties, there was a proceeding called *wager of law*, in which both the parties were examined summarily on *oath*, and to which if the defendant resorted, while he could by *oath* purge himself of the claim, that did not suffice, unless twelve other men of good character, attested upon *oath* to his credibility: and on the other hand, by resorting to this course, he precluded himself from putting his opponent to the proof of his claim by pleading a denial of it; so that practically it came to this, that the parties themselves were examined upon *oath*, without delay, before a jury of twelve persons, the party sued relieving the plaintiff from the onus of *proving* the debt, and himself undertaking to *disprove* it, to their satisfaction." Fin., p. 23.

"As the defendant could take no formal objection, so neither could he safely plead any untruthful plea; for as denial was easier than proof, and it might often be difficult to prove what both parties knew to be true, pleading by way of denial, was rigidly restricted and construed. Hence, if the claim were true, in *any part*, defendant must have admitted it as to so much, and denied or framed some other answer to the rest." Fin., p. 6.

Until the middle of the fourteenth century, the pleadings were oral, and until the thirteenth year of Edward I, (1285,) parties had to appear and conduct their statements and counter-statements in person, and were not allowed to appear by attorney. During the period of pleading in *person*, there would be personal honor to restrain false statement, and before the introduction of attorneys, there would be a comparative inability to state fictitious defenses. The plaintiff's truthfulness was further guaranteed in early times, by the fact that on delivering his declaration, he had to produce a sufficient number of witnesses to give credibility to his demand; this was called his *secta* or *suit*; and these persons were originally examined by the court. Indeed the origin of these pledges shows that its tendency would be the same sought by the verification, now. The finding of pledges was an institution of the Great Alfred, who classed the whole people into *decennaries* consisting of ten families each—no one of each could sue, unless he could find two or more of the same *decennary*, as pledges to satisfy the court that he had a real cause of complaint, and was not of a litigious and quarrelsome temper. From Alfred's time, 870, till long after the reign of Edward I, 1307, it was never once discontinued, or abolished. If the plaintiff failed in his suit, the judgment always was that the pledges be amerced, and the amercement being delivered to the coroner, he afterwards, with a jury assessed the penalty according to the nature and proportion of the  *vexation*, and the *ability* of the party. These were pecuniary penalties, not confined to mere costs, but in proportion to the nature of the demand against him, and his apparent ability to pay it, which was also to be made out of the pledges "if the plaintiff did not prevail in his suit." Finlason says: "As mere security against unprincipled claims and defenses, the plaintiff sued under peril of being amerced, if he made a false claim, and the defendant prepared to plead under peril of being fined, or even imprisoned, if he pleaded falsely; p. 5. "If a man denied his deed falsely, he was fined and imprisoned." 33 Hen. VI., 54. Fines and amerancements, both might be ordered by the court—the former assessed by the court, and the latter by a jury—there were fines "on failing in a suit;" "on parties making false claims," "for vexation under color of law." Others again, as an imposition set by the court on the suitors, with a view to enforce plainness and perspicuity in pleadings." 1 Sel., 41. "These pledges gradually grew into disuse, and for very weighty reasons, and the legislature substituted therefor "costs." 1 Sel., 51.

Under the ancient system of pleading, issues were limited in number—a party who denied a proposition of the plaintiff's petition could not demur to it—he had his

Any one knowing the facts.

SEC. 2908. If the statements of the pleading are known to any person other than the party, such person may make the affidavit.

How he knows.

SEC. 2909. When the affidavit is made by an other than the party, it must also contain averments showing the affiant competent to make the affidavit according to the foregoing provisions.

Case of guardian, etc.

SEC. 2910. The verification shall not be required to the answer of a guardian, of an infant, or person of unsound mind, or a prisoner.

Not required.

SEC. 2911. The verification shall not be required when the admis-

choice, to do one or the other—but no right to do both—and if he denied one proposition of fact, he could not deny any other—nor could he avoid the effect of admitting such proposition by more than one statement of sufficient matter. Now whatever was the object of this restriction, its obvious effect would be to make each party state his best defense, which would be his most *truthful* one, and it would thus secure what we desire to obtain by verification.

This restraint of costs, would do well enough, as long as only one question was involved in the issue—and when the statute of Ann, in 1706, introduced a possibility of many defenses, it would not yet cease to be of value, so long as the jury declared upon such issues distinctly, but when a jury may find a general verdict, including many issues, and each of them including law and fact, costs cease to be a sufficient restraint upon pleading falsehoods.

Besides, more early, this double pleading was under restraint, and not as now, in the mere choice of the party. It did not apply to replications, as it now does, so that there could be but one replication to each plea. It did not obtain in *all* actions. The court had a discretionary power to allow or refuse it, and was formerly very strict in granting such leave, and expected first to be satisfied of the necessity of pleading the several matters moved to be plead. And only of late did courts relax the strictness limiting the pleader to consistent pleas, and now, perhaps, even that restriction is quite removed, so that a defendant may plead unlimitedly.

Besides, there were two grand systems of pleas, and this liberty did not extend to but one of them, namely: pleas in bar as distinguished from those in abatement—those could not be plead at the same time—nor could those of one class in abatement, be plead with those of another class—so that there were yet some restraints on the number of pleas pleadable. But now, any plea of abateable matter may be plead with any other, and with any plea of matter in bar, so that the possibility of defenses has been opened up in a manner quite unknown heretofore, and more than ever before needs the restraining requirement of truthfulness, which must be sought by verification.

Again, under the common law, the court could try only the action of the *plaintiff*, because its jurisdiction was confined by the original writ, and the defendant could not become an actor. Since, however, the original writ has fallen into disuse, and courts have a jurisdiction fixed by law, independent of such writ. Defendants have had rights which have gradually been growing, sometimes by the equitable interposition of the court, as in the action of *assumpsit*, sometimes by statute, till now a defendant may also become a plaintiff, with all the rights of one. Whence further results the possibility of many true issues, and also of a specious statement of false ones—a statement which may mislead the other party, and secure delay, or the necessity of a preparation involving great expense, to avoid a danger which is none the less mischievous because it is ultimately found to be unreal. Indeed, to open to a party the power to plead as many defenses as he likes, and to leave the right quite unguarded, is the most dangerous of all changes.

Again, after the pleading had departed from its primitive simplicity, and general issues and common counts were introduced, and other such legal conclusions, verification was impracticable. Such pleadings did not state facts, and so could not be consistently sworn to. To ask a man to swear to conclusions of law, would be too absurd. Besides, those pleadings also were stuffed with lies—lies, too, which must be stated in them, else they were bad. How could a man swear to an averment of promises, which he knew were never made—to force and arms never used—to a losing and a finding which were a pure invention?

The objections to swearing to general pleadings, then, were, 1. That they did not state the facts of the case—but only facts enough to bring the case within the formal action chosen, which itself aided the facts. 2. They stated many legal conclusions instead of, and substituted for facts. 3. They stated, and had to state facts, which were utterly untrue, as facts.

Indeed, only by the introduction of the principle now underlying the new system of stating the facts constituting the cause of action, was the possibility opened up of a requirement of verification of pleadings.

sion of the truth of the allegations of the petition or answer might subject the party to a criminal or penal prosecution, and when it can be seen from the pleading to be answered, than an admission of the truth of its allegations might so subject the party, his general affidavit that such might be the effect of the admission, without stating the facts leading him to such a conclusion, shall be received, in lieu of a verification of the pleading.

SEC. 2912. Verification shall not be required to a pleading grounded on an injury to the person or the character. Slander, etc.

SEC. 2913. The affidavit of verification may be made before any person, either within or without this state, duly qualified to administer an oath, and must be signed by the person making the same, and the officer before whom the same is taken, shall certify that it was signed in his presence, by the person (naming him) and by him, before such officer sworn to or affirmed. That purporting to be the certificate of such officer, as signed officially, if made within this state, shall be *prima facie* evidence that it is such certificate, and that its averments are true, and if made without this state shall be so taken, when made before any one, by our law qualified to take depositions, but if taken before any officer not so qualified, his official certificate must be authenticated as is required by section 4058 of this code. Affidavit of verification.

SEC. 2914. The verification of the pleading does not apply to the amount claimed, except in actions founded on contract, express or implied, for the payment of money only. Not to amount claimed.

SEC. 2915. The verification shall not make other or greater proof necessary on the side of the adverse party. Not evidence.

The rule which requires two witnesses, or one witness with strong corroborating circumstances, to overcome the denial in an answer in chancery, seems to have been changed by the provision that the verification of the pleadings shall not make other or greater proof necessary on the side of the adverse party. One witness is sufficient to prove the execution of the note against the plea of *non est factum*, and authorize a recovery. *Albro v. Lawson*, 17 B. M., 644.

SEC. 2916. If a pleading be not duly verified, it may be struck out, on motion, but such defect will be deemed waived if the other party respond thereto, or proceed to trial without such motion. If not verified what.

SEC. 2917. Every material allegation of the petition not controverted by the answer, and every material allegation in the answer of new matter, constituting a set-off, counter-claim or cross-demand, not controverted by the reply, must for the purposes of the action, be taken as true. But the allegations of new matter in the answer, not relating to a set-off, counter-claim or cross-demand, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance as the case may require. An allegation of value, or of amount of damage, shall not be deemed true by a failure to controvert it, and an averment that, of the truth of any stated allegation or allegations the party has not sufficient knowledge or information to form a belief, shall be deemed a sufficient denial to prevent the same from being taken as true. A party desiring to admit any allegations of fact, which by this section would otherwise be deemed controverted by mere force of law, may at any time file a written admission thereof. Allegations not denied are admitted.

Facts which the pleadings admit, can not be contradicted or varied by evidence. Evidence is only intended to establish contested facts. *Parkhurst v. Magraw*, Miss. R., 134; *Hackett v. Richards*, 11 Leg. Obs., 315; and a judgment contrary to the admission in the pleadings, showing that there ought to

be no such judgment, would be certainly erroneous. *Bridge v. Payson*, 5 Sand., 217.

We have frequently decided, and, until a different construction of the code shall be enforced upon us by a higher authority, must continue to decide, that only those allegations in a complaint are to be deemed material in the sense of the code, which the plaintiff *must prove upon the trial, in order to maintain his action*. It is upon these only that an issue can properly be taken; and it is of these only that the truth is admitted by the omission, in the answer, of a specific denial. Per Duer, J., in *Fry v. Bennett*, 1 Code Rep., N. S., 245; 5 Sand., 54; *Newman v. Otto*, 4 Sand., 668; *Harlow v. Hamilton*, 6 Pr. R., 475.

A material fact that is clearly implied from what is stated, though the fact itself is not set forth in terms, is deemed to be a fact stated, and may be traversed or denied, or avoided, in the same manner as if distinctly set forth; and if not denied, it will be taken as admitted, when occurring in any pleading except a reply. *Prindle v. Caruthers*, 15 N. Y. Rep., 429; *Haught v. Holley*, 3 Wendell, 263; 11 East., 406.

It is the duty of the court to tell the jury what questions of fact are to be tried, and what facts are admitted by the pleadings. *Butcher v. Death & Teasdale*, 15 Mo. Rep., 271; *Steil v. Ackli*, 15 Mo. Rep., 289. If a material averment, permitted to be inserted in a petition at the trial by way of amendment, is unanswered, it is to be taken as admitted. *Robards v. Munson*, 20 Mo. Rep., 65.

The allegations of the complaint, not specifically denied, are, it is true, to be regarded as admitted. But, where there are several answers, an admission made in one, is not available against the others. Each answer must stand by itself, as a distinct defense, and the plaintiff must recover upon the whole record. One issue found for him, if a material one, is as complete a defense for him, as if all the issues were found in his favor. *Swift v. Kinglsey*, 24 Barb., 543.

But where the substantial allegations in a complaint are not *directly denied*, and no issue is taken upon them in the answer, but the defendant states other facts *inconsistent* with those set forth by the plaintiff, this will not be construed as a denial of the complaint, so as to prevent the allegations of the complaint from being taken as true. *Wood v. Whiting*, 21 Barb., 190.

Where, in an action brought by two or more persons, for an unlawful taking of property, the defendant answers that the plaintiffs are not joint owners of the property, that averment is *material*, and is *new matter* requiring a reply. *Walrad v. Bennett*, 6 Barb., 144.

The plaintiffs having alleged in their petition that they were the heirs of J. U. W., and having sued in that character, and the fact of their being his heirs not having been denied in the answer, the allegation had to be taken as true, and it was unnecessary to prove it. It was the duty of the defendants to deny each allegation of the petition they intended to controvert, or any knowledge or information thereof sufficient to form a belief. *Morton, etc. v. Waring's heirs*, 18 B. M., 82. [See section 2953.]

No evidence can be admitted to disprove allegations not denied. 10 Ind., 400.

It is not necessary that a special verdict should contain facts admitted by the pleadings. Such facts, together with the facts found by the jury, constitute a proper case for appeal. *Barto v. Hinrod*, 4 Seld., 483.

A judgment contrary to an admission in the pleadings would be erroneous; so, the objection, if made on the trial, should be allowed. *Bridge v. Payson*, 5 Sand., 210.

The code does not authorize the court to take as true allegations of value, or amount of damages laid in the plaintiff's petition, in ordinary cases, though not denied in the answer, and though there be no answer to the petition. *Daniel v. Judy*, 14 B. M., 394.

Allegations of value are not to be taken as true, but an allegation of value followed by another, that the article *was sold for that price to the defendant*, may be taken as true. *Stiles, J., Pate v. Pate, etc.*, Mss. opin., February, 1858. *Stanton's Ky. Code*.

If I am under obligation, by contract, to deliver a horse, of the value of two hundred dollars, and allege, by any pleading, that I have delivered a

horse of that value, the whole, including the allegation of value, would be taken as true, unless it was controverted by pleading on the other side. The proposition can be applied only where the value stated is not of the gist or essence of the pleading, as in the case supposed, it would be. W. L. M.

SEC. 2918. If the action, set-off, counter-claim, or cross-demand, is founded on an account, a bill of particulars must be incorporated into, or attached to, and filed with the pleading, or such pleading will be demurrable, and if not incorporated into it—must be verified as the pleading. And if the same be not a statement of such particulars as may be necessary to give the court and the other party, reasonable knowledge of the nature and the grounds of the cause of action, set-off, counter-claim or cross-demand, the court may, on motion, order it to be made more specific. Such bill of particulars shall be deemed a part of the pleadings to which it is annexed, and shall be answered or replied to as such, and as such shall define and limit the proof, subject, however, to amendment as hereafter provided. The items of a bill of particulars shall be consecutively numbered, and the party adverse shall answer specifically every item; but he may make one and the same allegation or denial concerning any number of items to which such allegation or denial is applicable, specifying the number of the items thus answered together, when less than the whole.

A motion may obtain a more specific statement.

SEC. 2919. If the adverse party shall deny that any item is due or payable, or that he owes the party as alleged, he must state all the substantive grounds on which he rests such denial, and shall specify whether some, and what part of the whole, of such item or demand is denied.\*

State ground of denial, &c.

SEC. 2920. If the action, set-off, counter-claim or cross-demand is founded on a note, bill, bond, or other writing, as evidence of indebtedness, the original or a copy thereof must be set out in or annexed to the pleading, if in the power of the party to procure it. If not so done, the reason thereof must be stated in the pleading. If there be no such copy so set out or annexed, and no sufficient reason stated for such omission, it will be sufficient ground for a demurrer to such pleading.

Annex copy.

If it appears on the face of a paragraph of the answer that it is founded upon a written instrument, and neither the instrument nor a copy of it is filed, the paragraph will be subject to a demurrer. *Price v. The Grand Rapids, etc., Co.*, 12 Ind. R.

SEC. 2921. 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.

Legal conclusion pleading allowed as to a judgment.

SEC. 2922. In pleading the performance of conditions precedent in a contract, whether such conditions are expressed or implied, it shall not be necessary to state the facts constituting such performance, but a general statement that the party duly performed all the conditions on his part, or to that substantial effect, shall be sufficient.

Same as to conditions precedent.

When the terms of subscription are prescribed by a charter, it is not necessary to state the terms in the petition, and a general averment that all the terms and conditions necessary to authorize a demand of payment of sub-

\* This section and the preceding one as to numbering items is the law of Mass., of 1852.

scription have been performed, is sufficient under the code. *Henderson & Nashville R. R. Company v. Leavell*, 16 B. M., 361.

Where the note in suit was payable at the Albany city bank, and the complaint did not allege presentment at that place, but only that it was *duly* presented, held, that presentment at the Albany city bank being a condition precedent, presentment there, was, under the code, properly alleged by the word *duly*. *Gay v. Paine*, 5 How., 108.

And under an averment of performance, evidence in excuse of non-performance is not admissible. *Oakley v. Morton*, 1 Kern, 25; and see *Garvey v. Fowler*, 4 Sand., 665.

Same as to any legal capacity not merely individual.

SEC. 2923. A plaintiff suing as a corporation, partnership, executor, guardian, or in any other way, implying corporate, partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver generally, or as a legal conclusion, such capacity or relation; and where a defendant is held in such capacity or relation, a plaintiff may aver such capacity or relation, in the same general way.

Some legal conclusions taken as true if not controverted.

SEC. 2924. If the general allegation contemplated in the three preceding sections is made in a petition, and is not controverted in the answer, or made in the answer in relation to a set-off, counter-claim, or cross-demand, and not controverted in the reply, each allegation not so controverted shall, on the trial, be taken as true.\*

How to controvert such proposition.

SEC. 2925. If either of the allegations contemplated in sections 2921-2922-2923 is intended to be controverted, it shall not be sufficient to controvert it in terms of the allegation contradictory of the general proposition intended to be controverted, but it is necessary to state specifically the facts relied on as a denial of such proposition.

Private statute.

SEC. 2926. 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.

The plaintiff having resorted to the courts of this state to enforce contracts prohibited and made indictable by the law of this state, (against lotteries,) the subject-matters of which are declared to be public and common nuisances, should, by an averment of the place where made, and that, by the laws of that place such contracts were authorized, have shown that these contracts were not within the statute and vitiated by it, the laws of the state having no extra-territorial force. It is as if an exception had been engrafted upon the statute, which prohibiting all dealing in regard to lottery tickets, excluded from its operation all contracts made without the state: and the plaintiff, in seeking to enforce a contract within the general statute, must, in pleading, by proper averments, bring himself within the exception. Per W. F. Allen, J. *Thatcher v. Morris*, 1 Kern., 437.

Rules of court.

SEC. 2927. Every court of this state shall take judicial notice of the rules of any other court thereof.

Petition in slander.

SEC. 2928. In an action for slander or libel, it shall not be necessary to state in the petition any extrinsic fact for the purpose of showing the application to the plaintiff of any defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally that the

\* Section 2924 must not be supposed to be a mere repetition of the matter of 2917, for as these general averments may sometimes be *legal conclusions*, they constitute a departure, in so far, from the spirit of fact pleading, and the question might arise, indeed, has, in other states, arisen, whether they would be admitted by a non-denial of them, as well as the question whether as they were not propositions of fact, any evidence could be introduced under them. To meet such doubt this section is framed. *Report on Civil Code*.



same was spoken or published concerning the plaintiff, nor shall it be necessary to state any prefatory or extrinsic fact for the purpose of showing that such words were used in a defamatory sense, but it shall be sufficient generally to state that the words or matter were used in a defamatory sense, specifying such defamatory sense, and where the words or matter set forth, with or without the alleged meaning, show a cause of action, it shall be sufficient.\*

SEC. 2929. In actions of slander or libel, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances sufficient in law to reduce the amount of damages; or he may allege either one of these without the other, and the allegation of the truth of the matter charged shall not, if the defendant fail to establish it, be deemed, in itself, proof of the malice of such words, but the jury shall decide upon the whole case, whether such defense was, or was not, made with malicious intent, and whether he prove the justification or not, he may give in evidence the mitigating circumstances, but each defense must be separately stated and numbered, and if the defendant relies on more than one mitigating circumstance sufficient in law to reduce the amount of damages, each of such circumstances must be separately stated and numbered, and sufficient in itself, and if the defendant relies on the truth of the matter charged, nothing herein is intended to relax the law of pleading heretofore in force, as

Answer in slander.

\* We regard this section as of great value. The first part of it, removing the need of showing by an allegation of extrinsic facts, the application to the plaintiff, was made the law of New York, and copied into all the new systems, but it was soon construed, not to exempt the plaintiff from the need of showing by averment of extrinsic or prefatory facts, that the words were used in a defamatory sense. The 61st section of the English practice act, of 1852, introduces the section as in substance here recommended. This was meant to be the law of all states adopting the new system, and is also substantially that of Maryland, section 73—Alabama, section 2229—Tennessee, section 2897, so it may be said to constitute the present prevailing rule of practice.

We believe that this section, even without its express enactment, would follow logically from a fair construction of the principle that only *facts* should be stated, as contradistinguished from evidence.

That the *plaintiff was meant* is not a legal conclusion, it does not then fall under that objection. It is a statement of pure fact, and to show that he was meant by statements of *other* facts, is certainly pleading evidence. That defendant *meant* plaintiff is an ultimate fact, that is to say, it is the kind of fact which should be plead. It is distinguished from a proposition of evidence in this, that it is the outcome and last result of several propositions of evidence, which lead to it as a conclusion of fact to be proved. It springs up in the mind as a sequence of these evidentiary facts. It is just the kind of statement, then, that should be made in all good pleading.

That pleading is the best which contains facts in the last degree of remoteness from what is evidence, and though this last expression of facts is often difficult to attain, yet no one deems a pleading bad, merely because, while it does well state ultimate facts, it does not state the minor facts that go to prove these. But this is what the old declaration in slander demanded. It demanded that you plead the *facts showing* that the defendant meant the plaintiff. That is the testimony which showed it. In no other case had you to plead all the premises which led to the fact-conclusion. That the defendant meant the plaintiff is a fact-proposition of defendant's state of mind in using the words, and you might as well in an assault case wherein you rely on purpose and malice to augment damage, insist that all the facts which show that defendant had such purpose or malice, must be stated in the declaration. These prior facts are in both cases alike, mere evidence, and should not be stated, or certainly should not be required to be stated under the penalty of bad pleading. The same is true of the proposition, the defendant intended to charge a crime—or the defendant meant a particular *thing*. And what right has the defendant to ask the plaintiff, how do you know I meant you, or that thing? Any more than in a suit on a note, to ask, how do you know I executed that note? or made that contract? *Report on Civil Code*, p. 306.

regards the certainty of statement required in such a mode of defense.\*

In all actions of slander for words not in themselves actionable, the right to recover depends upon the question whether they caused special damage, and the special damage must be fully and accurately stated. If the special damage was a loss of customers or of a sale of property, the persons who ceased to be customers, or refused to purchase, must be named; and if they are not named, no cause of action is stated. (*Kendall v. Stone*, 1 Seld., 14.)

A defendant in an action of slander may, in his answer, allege both the truth of the matters charged, and mitigating circumstances, or either. They should be separately stated; and it is not necessary to plead the former in order to set up the latter. All matters properly receivable in evidence may be pleaded in mitigation of damages in an action of slander, either with or without a justification. *Bush v. Prosser*, 13 Barb., 221, and *Follett v. Jewett*, 1 Am. Law Reg., 600, sustaining this view of the subject. By section 165 of the code, in actions of slander the rules of pleading and evidence both are changed; so that the defendant may now, under an answer properly setting forth the matter in mitigation, give in evidence, to reduce the amount of damages, any or all facts and circumstances which have a legitimate tendency to disprove malice, or show that the truth of the charge was probable or properly inferable—and even the truth of the charge itself. *Heaton v. Wright*, 10 How., 79; *Herr v. Bambery*, 10 How., 128.

**Intervention.**

SEC. 2930. Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both. An intervention takes place when a third party is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding any thing adversely to both the plaintiff and defendant. A third person may intervene either before or after issue has been joined in the cause, and before the trial commences.

**No delay to an intervenor.**

SEC. 2931. The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay; and if the claim of the intervenor is not sustained, he shall pay all costs of the intervention.

**Rules which hold in intervention.**

SEC. 2932. The intervention shall be by petition filed in the court in which the action is pending, and it must set forth the facts constituting the grounds on which the intervention rests, and shall be taken notice of by the adverse party, as any other pleading, on being served by copy, and shall be responded to in the time which is allowed for other pleadings of the kind used in such response, and all the pleadings therein shall be governed by the same principles and rules as obtain in other pleadings provided for in this chapter. But if such petition is filed during term, the court shall direct the time in which an answer shall be filed thereto.

**Proceedings against a married woman.**

SEC. 2933. In a proceeding against a married woman, growing out of any contract which she may have the legal right to make, the plead-

\* This section is meant to restore the law as it was before the judge made law of the case of *Underwood v. Parks*, (Strange,) malice is the gist of the action, and every fact showing its intensity may be proved, and every fact showing its absence or minimum of intensity should also be allowed to be proved, and that without any penalty, if the attempt be actually without malice, though it should not succeed.

The provision of letting the jury determine from all the case, the presence or absence of malice in the plea of justification is from Massachusetts. *Report on Civil Code*, p. 308.

ing need not state facts constituting a cause against her with respect to her separate property, but need only state facts constituting a cause of action, or set-off, or counter-claim, or cross-demand, against her as a person, and judgment shall be personal. May be as against a man.

SEC. 2934. One cause of action, defense, set-off, counter-claim, cross-demand, or reply, shall be expressed in but one statement, and not in various counts or divisions. If such be done, the adverse party may move to strike out all but one of such counts or divisions, supporting his motion by an affidavit that the same are for only one cause of action, whereupon the other party shall either so strike out at the cost of the motion, or declining, must show on the trial as many distinct causes as he has counts or divisions, or shall pay all the costs of the whole trial.\* Only one statement of one cause.

The theory of the code in reference to pleading is, that the party pleading knows or should know, beforehand, what is the truth of his case, and that he should state the truth, and nothing but the truth, in his pleading. The statement of the case in different forms, for the purpose of guarding against a variance between the allegation and the proof, is no longer necessary. If there is any variance between the allegations and the proofs, in any of the details of the case, the party will upon the trial be allowed to amend, so as to adapt his pleading to his case as proved, upon such terms as may be just—provided no new cause of action is stated. (*Dunning v. Thomas*, 11 How., 281.)

SEC. 2935. Where a transaction has taken place between the plaintiff and defendant, constituting in favor of the plaintiff a cause of action against the defendant, and where another contemporaneous or subsequent transaction growing out of and based upon the former transaction, has also taken place between them, which may or may not have operated a merger or displacement of the former cause of action—then, if such plaintiff is not clear upon which of such transactions he is entitled to recover, he may state in his petition, in distinct counts, the facts constituting each of such causes of action, and may pray for the relief proper to each cause of action, and must also state that he claims to recover but for one of such causes; whereupon the defendant may allow judgment to go against him on either of such causes in bar of the other; or if the defendant contests both of such causes, the plaintiff may, on proper proof, recover on either, or having obtained verdict on both, may state on which one he will have judgment, which judgment shall be in bar of the other. May state two causes of action growing out of one transaction.

The same principles shall obtain in regard to a set-off, counter-claim, or cross-demand.†

SEC. 2936. Where a transaction has occurred, and if certain facts thereof should be proved, such proof would entitle the plaintiff to one kind or degree of relief, while if other facts thereof were proved, such May select alternate causes of action based on same right to recover.

\* There is no longer any reason for the allowance of many statements. It was done to avoid a variance which might defeat the cause, but now the same proof which could be made under many statements, may be under one, by an amendment, if need be. The facile power of amendment stands in the stead of the several counts. *Report on Civil Code*, p. 309.

† This section is needed for cases like the following: A. sells goods to B. and receives B's note therefor. But some doubt exists as to A's ability to recover on the note transaction; perhaps it has been altered by the consent of the maker, who is now dead, and the consent can not be proved, and he desires to unite with it his cause growing out of the original transaction. Now, it will be seen that verification don't stand in the way, for both transactions are equally true, though a recovery in one should defeat the right of recovery on the other. Nor is this a stating of one cause of action in two ways. For the cause of action is constituted by the statement of the facts put into the count, and these are dissimilar in each. *Report on Civil Code*, p. 309.

proof would entitle the plaintiff to another kind or degree of relief; then if the plaintiff can not determine which group of facts he can prove, but believes he can prove the one or the other of such groups, he may state as cause of action in distinct counts, each of such group of facts, with the relief which he demands thereon, and that he asks judgment only on one of such group of facts. Whereupon the parties shall have the same rights, and the same proceedings may be had as are provided for in section 2935, and the verification of the causes of action of this section shall be in effect that the plaintiff believes one or the other of them true, but can not determine which.\*

Contradictory defenses.

SEC. 2937. Contradictory causes of defense or reply may be stated in an answer or reply, and when the pleading is verified, it must be to the same effect as required in the last section.

Joined in answer.

SEC. 2938. Two or more parties making the same defense or reply, may do so jointly.

Different counts if defendants have different relations to plaintiff.

SEC. 2939. The pleading may include one count only when the same contract was made by each of the adverse parties, but must include different counts describing the different contracts of the adverse parties, when, as in the case of maker and indorser, the same contract was not made by all.

Plaintiff to set forth any exception he claims under.

SEC. 2940. Whenever a party claims a right derogatory from the general law, or when his claim is founded upon an exception of any kind, he shall set forth such claim or such exception particularly in his pleading.

Legal conclusions not to be stated; to be ordinary language.

SEC. 2941. Propositions which state matters of law, as contradistinguished from those which state matters of fact, must not be stated in a pleading, but if a proposition which has a meaning which would make it matter of law has also another and a common sense meaning, which would make it matter of fact, it shall be taken in the latter meaning and shall be deemed a proposition of fact.†

\* This section provides for a case dissimilar to that of section 2935, in this, that here is only one transaction. At common law, one transaction often gave a party a right to elect one of several formal actions, to each of which were attached remedies dissimilar either in kind or degree. In each of these actions a different group of facts in such transaction was relied on as a cause of such remedy, and to that end was either stated in the declaration, or was implied by the very form of the action chosen. The same right of election to rely on one group of the facts as a claim for damage exists under the new system, but whether it allowed one, having made such choice to afterwards state any other group, which would seem to ignore such choice has been doubted. The best and most experienced lawyers, under the new system, have most felt that this right should continue to be enjoyed, and when guarded by the required verification as herein, it can not be attended with danger. This is no license for stating *one cause* of action in many ways; but only for allowing a choice of one of many possible remedies, dissimilar in kind or degree, to be made out of the facts of a transaction. *Report on Civil Code*, p. 309.

† The first part of this section tends to the exclusion of statement of law. We know it is difficult to do so in every case. The latter part of it in view of that difficulty, provides for the construction of a statement which has two meanings—one of which is attached by the popular, and another by the legal mind. And in providing that such shall be held to be a fact-statement rather than a legal one, we in part remove the difficulty which would otherwise exist. We thus, also, by a more positive regulative principle, secure the leading idea of this system of fact-statement and ordinary language. Again, most of the trouble which has attended the new system, has grown out of a want of just this rule. A statement has been found in the petition which was capable of two constructions, one of which would make it a legal, the other a fact-conclusion. In strict keeping with the requirement that ordinary language should be the language of pleading, it should have been taken as ordinary language, and therefore to be fact-statement, and should have been replied to as such. But perhaps for want of a distinct averment of this rule, it has been denied as a legal conclusion. And then the trial has been conducted on the same hypothesis, and many of the uncertainties of the common count and general issue have been the result. *Report on Civil Code*, p. 310.

It seems to be safe and a compliance with the code, to state the facts constituting the cause of action substantially in the same manner as they were stated in the old system in a *special count*. By that system the legal issuable facts were to be stated, and the evidence by which those facts were to be established was to be brought forward upon the trial. This position will not embrace what were known as the common counts. Facts, from which the indebtedness appears, should be stated so that the defendant, by his answer, may put them in issue or avoid them. Under the present system, it is no longer necessary to state the conclusion of law from the facts previously stated. Under the old system, the facts constituting the cause of action were stated, and then in actions of *assumpsit* followed the conclusions of law, by means whereof the defendant became liable, &c.; and then followed the undertaking and promise, upon which issue was joined. The consideration, when necessary, should always appear in the statement of facts constituting the cause of action. It has been supposed that a wider latitude should be allowed in equity pleading, and that evidence may to some extent, be incorporated in the statement. The rule of the code is broad enough for all cases, and it permits a statement of facts only as contra-distinguished from the evidence which is to establish those facts. But in equity cases the facts may be more numerous, more complicated, more involved; and the pleader may state all the facts, in a legal and concise form, which constitute the cause of action and entitle him to relief. The rule touching the statement of facts constituting the cause of action is the same in all cases, and the rules by which the sufficiency of the pleadings are to be determined are prescribed by the code. Per Marvin, J., *People v. Ryder*, 2 Kern., 437.

The words, "facts constituting a cause of action" in the code, sec. 142, mean those facts which the evidence on the trial will prove, and not the evidence which will be required to prove the existence of those facts. *Wooden v. Strew*, 10 How., 48.

"The facts" which are required to be stated as "constituting the cause of action," can only mean real traversable facts, as distinguished from propositions or conclusions of law, since it is the former, not the latter, that can alone, with any propriety, be said to constitute the cause of action." Per Duer, J., *Mann v. Morewood*, 5 Sand., 564.

"The errors which too frequently occur in pleadings under the code, must be ascribed to a mistaken interpretation of the words, "facts constituting a cause of action," or "a defense;" nor is the source of the mistake difficult to be explained. In writing and in conversation, the term "fact" is frequently and not improperly applied to an abstract proposition—a proposition true in morals or in law, but of which the truth depends, not upon testimony, but upon authority or reasoning, and in this sense of the term, it is obvious that every just conclusion of law is a fact. That such a conclusion, however, although just in itself, is not a fact within the meaning of the code, is evident upon slight reflection, and as a single example will be sufficient to prove. There is no apparent impropriety in saying, "it is a fact that Peter owes John a certain sum of money," but who will assert that a complaint would be good that should aver that the defendant owes the plaintiff a certain sum for which the plaintiff demands judgment, without alleging a single fact from which the debt could arise? Yet, if the words of the code, "facts constituting a cause of action," refer to conclusions of law, and not to the facts, from which if admitted or proved, the conclusions are to be drawn, even such a complaint would be free from objection. All these errors in pleading will be avoided, if it is constantly remembered that the facts which the code requires to be set forth are not true propositions, but physical facts, capable as such of being established by evidence, oral or documentary, and from which, when so established, the right to maintain the action, on the validity of the defense, is a necessary conclusion of law—a conclusion which the court will draw, and which it is quite unnecessary that the pleader should state." Per Duer, J., *Lawrence v. Wright*, 2 Duer, 674.

Mere conclusions of law, or mere propositions of law, should not be stated, or, at most, should be but seldom and very briefly introduced; and are never necessary, sec. 129; and least of all, should they be relied upon as a substantive allegation in pleading. For this purpose they are totally worthless.

They are not *facts*; and above all, they are not issuable facts. No issue can be taken upon them—sec. 128. *Drake v. Cockroft*, 4 E. D. Smith, 34, *ante*, vol. 1, p. 141. *Ensign v. Sherman*, 13 How. Pr. R., 37. *Throop v. Hatch*, 3 Abb., 25. *Spier v. Stalter*, *ante*, vol. 1, p. 317. *The People v. McCumber*, N. Y. Court of Appeals, December Term, 1859, *ante*, vol. 1, p. 540.

Thus the answer that the defendant is not indebted, put into a demand, the grounds of which are set forth by the plaintiff, expresses only a conclusion of law. It does not put in issue any fact alleged by the plaintiff, nor set up any fact by way of avoidance, but only asserts, as a matter of law, that the facts stated do not constitute a cause of action; that is, do not show an indebtedness, and is more like a demurrer than an answer in bar. *Re Prime*, 1 Barb., 352. *Pierson v. Cooley*, 1 Code Rep., 91. *Morrow v. Cougar*, 3 Abb., 328. *Maurice v. N. Y. Dry Dock Co.*, 3 Edw., Ch. R., 146. *Dimon v. Dunn*, 15 N. Y. Rep., 498. *Western Law Monthly*, vol. 1, p. 451.

The allegation that he is the *owner*, is only a legal conclusion, some issuable fact by which it would appear that he is owner, should be stated. *Adams v. Holley*, 12 How., 326.

An averment that the settlement with his guardian had no reference to the claim in this suit, nor was the same in any way released, discharged or affected thereby, is an averment of a legal conclusion. *Jones v. The Phoenix Bank*, 4 Seld., 228.

A statement that by means of a contract, set out in the complaint, it became the duty of the defendant to perform certain acts, is a statement of a conclusion of law. *City of Buffalo v. Holloway*, 3 Seld., 493.

To say that Southwick has failed to fulfill his obligations, is no more than saying that he has broken his contract, or that the plaintiff is entitled to judgment. It is merely the inference from a state of facts not disclosed. *Van Schaick v. Winne*, 16 Barb., 95.

The new matter must be facts, and where the answer alleged that a note sought to be recovered upon, was obtained by fraud, but did not set out the facts and circumstances of such fraud, it was held insufficient on that ground. *McMurray v. Gifford*, 5 Pr. R., 14.

A mode of contestation conceding the facts of a pleading, but seeking to avoid their legal effect, is to be specially pleaded.

Same, obtains as to any one fact-proposition of the adverse plea.

What may be given in evidence.

SEC. 2942. Any defense showing that a contract, written or oral, or any instrument sued on, is void or voidable; or the fact that the alleged instrument was delivered to a third person, as an escrow, or showing matter of justification, excuse, discharge, or release, and any cause of defense which admits the facts of the adverse pleading, but by some other matter seeks to avoid their legal effect, must be specially pleaded.

SEC. 2943. Any defense that admits that an allegation of the other pleading is true, as an allegation of fact, but assumes that it is not true as an allegation of law, and seeks to avoid it by new matter, must be specially pleaded.

SEC. 2944. Under a mere denial of an allegation, no evidence shall be introduced by the party so denying, which does not tend to negative such an allegation of fact, or to negative some proposition of fact, as contradistinguished from one of law, which the party having made the controverted allegation, is bound to prove, in order to sustain such allegation.\*

\* This section constitutes the last of this cluster of sections, which are eliminations of the general one, that only fact statements shall be used in pleading. It may be thought that it should have been placed in the chapter on evidence. But it will do a better office to stand as a warning here. And it is really a guide to pleading; for it plainly tells the party who knows what facts he wants to prove, how to plead, in order to be admitted to prove them. For instance, if the defendant merely denied in the case supposed in the last section, that "A. promised B.,"—under such denial he could not prove that A. was an infant. He could only prove that A. did not as a matter of fact promise B. If he wanted to show that while he did promise as a matter of fact, yet as a matter of law such promise was not binding, then he must state the circumstance on which he intends to rely, as proof to establish that defense. Under the mere denial supposed, the defendant could prove that A. did not

But the true construction to be put upon the code, section 92, 85, is, that "new matter" shall comprehend every fact not appearing in the petition, which defeats the action and which the plaintiff is not required to prove to make out his case, whether such fact existed concurrently with, or arose subsequently to, the alleged cause of action.

Such new matter must be specifically stated. Under the general or special denial authorized by section 92, no evidence can be received except that which merely negates the material facts stated in the petition. Facts going to show the *illegality* or *original invalidity* of the plaintiff's claim, or showing it subsequently defeated, are all new matter to be specially pleaded; and can not be proved under a denial. This construction is necessary to carry out the *object* of the code; which, as declared by the code commissioners, was, "to present facts in such a manner as that the points in dispute to which the proof is to be directed, shall be perceived." *Rep.*, p. 50. If *infancy*, duress, and like defenses, and in replevin, ownership in defendant, or in third person, can be given in evidence under a *denial*, then the plaintiff is *not* apprised of the facts "to which the proof is to be directed." The language of the code, section 92, necessarily limits the office of the answer of *non detinet*. It is a special denial of *a fact* asserted; and that fact may be *disproved*, by proving the *non existence* of any *fact*, or the *falsity* of any *statement*, offered in support of it, but not by evidence of *other facts*, of other ownership; for, if so, then special facts not set up in the answer would be proved. The proofs and pleadings would not correspond. If so, payment might as well be proved under a denial. Payment, tender, accord, and satisfaction, arbitration, release, former judgment, discharge in bankruptcy, and like defenses, must be specially pleaded. 9 Barb., 371; 8 Barb., 608; 8 How. Pr. R., 258; 2 E. D. Smith's C. P. R., 197; 5 Abbott's Pr. R., 358-389; 23 Barb., 490; 4 Abbott's Pr. R., 103; 2 Duer, 176; 11 Johns., 189; 13 Johns., 286; 3 Barb., 429; 9 *ibid.*, 498; 3 Comst., 216.

This construction of the code is necessary to secure *uniformity*, which did not belong to the old system, and seems to result from the authorities. Code, section 85; *Benedict v. Seymour*, 6 How. Pr. R., 298; *Brazill v. Isham*, 2 Kern., 9; *Zalriskier v. Smith*, 2 Kern., 322; 20 Barb., 468; 2 Duer, 176; 1

promise B., or could prove any fact which could furnish a fact-inference, that A. did not promise B. Or any facts which negative any fact proved by the plaintiff for the purpose of establishing his proposition of fact. The propositions of the pleading will all be of fact where possible to be so construed, and so when a promise is alleged, it will not be a promise implied by law, from facts stated or not stated, but will be a fact-promise—which the party expects to prove as alleged, and where there was no fact promise made, there should be none averred—but only the facts on which the law implies the promise.

So, "A. promised so and so," with the denial, "A. did not so promise," will not allow the denier to show that facts exist *inconsistent* with such a promise—when the same is treated as a proposition of law, but only that facts exist inconsistent with it as a *proposition of fact*. On a denial of a fact proposition, or a proposition which has both a fact and a law meaning taken in its *fact meaning*—the *denior* may prove any fact-proposition contradicting the denied proposition, or any fact-proposition inconsistent with it, implying that it is not true. For example, if one states as a consideration, labor for defendant, and defendant's promise to pay its value, defendant may deny the labor, and thereunder disprove the labor. If he deny the promise to pay its value, he may thereunder disprove the promise to pay value—by showing that the promise was not *that*, but something else—was misunderstood, or not made, or made to another, and not to plaintiff—but can not show that he did not do the labor, under such denial.

If there was no actual fact-promise, but mere labor, under such circumstances as that the law would attach thereto a promise—so that the promise is a legal conclusion and not a fact, then no promise should be stated, but only the facts. As A. did such and such labor for the defendant, and it was worth so much. On denial thereof, the defendant could only prove the contradictory of labor being done.

That A. sold goods to the defendant will not allow proof that he sold them to the wife of the defendant, unless she was his *actual agent* in the transaction. Not, for instance, if he had protested against sale to her. The proposition will be treated as a fact-proposition, and the proof must prove it as a fact, and not as a legal proposition; and under a denial of it, defendant may prove that they were sold to his wife, and thus contradict it. *Report on Civil Code*, p. 313.

Duer, 253; 8 How. Pr. R., 485; Van Santvoord, P., 461-2-480; *Fry v. Bennett*, 1 Code, R. N. S., 238; *Gilbert v. Crane*, 12 How. Pr. R., 455; 5 Sand., 54; 4 Comst., 91; 1 Smith's Com. Pl. R., 265-437; 3 Code, R., 9; 1 Monell, Pr., (2d ed.,) 560-4; 12 Barb., 573; Gould Pl., Ch. 4, sec. 7; 8 How. Pr. R., 443; *Andrews v. Bond*, 16 Barb., 633; *Schermerhorn v. Van Allen*, 18 Barb., 29; *Catlin v. Gunter*, 1 Duer, 253; *Baker v. Bailey*, 16 Barb., 57; *Garvey v. Fowler*, 4 Sand., 665; *Jackson v. Whedon*, 1 E. D. Smith's R., 141. *Western Law Monthly*, June, 1860. On this subject of pleading under new code, see all the articles on code in the same monthly.

Not to plead evidence.

SEC. 2945. Propositions which are statements of evidence, as contradistinguished from propositions which are statements of the ultimate results of evidence, should not be stated in any pleading.\*

Where the suit is for equitable relief, such as an injunction and similar actions, and where the costs of the action are in the discretion of the court, it is often necessary to state in the complaint, the facts which will bear upon the granting of costs, or of particular relief as they were formerly stated in a bill in chancery. *Howard v. Tiffany*, 3 Sand., 695.

Every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred or stated. This rule of pleading in an action for a legal remedy, is the same as formerly in this, that facts, and not the evidence of facts, must be pleaded. *Allen v. Patterson*, 3 Seld., 478. See also *Eno v. Woodworth*, 4 Com., 249; *Munn v. Morewood*, 5 Sand., 557.

If evidence of facts be alone stated, the necessary facts, though provable by such evidence, can not be proved. *Western Law Monthly*, 1 vol., p. 90.

It is true, it does not subject the pleading to a demurrer, if it, at the same time, contains an allegation of sufficient material matter to show a legal right. 8 O. St. R., 293, 297-8, post. But the extraneous matter is liable to be stricken out on motion of the opposite party, sec. 118, at the costs of the party improperly pleading it. It is besides, unprofessional and derogatory to the standing of the pleader. It can never legitimately aid the party introducing it, but always tends to perplex and embarrass his case, which it is his interest to make as plain and forcible as possible. In *the people*, ex. rel. *Beatty v. The Board of Police*, 9 Abb., 257, 269, the court say: "Merely evidence needs not to be, and it should not be, pleaded. It has a tendency besides when so introduced, to confuse a case, and should, for that reason, be stricken out." See also, *Dows v. Hotchkiss*, 10 N. Y. Leg. Obs., 281; *Wooden v. Strew*, 10 How. Pr. R., 50; *Lawrence v. Tright*, 2 Duer., 674; *Mann v.*

\* This section suggests the danger of the other extension. If we were not writing on law, we would call it the danger of wrecking on Scylla while shunning Charybdis. Facts are differentiated from evidence, as effect is from cause. Testimony shows the existence of fact. No right of recovery can be based on testimony, it must be based on established facts. Various testimony may lead to the same facts; or testimony may be of opposite kinds, and yet the facts involved may be found. Infinite issues might be made on the statements of testimony, and yet none of them establish the fact. Rights depend not on testimony but on facts. Testimony is only of value as it is the circumstance from which we infer the fact. The existence of the fact is the ground of the right, and this existence is established in the minds of the jury by evidence. If some evidence be stated there might be also stated fact-propositions enough to constitute a cause of action, in which event, perhaps, little objection should be made, as the fault of excessive statement will tend to its own correction, and to cherish such objections unless in gross departure from the rule will tend to delay—but if there be not a sufficient statement of facts to constitute a cause of action then the fault will be assailable by the demurrer, because not containing a sufficient statement of cause of action. It requires, oft times, more exact thinking, than should be required of pleaders, to never commit the error of stating an item of testimony. This power of compact fact-statement will grow with use. The adverse party will seldom be prejudiced by a small admixture of testimony, and the good sense of the court will, under section 2946, temper the effect of the motion to strike out with a just appreciation of its use; so that substantive justice, rather than formal technicalities shall in each case prevail. *Report on Civil Code*, p. 314.



*Morewood*, 2 Sandf., 566; *Page v. Boyd*, 10 How. Pr. R., 417; *Buzzard v. Knapp*, 12 *ibid.*, 504; *Page v. Ford*, ante, vol. 1, p. 525. *Western Law Monthly*, March, 1860.

SEC. 2946. The court may, on motion of any person aggrieved thereby, cause irrelevant or redundant matter to be stricken from any pleadings, at the cost of any party, whose pleading contains them. Motion to strike out.

What is *irrelevant* or *redundant* matter in an answer? It is superfluous matter incorporated with an answer, otherwise good. Section 160 does not refer to a whole answer or defense, in authorizing irrelevant or redundant matter to be stricken out. If an answer otherwise good, is loaded with unnecessary and redundant matters, the plaintiff should move, under section 160 to expunge them. If doubts are entertained as to its sufficiency in law, a demurrer is the remedy. *Nichols v. Jones*, 6 How., 355.

Under the code a party has the right to set forth his cause of action, *fully*, and unless he burdens his pleading with matters that are totally irrelevant, impertinent, or imposes upon the defendant the necessity of specifically traversing a great number of *facts*, which are more properly *evidence* in support of a cause of action, than substantive averments to show that a cause of action exists, the defendant can not be regarded as aggrieved thereby. Motions to strike out parts of a pleading as irrelevant or redundant, are not to be encouraged unless it is manifest to the court, that it would be to the *prejudice* of the party who has to answer, to suffer the objectionable matter to remain. Nor is a court to be taxed with the labor and trouble of minutely inspecting a pleading upon summary motion of this kind, for the purpose of ascertaining whether averments are or are not relevant, unless in cases when it is absolutely incumbent upon the party to get rid of them, to enable him to frame a proper answer. *Malony v. Dous*, 15 How., 261.

An answer drawn in conformity with approved usage in chancery pleading, admitting, specifically, all the statements in the complaint, and stating various legal arguments and propositions in defense, can not be sustained under the code. Such statements are redundant. *Gould v. Williams*, 9 Pr. R., 51.

This section does not authorize the striking out of every irrelevant or redundant expression. A party must be aggrieved or prejudiced thereby. *Hynds v. Griswold*, 2 Code Rep., 47; effect must be given to the word "*aggrieved*," as used in this section. The matter must not only be irrelevant or redundant, but some person must be prejudiced thereby. Such a person only is authorized to make the motion. *Ibid.*, and 4 Pr. R., 69.

Where the complaint, in slander, set forth the speaking by the defendant, at a certain time and place, certain words, and further, that *the defendants on divers days and times between that day and the commencement of this suit*, spoke the same words, the words in *italic* were held to be redundant. *Gray v. Nellis*, 6 Pr. R., 290.

It is probably unnecessary, but not improper, for the party after he has stated the facts in his pleading, to state the legal effect or conclusion therefrom, as for instance, after alleging in the complaint what was done with the note prior to the defendant's taking it, it was added, "whereupon the plaintiff became entitled to the possession of said note." See *Decker v. Matthews*, 2 Kern., 213.

The true test of the materiality of averments sought to be struck out, is to inquire whether such averments constitute a cause of action or defense; if they do they will not be struck out. *Ingersoll v. Ingersoll*, 1 Code Rep., 102; *Averill v. Taylor*, 5 Pr. R., 476; 1 Code Rep., N. S., 104.

It may now be considered as settled, that in a purely legal action, the common law rule, which confined the allegations of fact, in every pleading, to such as were essential to the cause of action or defense, and which, if put in issue, would be decisive of the suit, is still in force; and that whatever is inserted beyond these essential facts in such an action, will be stricken out

on motion. *Shaw v. Jayne*, 2 Code Rep., 69; *Knowles v. Gee*, 3 *ibid.*, 31; *Milligan v. Cary*, 3 *ibid.*, 250; *Williams v. Hayes*, 1 Code Rep., N. S., 148.

**Material matter.** SEC. 2947. A material allegation in a pleading, is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

**Motion to make specific.** SEC. 2948. When the facts on which any pleading is founded, are stated in a manner so general, or so indefinite, or so uncertain that the precise nature of the cause of action, or defense, or set-off, or counter-claim, or cross-demand is not so apparent as to enable the adverse party to respond intelligibly thereto, the court may, on motion, require the pleading to be made more specific, definite, and certain by amendment, and no pleading which recites or refers to a contract, shall be deemed sufficiently specific, unless it states whether the same is in writing or not. Such motion shall point out wherein the amendment is required or shall be disregarded, and if the reason for such demand of more specific statement exists outside of the pleadings, the motion must state the same and be sworn to.

**Title not to be changed.** SEC. 2949. The title of a cause shall not be changed in any of its stages of transit from one court to another.

**Judicial notice.** SEC. 2950. Matters of which judicial notice is taken, need not be stated in a pleading.

**Liberal construction.** SEC. 2951. In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantive justice between the parties.

It is said that everything shall be taken most strongly against the party pleading, or rather, if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them; for it is to be intended that every person states his case as favorable to himself as possible. This must be taken with some qualification, for the language of a pleading is to have a reasonable intendment and construction, and, when a matter is capable of different meanings, that shall be taken, which shall support the pleading, and not that which will defeat it. *Allen v. Patterson*, 3 Selden, 480.

Under the code a pleading must be so expressed that it is plain and intelligible to those who understand the language, therefore the words expressed are to be understood in their ordinary and popular sense. *Mann v. Morewood*, 5 Sand., 557.

**How to plead conveyance.** SEC. 2952. When a party claims by conveyance, he may state it according to its legal effect or name.

**Same of inheritance.** SEC. 2953. When a party claims by inheritance, either by immediate or mediate descent, he shall allege how he is heir, as son, nephew, or otherwise.

**Same of an estate.** SEC. 2954. It shall not be necessary to allege the commencement of either a particular or a superior estate, unless it be essential to the merits of the case.

**Same of time.** SEC. 2955. When time forms a material point in the merits of a cause, the day, month, and year, or when there is a continued act, the period of its duration must be alleged. When time is not material, it need not be stated, and if stated, need not be proved.

If the time when a fact happened is material to constitute the cause of action, it should be stated. The fact without the time would be insufficient to constitute the cause of action; but if the time is immaterial, a demurrer will not lie for omitting to state it. *People v. Ryder*, 2 Kern, 433. An allegation that the plaintiff "afterwards, to wit," on a day specified, paid certain moneys, does not preclude him from showing that the payment was

made at an earlier day for the purpose of claiming interest. The allegation of time in such a case is immaterial. *Lyon v. Clark*, 4 Seld., 148.

SEC. 2956. In actions for injuries to goods and chattels, their kind or species shall be alleged. Same as to goods.

SEC. 2957. It shall be necessary to allege a place, only when it is descriptive of the subject matter of the action, and forms a part of the substance of the issue. Same as to place.

SEC. 2958. In actions for injuries to real property, the party shall describe the property, and when the injury is to an incorporeal hereditament, shall describe the property in respect of which the right is claimed, as well as the right itself, either by the name by which the property is designated in the national survey, or by its abutments, or by its course and distances, or by any name which it has acquired by reputation, certain enough to identify it. Same as to real property.

SEC. 2959. When the party intends to prove malice, to affect damages, he must aver the same. Aver malice.

SEC. 2960. In an action, set-off, counter-claim, or cross-demand on a bond with conditions, the party suing thereon shall, in his pleading, notice the conditions and allege facts constituting the breach or breaches relied on. Breaches in bond.

SEC. 2961. When a pleading shows affirmatively, that its cause of claim is barred by the statute of limitations, it may be assailed by demurrer. Statute of limitations.

SEC. 2962. When the defendant pleads the statute of limitations, responding to such plea, the plaintiff may, without leave or cost, or incurring delay, amend his petition, by a count averring as another cause of action, the proper admission or new promise, with what other matter may be necessary to constitute sufficient cause of such claim, and the plaintiff may recover on either of such claims as he may show himself entitled. But he may in the first instance, rely on and state as cause of action, the matter displacing the bar of the statute as contemplated in the amendment herein stated. Defense of limitations how met.

SEC. 2963. When any pleading shows affirmatively, that its cause of claim should be evidenced by writing, according to the law of evidence, and that the same is not so evidenced, it may be assailed by demurrer. Statute of frauds.

SEC. 2964. Where such cause of action, set-off, counter-claim, or cross-demand, as should be evidenced by writing, is so evidenced, then the same must be stated to be so, and the writing, or a copy thereof, must be annexed to the pleading, unless a reasonable excuse be set forth in the pleading for not annexing the same, else it shall not be received in proof on trial. What must be in writing should be set out or annexed.

SEC. 2965. All statements which need not be proved to any extent at all, such as the statement of time, quantity, quality, and value, when these are immaterial, the statement of finding and losing, and bailment in action for goods, or their value; the statement of promises which were not in fact made, and which need not be proved, and all statements of a like kind, shall be omitted. Not to aver what need not be proved.

SEC. 2966. If a party state more facts, or a greater title or estate than is necessary to entitle him to the relief claimed, and such facts, estates, or title be denied to the full extent, he shall not be compelled to prove more than is necessary to constitute a claim to the relief prayed, or to any lower degree of relief, included in the relief prayed. And if a party states in his answer or reply, more than is needed for his defense, he shall not be compelled to prove more than is needed for his defense. May recover on less than the part alleged.

When paper is  
held admitted.

SEC. 2967. When the action, defense, set-off, counter-claim or cross-demand is founded on a written instrument, and the original is referred to in a pleading, and annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the adverse party in response to such pleading, if it is one which may be responded to, and if it be not, then before the trial deny the genuineness of execution of the same by affidavit; and when any other writing, purporting to have been executed by one of the parties is referred to in, and filed with a pleading, it may be read against such party as genuine and duly executed, unless he denies the same by affidavit, before the trial is begun.

Supplemental  
pleading.

SEC. 2968. Either party may be allowed, on motion, to make a supplemental petition, answer or reply, alleging facts material to the case, which have happened or have come to his knowledge since the filing of the former petition, answer, or reply, nor shall such new pleading be considered a waiver of former pleadings.

The *supplemental answer* under the code is a substitute for the old plea of *puis darrein continuance*; but it differs from the plea in this respect, that the supplemental answer may be allowed on motion, whenever the facts forming the ground of the answer have occurred since the answer was put in, or where the defendant was ignorant of them at the time of pleading the first answer; whereas, the plea of *puis darrein continuance* could strictly be pleaded only before or at the next continuance *after* the facts transpired. When the facts asked to be incorporated and pleaded in a supplemental answer go to divest the plaintiff of the right to maintain the action, and transfer the cause of action to another, who has received satisfaction for the demand involved in it, it is the duty of the court to grant the motion. The word *may* in such a case means *must*, and it will make no difference whether the motion be made at the earliest day or not. *Drought v. Curtis*, 8 P. R., 56.

The provision contained in this section does not enable a party to set up by way of supplemental answer, any defense known to him before the putting in of his former answer. *Houghton v. Skinner*, 5 P. R., 420.

Where plaintiff introduces new facts and parties into the case, by amending his complaint instead of resorting to a supplemental complaint, the amended complaint is not a nullity. It is irregular but the irregularity will be waived by a general appearance by the persons thereby brought in as defendants. *Beck v. Stephani*, 9 P. R., 193.

A. sued B. for an assault and battery. Afterward B. sued A. for slander. After issue joined in the action of A. against B., the action of B. against A. was tried; and on the trial A. set up, in mitigation of damages, the assault and battery for which he was then suing B. B. recovered only six cents damages, and, in consequence, as was alleged by him, of the setting up of said assault in mitigation, B. now moved for leave to make a supplemental answer, to introduce the facts which had taken place since issue joined, and insisted as the plaintiff A. had set up the assault, etc., in mitigation of the action by B., he could not now recover damages for such assault. The court granted the motion, and said the facts which transpired on the former trial were material. *Bradley v. Hontelaig*, 4 Pr. R., 251.

Matter of abate-  
ment.

SEC. 2969. Matter in abatement may be stated in the answer or reply, as one or more of the causes of defense or reply. Either together with or without other causes of defense in bar, and no one of such causes shall be deemed to overrule the other; nor shall a party after trial, on matter of abatement, be allowed in the same action to answer or reply matter in bar.\*

\* Some have deemed because the old adjective appliances of abatement, namely, the formerly technical pleas of abatement were abolished, that therefore the substantive right of using abateable matter as a defense had also been taken away. No pleas were more technical and unreasonable than were the pleas of abatement. The

In Indiana it had been held in 11 Ind., 398, and 369, and 7 Ind., 147, that defendant having first had the abateable matter determined against him might then answer over to the merits which in N. Y., in 4 How., the contrary, had been held. This section leaves no room for doubt.

And another action pending in a court of another state, is no bar to a suit upon the same cause of action in this. Ind. Dig., 6. Nor is the pending of such suit in one of the federal courts, *Cook v. Litchfield*, 5 Sandf., 330, and hence would not be ground of demurrer or answer in abatement to a suit in a court in this state. Hence the answer should show where the action is pending.

SEC. 2970. Any defense arising after the commencement of any action, shall be stated according to the fact, without any formal commencement or conclusion, and any answer which does not state whether the defense therein set up arose before or after action, shall be deemed to be of matter arising before action. Subsequent defense how plead.

SEC. 2971. The forms contained in schedule A to this act annexed shall be sufficient, and those and the like forms may be used with such modifications as may be necessary to meet the facts of the case; but nothing herein contained shall render it erroneous or irregular to depart from the letter of such forms so long as the substance is expressed without prolixity. As to forms.

#### *Amendments.*

SEC. 2972. No variance between the allegation in a pleading and the proof is to be deemed *material*, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be shown by proof *alivunde* to the satisfaction of the court, and such proof must also show in what respect he has been so misled, and thereupon the court may order the pleading to be amended upon such terms as may be just.\* No immaterial variance to be regarded.

substantive matter of abatement so far as allowed yet to constitute a defense, should not be plead in a manner different from other defenses. It is said that such matter should be first plead, as it might, if true, settle the case and prevent any further contestation on other parts thereof. This is only specious. If more pleas in bar than one are plead, it holds of them also that if one should be found true the same thing would occur. And it is true among several pleas in bar, that there is always one, which really involves a point logically antecedent to, and suspensive of the rest of them. That the plaintiff is an infant and sues alone is, if you get down to the real sense of the plea, but a defense which is based upon the idea that in the suit in hand he should not recover. And to just that, and no more, comes every defense also in bar. Indeed, it is only when you look beyond the case in hand, and ask about making another attempt to realize the same right in some other contemplated suit, that a difference is seen to exist between pleas which state matter in abatement and pleas, which state matter in bar. The true idea of a successful defense is, the successful assertion of any fact which will defeat the suit in hand. And it matters not so far as that suit is concerned, whether it be by showing that it is brought by the wrong man, or at the wrong time, or in the wrong court, or in the wrong way, that there never was a right, or that there is no longer one, or that there is not yet one.

All matter being reduced to one level of virtue, and none having precedence, it follows that any defense may be plead with any other, and that one shall no longer overrule the other. But the question might arise, and has done, whether the jury should not pass on the abateable matter first; and whether a party might not go to trial on abateable matter, and being defeated, amend in the same cause, by pleading the matter in bar. We remove that doubt by this section, which is but an enunciation of the New York decisions in the premises. *Report on Civil Code.*

\* These sections on amendment have been found to be of great utility, and have been introduced into all the codes based on the New York system. They are copied, and into nearly all, with not the smallest change. The examination of the interpretation of them as made in decisions, has however indicated a slight verbal change,

These provisions introduce a principle unknown to the former practice, namely, that of determining this class of questions, not by the incoherence of the two statements upon their face, and hence inferring their effect upon the state of the preparation of the party, but by proof, *aliunde*, as to whether the party was actually misled to his prejudice by the incorrect statement. *Catlin v. Gunter*, 10 How., 315.

These sections obviously contemplated a case where the alleged variance has been discovered, or developed on the trial or hearing, at which time, the relief in a case to which it is appropriate, may at once be given, and the trial thereafter proceed upon the amended pleadings. *Egert v. Wicker*, 10 How., 193; *Cotheal v. Tullmadge*, 1 E. D. Smith, 575.

The code on the subject of variance between the pleadings and the proofs is applicable to cases in which usury is put in as a defense. These provisions have changed the strict rules which formerly prevailed as to a variance in such cases. Where on the trial the evidence of the defendant tended to prove an usurious agreement which differed from the one alleged in several particulars, but not in its entire scope, and the plaintiff gave no proof that he was misled thereby to his prejudice; *held*, that the variance was immaterial. *Catlin v. Gunter*, 1 Kern., 368.

Amendment of the complaint allowed at the trial, in an action of slander, so as to insert words in the German language, with an inuendo that they meant in English the words stated in the complaint; it appearing on the trial that the slander was uttered in German to those who understood that language, that the meaning of the words was properly stated in the complaint, and there being no affidavit of surprise on the part of the defendant. *Litzman v. Ritz*, 3 Sand, 134.

Where it was alleged in the complaint that the work and labor for which the action was brought was performed by Jones Wolcott; *held*, that this was an immaterial variance and was properly disregarded by the referee. *Woolcott v. Meech*, 22 Barb., 321.

A variance between the complaint and the proof, by which it is certain that the defendant was not and could not have been misled, may, under the provisions of the code, be disregarded, without amendment, by a referee as well as a judge. *Harmony v. Brigham*, 1 Duer, 210.

Vide *Butcher v. Death & Teasdale*, 15 Mo. Rep., 271; *Cummings v. Gutridge*, 17 Mo. Rep., 469; *Reeves v. Larkin*, 19 Mo. Rep., 192.

It is error in the circuit court to permit amendments to be made, except on terms not prejudicial to the rights of the parties. *Lee v. Bohst*, 9 Mo. Rep., 28. Vide *Jones v. Cox*, 7 Mo. Rep., 173, affirmed; *Jarbee v. Steamboat Daniel Hillman*, 19 Mo. Rep., 141.

It is improper to dismiss a suit because all are not made parties who should have been, the court having power to order others interested to be made parties. *Hayden v. Marmaduke*, 19 Mo. Rep., 403.

Courts of original jurisdiction should be liberal in allowing amendments in furtherance of justice. *Dallman v. Bowman*, 16 Mo. Rep., 225.

“If a plaintiff asks for equitable relief, and it turns out on the trial that he is entitled to legal relief only, I should permit him to take it in that form. And, if he had asked for legal relief only, where it appeared he was entitled to both legal and equitable, I should allow the proper amendment to administer complete justice in the case. The power to amend, authorized by the code, is ample for such purpose. In trying a cause at the circuit, I should certainly allow whatever amendment was necessary to give the parties redress.” *Parker, J., in Getty v. Hudson R. R. Co.*, 6 How., 270.

and it has been made. One novel idea in this new system is, that the court will not presume, from a mere variance or amendment that the adverse party has been misled, but will insist upon his showing that circumstance, as a fact existing outside the case, which is true of it, if it exist at all. The world is indebted for that suggestion to the distinguished logician and philosopher, JOHN S. MILL. We find it suggested by him as long since as the year 1828, in his edition of Bentham's *Rationale of Judicial Evidence*. The English act goes quite the length of this, perhaps further, in liberal allowance of amendment. This power obviates the need of many statements, of a cause of action, and excuses the denial of such an allowance. *Report on Civil Code*.

On a trial at the circuit, the pleading may be made to conform to the proof; immaterial allegations may be disregarded, immaterial evidence rejected, and such judgment may be directed as the facts and the law of the case require. *Corning v. Corning*, 1 Code Rep., N. S., 351.

In an action on contract, there is no variance between the allegation of a sole liability and the proof of a joint undertaking by the defendant and another. *Carter v. Hope*, 1 Code Rep., N. S., 351.

Plaintiff permitted to amend on the trial, by changing the form of action, from an action on a promissory note to an action on a special contract. *Jackson v. Sanders*, 1 Code Rep., 27.

Evidence of a special agreement is admissible in an action by a daughter against her father, for wages, although the plaintiff claimed to recover upon an implied agreement only, the defendant not having been misled. *Fort v. Gooding*, 9 Barb., 371.

SEC. 2973. 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, and may order an immediate amendment without costs.

And it may be amended without costs.

SEC. 2974. When, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof.

What is not an immaterial variance.

A variance between the pleadings and the proof, sufficient to defeat the action and destroy the defense, must leave the case *unproved* in its *entire scope and meaning*. If left unproved in some particular or particulars, it is a subject for amendment upon terms, if the adverse party has been misled by it; otherwise amendments may be made at the trial, and without any conditions whatever. *Fuy v. Grimstead*, 10 Barb., 321.

Under an averment, in an answer, that the property was "very poor and of very little value," the defendant can not prove that it was "worth nothing and of no value." A defendant will not be allowed to give evidence of a defense not set up in his answer. *Deifendorf v. Gage*, 7 Barb., 18 Evidence offered in support of immaterial issues, may be rejected on the trial, whether objected to or not. *Corning v. Corning*, 2 Seld., 97; see *Catlin v. Gunter*, 1 Kern., 368.

The plaintiff has a right to strike from his petition any cause of action at any time before the final submission of the case to the jury or to the court, where the trial is by the court, (section 2845, Iowa.) By amending his petition, he may submit a distinct cause of action from that in the original petition. *Hord v. Chandler*, 13 B. M., 404.

Where an answer sets up the defense of usury, stating the circumstances of the transaction, and, on the trial, the taking of usury was proved, but under circumstances variant from those stated in the answer, *held*, that the *scope and meaning* of the answer was the usury, and that being proved, there was no failure of proof. *Catlin v. Gunter*, 10 Pr. R., 321-2; 1 Kernan, 347.

SEC. 2975. The plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceedings already had; but a notice of such amendment shall be served on the defendant or his attorney, and the defendant shall have the same time to answer or demur thereto, as he had to the original petition.

Plaintiff may amend before the filing of the answer.

If the plaintiff amends his complaint, by adding new parties, after the defendant's default for want of an appearance has been entered, he thereby waives the default. *Seudder v. Voorhies*, 1 Barb., 55.

Where after a default, the plaintiff amends his complaint (not in mere matter of form) he must serve the same on the defendant. A judgment entered thereon without such service, is irregular. *Bayley v. Smith*, 2 Sand, 651.

SEC. 2976. Upon a demurrer being overruled, the party demurring may answer or reply.

Amendment after demurrer

Amendment may be permitted at any time.

SEC. 2977. The court may, on motion of either party, at any time in furtherance of justice, and on such terms as may be proper, permit such party to amend any pleadings or proceedings 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, or when the amendment does not change substantially the claim or defense by conforming the pleadings or proceedings to the facts proved. The court may likewise, in its discretion, on terms, and for good cause proved, allow an answer or reply to be filed after the time limited by this code, when such time has not been by order extended. And whenever any proceeding taken by a party, fails, in any respect to conform to the provisions of this code, it may permit an amendment of such proceeding so as to make it conformable thereto.

Variances not affecting the merits, which do not surprise the adverse party, and on which he ought not in good faith, to have relied, will be disregarded on arguments at bar without directing any amendment. If the prevailing party deem an amendment prudent, he must apply for leave, by a motion, after the argument, when the court will allow it on such terms as shall be just. *DeRuyster v. Wheeler*, 1 Sand., 119. Where it was averred that the defendants represented a note to be "a good note, and that it would pass in South street," and the proof was that they said "the note was good, and that there were people in South street, who would take it;" held, no substantial variance. *Hackins v. Appleby*, 2 Sand., 421. Evidence of the special agreement is admissible in such action, although, the plaintiffs, in their reply, claim to recover upon an implied agreement only. Such an objection for a variance, between the pleadings and the evidence is provided for by the 169th and 170th sections of the code of procedure. [Sections 2972 and 2973, Iowa.] *Fort v. Gooding*, 9 Barb., 371; and see *Getty v. Hudson River R. R. Co.*, 6 How., 269.

The court will direct an amendment of the pleadings by substituting a party as defendant, when it appears, at any stage of the proceedings, that such amendment will further the ends of justice. *Fuller v. Webster Fire Ins. Co.*, 12 How., 293.

But such amendment should only be allowed on such terms as to prevent injustice. *Luyster v. Sniffin*, 3 How., 250. See *Onondago Ins. Co. v. Minard*, 2 Com., 98.

The court, at the trial, may remedy, by amendment, a variance between the case made by the proof and the complaint, where all the facts, essential to the rights of the parties are put in issue by the answer and reply. *Hull v. Gould*, 3 Kern., 127. See *Corning v. Corning*, 2 Seld., 37.

In an action for the recovery of the possession of a heifer, which was secretly taken from the possession of the plaintiff by the defendant, damages are recoverable for time spent and expenses incurred by the plaintiff, in searching for the heifer, after she was taken by the defendant. Where the plaintiff had not claimed such damages in his complaint, he was allowed to amend the same on the trial without terms, by inserting therein allegations to entitle him to such damages, the defendant not being able to show he had any absent witness material to the claim for such damages. *Miller v. Garling*, 12 How., 203; and see *Hagins v. De Hart*, *ibid.*, 322.

Where the defendant must have known the facts contained in an amended answer, which he proposes to file, at the time of the filing of his original answer, it is no abuse of discretion to refuse leave to file it. *Stiles, J., Barbours v. Moss, administrator*, Mss. opin., July, 1857. *Stanton's Ky. Code*.

Where a complaint and answer are both very general in form, and neither party demurs, and both have gone to trial with a full understanding of their rights, and neither party has been taken by surprise by the pleading of his adversary, and a full and fair investigation has been had on the merits, such an amendment will be allowed as will conform the complaint to the facts proved, and as will do substantial justice to both parties. *Hunter v. The Hudson River Iron and Machine Co.*, 20 Barb., 493.



Whenever the court can see that justice would be furthered by an amendment of the pleadings and proceedings in an action, if asked for, it should grant the amendment upon terms just to the opposite party. It is in all cases, proper, however, in order to prevent laxity and negligence in pleading, to require from the party asking the amendment, some reasonable excuse for the defect in his pleading, which he seeks to correct. *Harrington v. Slade*, 22 Barb., 164.

The defendant having answered evasively, ought not to be allowed to amend his answer, after the testimony closed. Crenshaw, C. J., *Trumbo v. Botts*, Mss. opin., January, 1857. *Stanton's Ky. Code*.

Where a wife had sued her husband without appearing by her next friend, and the court held a next friend necessary, the court allowed the proceedings to be amended by inserting the name of a next friend. *Forrest v. Forrest*, 3 Code Rep., 254.

Under this section a plaintiff will be allowed to amend his petition, in an action of slander, so as to allow the use of other slanderous words by the defendant. Simpson, J., *Winn v. Elliott*, Mss. opin., January, 1854. *Stanton's Ky. Code*.

Where plaintiff purposely commenced his action upon contract, with the view to obtain an advantage he could not obtain if he sued in tort, having secured that advantage, he will not be allowed to amend by making his action in tort. *Lane v. Bean*, 1 Abbott, 65.

Plaintiff declared for goods sold. The answer set up that they were sold upon a credit that had not expired. Plaintiff moved to amend his petition by averring that the goods were procured through fraudulent representations on the part of the defendant. In the original complaint the plaintiff demanded judgment for \$162.87, that being the contract price of the goods. In the complaint as proposed to be amended, he demanded judgment for the same amount, averring that to be the value of the goods. Held, that, within the meaning of the code, there was no change in the nature of the claim. *Chapman v. Webb*, 1 Code Rep., N. S., 388.

The very terms of this section are sufficient to show that it was the intention of the framers of the code to endow the court with the most enlarged discretionary powers in granting amendments. The only proper inquiry for the court is, whether the proposed amendment will change substantially the cause of action or defense, or, if not, whether it will be in furtherance of justice to allow it." Harris, J., *Dutcher v. Slack*, 3 Pr. R., 322; 1 Code Rep., 113.

The complaint may be amended in the amount claimed by the plaintiff, in an action on contract, for the recovery of money only, even after reply, repeating the original claim, and both pleadings verified. *Merchant v. New York Life Ins. Co.*, 3 Sand., 658; 2 Code Rep., 66, 67.

Where it occurred on the trial that there was a mistake in the name of the plaintiff, it was not held to be a ground of nonsuit, and that such a mistake can be corrected, on trial, by amendment. *Barnes v. Perine*, 9 Barb., 292; *Travis v. Tobias*, 8 Pr. R., 334.

Parker, J., in *Dows v. Green*, 3 Pr. R., 378, said: "The question to be determined is, whether the permitting the plaintiff to alter the prayer of his complaint so as to claim the property itself and damages for its detention, instead of simply praying judgment for the value of the property, is changing substantially the cause of action?" It is changing the form of the action, or, rather, the class to which it belongs, but not the cause of action. The cause of action is made up of the facts which entitle the plaintiff to relief. The injury complained of is the cause of action, and such is the sense in which the words are used. 1 Pr. R., 82; 2 *ibid.*, 43; 3 *ibid.*, 148.

The court under this section may allow amendments to the petition even during the trial, upon proper terms, by adding or striking out the names of parties, or correcting mistakes in the names of parties, or any other mistake, or inserting material allegations, or so changing the allegations thereof as to conform to the proof, provided the ground of action is not materially altered. Hise, C. J., *Coil v. Harvard*, Mss. Opin., Dec., 1853. *Stanton's Ky. Code*.

A variance between the declaration and proof must be objected to at the trial; and if not done then, the party can not afterwards avail himself of it. *Pike v. Evans*, 15 John, 210; and see *Hall v. Lathrop*, 3 Hill, 237; see *Lawrence v. Barker*, 5 Wend., 301.

When an order requires a party to amend, and directs him to pay costs, payment of the costs is not a condition precedent to the amendment. It must be expressed to be on *payment, &c.*, or in other express terms. *Sturtevant v. Fairman*, 4 Sand., 674; *Corning v. Corning*, 2 Seld., 97; *Bowman v. Earle*, 3 Duer, 691; *Cayuga Co. Bank v. Warden*, 2 Seld., 19.

An amendment without costs, is an amendment upon such terms as may be proper, within the meaning of this section. *Cayuga Bank v. Warden*, 2 Selden, 27.

All technical errors to be disregarded.

SEC. 2978. The court must, in every stage of an action, disregard any error or defect in the proceeding, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

So complete and thorough has been the departure from the former rules and forms of pleading, that it is hardly safe to rely upon analogies derived from that system in giving practical effect to the new. Based as the new is upon an entirely *different theory*, and having professedly different ends to accomplish, it is better, with a view to carry it out in its spirit, to consider it as it is in truth, an entire new theory, to be construed and carried into effect according to its terms and upon principles peculiar to itself. Difficult as it may be for a mind trained to the logical and truly scientific rules of pleading under which justice has so long been administered in states and countries in which the common law has had sway, to cast aside all the rules which have been supposed to be founded in wisdom, and in practice to have accomplished a good purpose, for a new and confessedly imperfect scheme, it is safe to say that it must be done, in order to give effect to the provisions referred to, and to give the new system a fair trial; and that less injustice will be done in that way than by attempting to engraft the new upon the old, which can only be done to the prejudice of both. *Bush v. Prosser*, 1 Kern., 351.

Amendment does not entitle to a continuance.

SEC. 2979. When either party shall amend any pleading or proceeding, the case shall not be continued in consequence thereof, unless the court shall be satisfied by affidavit or otherwise, that the adverse party could not be ready for trial in consequence of such amendment. But if the court is thus made to become satisfied, a continuance may be granted to some day in the same term, or to the next term of said court.

It has been held that the substitution of parties different from those in whose names the suit was originally brought, where the claim or defense was not substantially changed, did not entitle to a continuance. *Huhler v. Pullen*, 9 Ind., 273. See cases on this point, Ind Dig., 110, 279, 677.

Consolidation.

SEC. 2980. Whenever two or more actions are pending in the same court which might have been joined, the defendant may, on motion, and notice to the adverse party, require him to show cause why the same shall not be consolidated, and if no sufficient cause be shown, the same shall be consolidated.

Amendments need not be verified unless, &c.

SEC. 2981. Courts may permit the amendments authorized by this chapter to be made, without being verified as prescribed in section 2904, unless a new and distinct cause of action, defense, set-off, counter-claim, or cross-demand is thereby introduced.

Lost pleading.

SEC. 2982. If an original pleading be lost or withheld by any one, the court may order a copy thereof to be substituted.

Amendments how to be made.

SEC. 2983. All matters of supplement or amendment, whether of addition or subtraction, shall be made not by erasure or interlineation of the original, or by addition thereto, but upon a separate paper, which shall be filed, and shall constitute, with the original, but one pleading. But if it be stated in such paper, that it is a substitute for the former pleading intended to be amended, in that case it shall be deemed such

substitute, but the pleading superseded by the substitute shall not be withdrawn from the files.

SEC 2984. No record shall be amended or impaired by the clerk, or other officer of the court, or by any person without the order of such court, or of some court of competent authority.

Records not to be altered.

*Interrogatories.*

SEC. 2985. Either party may annex to his petition, answer or reply, written interrogatories to any one or more of the adverse parties concerning any of the material matters in issue in the action, the answer to which on oath may be read by either party as a deposition between the party interrogating and the party answering.

Party may file interrogatories.

SEC. 2986. The party answering shall not be confined to responding merely to the interrogatories, but may state any new matter concerning the same cause of action, which shall likewise be read as a deposition.

What respondent may state.

SEC. 2987. These shall be answered at the same time the petition is required to be answered, and when annexed to the answer or reply, shall be answered at or before the calling of the cause for trial, if such pleading has been filed four clear days.

When response to be filed.

SEC. 2988. The trial of an action by ordinary proceedings shall not be postponed on account of the failure to answer interrogatories, if the party interrogated is present in court at the trial, so that he may be orally examined; nor, in case of his absence, unless an affidavit be filed showing the facts, the party believes will be proved by the answers thereto, and that the party has not filed the interrogatories for the purpose of delay; whereupon, if the party will consent that the facts stated in the affidavit shall be considered as admitted by those interrogated, the trial shall not be postponed for that cause.

No delay.

SEC. 2989. The party in answering such interrogatories, shall distinguish clearly between what is stated from his personal knowledge, and what is stated from information or belief merely. An unqualified statement of a fact shall be considered as made of his personal knowledge.

Respondent must state the extent of his assurance.

SEC. 2990. The answers to the interrogatories shall be verified by the affidavit of the party answering, to the effect that the statements in them made of his own personal knowledge are true, and those made from the information of others he believes to be true.

Affidavit.

SEC. 2991. Where a party filing interrogatories shall also file an affidavit that he verily believes the subject of the interrogatories, or any of them, is in the personal knowledge of the opposite party, and that his answers thereto, if truly made from such knowledge, will sustain the claim of defense, or any part thereof, and the opposite party shall fail to answer therein within the time allowed therefor, or by the court extended, the claim or defense, or the part thereof, according to such affidavit, shall be deemed to be sustained, and judgment given accordingly.

If unanswered, what taken as true.

SEC. 2992. The court may compel answers to interrogatories, by process of contempt, and may, on the failure of the party to answer them after reasonable time allowed therefor, dismiss the petition, or quash the answer of the party so failing.

Answer may be compelled.

DECISIONS UNDER THE PRIOR PRACTICE. An equitable defense can not be made in a law suit, 5 Iowa, 379; pleadings should be in English, 5 Iowa, 375; a demurrer was sustained to a set of facts which the defendant claimed to show by way of recoupment, because the same were not stated with sufficient certainty and

distinctness to constitute a plea of set-off, 5 Iowa, 379; [the plea is not given, but is not uncertainly assailable by motion alone?] aid of venue as stated in the margin, 2 G., 440; a demurrer was sustained to an answer in action on delivery bond, because said answer stated only that the property did not belong at time of levy to attachment defendant, and did not say to whom it did belong, 5 Iowa, 546. [Was not a motion for a more "definite and specific plea" the remedy?] an action may be brought on a judgment instead of *scire facias* to revive it, 5 Iowa, 506; a judgment can not be given for a larger sum than that demanded in the petition, 5 Iowa, 505; under the claim of interest plaintiff can only recover interest from the commencement of the suit, 5 Iowa, 505; a suit was brought on an agreement which contained a condition precedent of liability, that condition was not in the petition averred performed and demurrer was sustained to the petition. [The second ground of sustaining the demurrer is not shown to have been made as required by section 1754, Code,] 5 Iowa, 386; substantial formality is alone requisite, 5 Iowa, 372; the laws of other states are facts which should be plead as such, if relied on as facts, 5 Iowa, 364; the laws of other states are facts to be plead and proved and not taken notice of judicially, 4 Iowa, 468; a demurrer was sustained to an answer in slander which averred provocation and passion as mitigation, on the ground that such facts could be proved under a denial, 4 Iowa, 456; [see note to sections 2928 and 2929;] if an action be brought by one having the legal interest in a note, a defense against the party beneficially interested may be made by the defendant, 5 Iowa, 540; causes not to be mingled, 1 Iowa, 263; but several notes may be stated in one count, *Stadler, Bro. & Co. v. Parmlee & Watts*, Dec., 1859; and see 1 G., 147; 4 G., 493; such causes must be held in the same right, 4 G., 196; statements, how to be made, 4 G., 302; 1 Iowa, 4; 5 Iowa, 370; 3 Iowa, 63; a set-off is not a defense and it should be pleaded separately, 4 Iowa, 434; set-off should be pleaded entirely separate from matters of defense, 5 Iowa, 463; if on firm settlement one member give to another a note for his share and afterwards pay a debt of the firm not counted in the settlement, such maker when sued by the payee on said note may set off that sum which the payee should contribute, 5 Iowa, 540; the court and not the jury must define the issue, 5 Iowa, 274, 4 Iowa, 154; allegations not denied taken as true, 5 Iowa, 376; the statement of facts basing the attachment can not be put in issue in the original cause by answer, 5 Iowa, 378; approved, *Sackett, Belcher & Co. v. Partridge & Cook*, 4 Iowa, 416, and 5 Iowa, 379; a denial of indebtedness held a sufficient answer, 5 Iowa, 378; allegations not responded to are true on trial, 5 Iowa, 276; averments not denied can not be disproved, 4 Iowa, 5; allegations not responded to are taken as true, 4 Iowa, 592; on motion, the court may, if necessary, require a party to respond specifically to the affirmative allegations of the petition, 5 Iowa, 471; when the justice's record states that the defendant's set-off was not objected to, it will not be presumed untrue from the mere fact of a trial, as it would be in a case where the record was silent, and there was only one action, 5 Iowa, 270; material facts charged within a sworn bill to be within the knowledge of the respondent, and not responded to on oath when sworn answer is called for, are taken to be true, 4 Iowa, 581; a respondent in chancery can pray nothing save to be dismissed with costs; for other relief he must ask by cross-bill, 4 Iowa, 581; certificates of stock received by the vendor of land as the price thereof need not be annexed to a bill by the vendor seeking to vacate said sale for fraud, 5 Iowa, 366; if such instrument be in a foreign language the copy should be an English translation thereof, 5 Iowa, 376; the objection to a pleading that a copy of the account is not annexed thereto is waived by omitting to demur therefor, 5 Iowa, 539; merely annexing instrument without inserting in the petition the propositions intended to be sustained by it—rather disproved, 5 Iowa, 291; an amended answer containing new matter filed unreasonably late, may on motion be struck out, 4 Iowa, 458; the plea of justification must confess the charge and must set forth such matters as fix the crime, 4 Iowa, 456; identicalness of parties is not always demanded to admit a defense of *res adjudicata*, 4 Iowa, 246; provoking language is not a defense to an action for an assault and battery, mitigation only, 5 Iowa, 480; if vendor of land with warranty, sue vendee on notes given for the price, the vendee may reply, that the vendor's title to part of said land was not good, and may deduct from the notes such sum as he reasonably paid for the outstanding title, 5 Iowa, 408; the statement of facts basing the attachment, can not be put in issue in the original cause by answer, 5 Iowa, 378; the laws of other states are facts to be plead and proved, and not taken notice of judicially, 4 Iowa, 468; under a general denial without a specific statement of the statute of another state on which he relies as a fact, defendant can not give in evidence the law, 4 Iowa, 469; more particularity is required by Code than by common law, 4 Iowa, 469; no fact can be held as *res adjudicata*, except such fact as was an ultimate fact, put directly in issue and decided, 4 Iowa, 199; several grounds of defense should be pleaded in separate counts (dictum,) 5 Iowa, 463; matter of tender can

not be proved under plea of payment, 5 Iowa, 484; a party may base his defense on the fact that the conduct of the other party precludes his being heard to assert the facts of his claim, 5 Iowa, 422.

In Slander, prove words substantially as laid, 4 Iowa, 453; provocation may be shown in mitigation, 4 Iowa, 453; so may the general bad character of plaintiff; 8 Iowa, 29; malice presumed from the nature of the words, 2 G., 311; certainty required in a plea of justification, 4 Iowa, 453; M., 286; 2 G., 231; what words are actionable, per se, M., 269; 4 Iowa, 321; 4 G., 354; M., 136; 2 G., 311-587; 4 Iowa, 427-424; that "the petition is insufficient in law to sustain the action," is not a good demurrer, 5 Iowa, 523; taking a bill of exceptions does not save the error of ruling on demurrer where the failing party answers over, 4 Iowa, 589; pleading over waives the demurrer, 4 Iowa, 499; the error of overruling the defendant's demurrer is waived by defendant filing an answer, 4 Iowa, 552; by amending answer demurred to, defendant waives his right to object to the action of the court in making the decision, 4 Iowa, 455; going to trial on one of many counts waives any wrong ruling as to the counts not tried, 1 G., 259; see 8 Iowa, 212; demurrer don't extend back, 4 G., 453; [see notes on Demurrer in Code of Civil Practice.] if one count good then a general demurrer to the whole is bad, M., 102; 2 G., 602; demurrer defined, 5 Iowa, 15; 3 G., 564-538; 2 G., 582; 1 Iowa, 546; 5 Iowa, 521; *Crouch v. Crouch*, Dec., 1859; 4 G., 510; admission of, 1 Iowa, 426; M., 321; 8 Iowa, 193; the waiver of pleading over, 6 Iowa, 191-204; 4 *ibid.*, 321; 3 *ibid.*, 150-209; 4 G., 254-272; 2 Iowa, 559; 7 Iowa, 435; 3 G., 17; 4 Iowa, 587; 3 *ibid.*, 582; right to plead over, 4 G., 78; "use and benefit of" held surplusage, 2 Iowa, 158; answering waives demurrer, 4 Iowa, 321; pleading over is a waiver of demurrer, 4 Iowa, 5; answering over waives demurrer, 5 Iowa, 279; one suing *sui juris*, may so amend as to sue as assignee for creditors, and this after a finding against him on issue denying his assumed right, 4 Iowa, 56; amendments by filing counter-claim, *Flanders v. Hovey*, June, 1859; voluntary dismissal of suit at any time before trial, 1 Iowa, 421; *ibid.*, 106; 6 *ibid.*, 34; 8 *ibid.*, 459; proper judgment is nonsuit where no evidence is offered, 8 Iowa, 459; power of court to dismiss suit as a penalty for disobedience of order, 2 Iowa, 535; when too late to dismiss, 1 G., 134; for want of evidence, 2 G., 205-120; 1 G., 494-259; [no involuntary nonsuit or dismissal under Code of Civil Practice, except as in sections 3127 and 3128.] involuntary nonsuit, 6 Iowa, 476; 6 *ibid.*, 34; nonsuit, no bar, 1 G., 494; 1 G., 314; 1 *ibid.*, 259; when a joint co-defendant must plead, if he would avail himself of the non-joinder of his co-defendant, 2 G., 161; 3 *ibid.*, 228; right to withdraw claim, *Campbell & Bros. v. Ayres*, June, 1859, and 1 Iowa, 568; 5 *ibid.*, 438; an issue of fact not triable on a motion, 3 Iowa, 463; order allowing substitution of copies, 5 Iowa, 488; sue in name used by the defendant, M., 105; 1 G., 427; a plea of *nil tiel* corporation, 1 G., 447-463; after plea of former suit pending its dismissal, 6 Iowa, 507-509; omission to set out proper name, assailed by plea in abatement, 1 G., 427; cause of action, not mature yet, 6 Iowa, 350; incumbent of an office in issue on plea of abatement has the burden of proof, 4 G., 92; non-joinder on joint contract and demurrer, *Blake v. Burley*, December Term, 1859, and 4 G., 252; in slander, non-joinder of husband, how taken advantage of, 4 Iowa, 324; effects of sustaining or overruling plea in abatement, 6 Iowa, 507-509; 4 *ibid.*, 56; 6 *ibid.*, 70; 4 G., 294; *Allen v. Newberry*, and *Terry v. Page & Startzman*, both June Term, 1859; duty of officer to file papers, and may be done *nunc pro tunc*, 2 Iowa, 38; though the action of malicious prosecution has no technical existence, yet a proceeding therefor is governed by the principles which obtain in such action, 2 Iowa, 393; what the plaintiff must prove in action for malicious prosecution, 3 G., 539; 2 Iowa, 407; 5 Iowa, 277; the defense of usury may be made against a *bona fide* vendee of the note as the contract is made illegal by the penalty, 4 Iowa, 494; when a party is liable to pay property, he is not liable to an action until demanded, 4 Iowa, 591; the burden of showing that an indorsee is *bona fide*, holden for value, is not thrown on him without pleading his knowledge of its infirmities, 5 Iowa, 58; right of him who illegally vends liquors, to replevin to recover them, 6 Iowa, 410; replevin by party claiming liquors taken by warrant for violation of law, 5 Iowa, 438; in action for damages for the taking and destruction of liquor, what plaintiff must prove, 5 Iowa, 308; in action for value, what is not a good defense, 6 Iowa, 410; see also what is not a good defense in a carrier for not safely carrying liquors, 4 Iowa, 430; a rule of court can only be abolished by as solemn an act as that by which it was made, 5 Iowa, 471; assumpsit, M., 59; 3 G., 599; 2 Iowa, 463; forcible entry and detainer, M., 111; a motion to dismiss for want of jurisdiction, when to be sworn to, *Shellenberger, et al. v. Ward, et al.*, June Term, 1859; going to trial on merits waives the plea in abatement, M., 438; 1 G., 165-447-463; see also M., 156; plea in abatement to be verified under chap. 1; Reprint, page 47, sec. 1, 1 G., 165; court may discharge and make another next friend, *Thurston v. Cavenor*, June Term, 1859; action of account is obsolete, M., 240; what constitutes a good plea of accord and satisfaction, 1 G., 134; 4 Iowa, 219; 2 G.,

533; 4 G., 544; 4 G., 309; amendments, sections on, to have a liberal construction, 1 Iowa, 296-482-128; 3 *ibid.*, 325; 2 *ibid.*, 411; 4 *ibid.*, 56; 6 *ibid.*, 56-70-538; 4 G., 389; 7 *ibid.*, 423; swearing to amendments, 1 Iowa, 449; 4 G., 113; remedy where a valueless note is given for price, *Campbell & Bro's. v. 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## CHAPTER 123.\*

[Code—Chapter 105.]

### TRIAL AND ITS INCIDENTS.

How issues arise and what they are.

SEC. 2993. Issues arise in the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds: 1st, of law; 2d, of fact.

What an issue of fact.

SEC. 2994. An issue of fact arises, 1. Upon a material allegation of fact in the petition denied by the answer. 2. Upon a material allegation of fact in a set-off, counter-claim, or cross-demand, presented in the answer and denied by the reply. 3. Upon allegations of fact being new matter, in the answer or reply, which shall be considered as controverted by the opposite party without further pleading.

The plaintiff in his complaint, said the defendant owed him \$600, for a note. The defendant, in his answer, did not deny it, nor say anything about it; but said the plaintiff owed him \$40.00, for goods sold. The plaintiff made no reply. *Held*, that there was no issue to be tried. *Pardee v. Schenck*, 11 How., 500.

What one of law.

SEC. 2995. An issue of law arises upon a demurrer to the petition, answer, or reply, or to some part of either, or upon any allegation of

\* This chapter also nearly follows the corresponding chapter as used in the new system in those states where the same obtains. Some sections have been borrowed from the English acts of 1852 and 1854 and the whole has been expanded into larger detail. Two modes of equitable trial are not used anywhere under the new system. In Kentucky a case by equitable proceedings is tried by the method called herein the 1st, which is held to be the proper chancery mode, while in all the other states of the new system, all chancery and all law cases are tried by the mode herein called 2d.



fact in a pleading by the one party, the truth of which is neither controverted by the other party nor by the law for him.

SEC. 2996. Issues both of law and fact may arise upon different parts of the pleadings in the same action. In such cases the issues of law must be first tried; but by going to trial on an issue of fact without objection, a party will be deemed to have waived his demurrer. Of law to be tried first or waived.

SEC. 2997. A trial is a judicial examination of the issues in an action, whether they be issues of law or of fact. Trial defined.

SEC. 2998. Issues of law must be tried by the court, unless referred as provided in section 3089. An issue of fact in an action by ordinary proceedings, must be tried by a jury, unless a jury trial shall be waived, as provided in section 3087, or a reference be ordered, as provided in section 3090. How they are to be tried.

#### *How Equitable Issues Tried.*

SEC. 2999. Equitable issues may be tried according to two distinct methods, called first and second methods of equitable trials, and these methods shall differ one from the other in the following particulars, and none others: \* Equitable issues, how tried.

1. As to the form of evidence. In all cases tried according to the first method, all the evidence shall be in writing, while in those cases tried by the second method, the evidence shall be as in ordinary actions.

2. As to who may determine the facts therein. In a trial by the first method, the issues shall be tried by the court, who may, however, to inform his conscience, order the whole issue, or any part thereof, or any specific question of fact involved therein, to be tried by a jury, or may refer the same, and may in either case accept or reject the finding of the jury or referee, and may, with or without a statement of any finding of facts, render such judgment as he considers equitable. While in a trial by the second method, either party shall be entitled to have the whole issue or any part thereof, or any specific question of fact involved therein, tried by a jury, under the instructions of the court, as in a case by ordinary proceedings, or to have the same tried by the court acting as a jury, and finding in writing the facts, which finding of facts in either case shall be of ultimate facts and not of evidence of such facts, and shall be stated on the record as a special verdict, and the judgment of the court shall be the legal conclusions based upon and supported by the facts so found as herein contemplated.

3. As to what is triable on appeal. In an appeal taken on a case tried in the first method, all the evidence shall go to the supreme court, which shall try the case on both the law and facts as apparent of record. While in cases tried by the second method, no evidence shall, on appeal, go to the supreme court, except such as may be necessary to explain and apply any bill of exceptions, and such court shall try only the legal errors thereof, duly presented, as in a case by ordinary proceedings, including the sufficiency of the facts stated on the record, as the basis of the judgment to warrant the same.

SEC. 3000. The first method shall obtain in all cases, except, 1. When the first method shall obtain. In divorce cases. 2. In foreclosure of tax-title cases, and of mortgages.

\* This section, we have said, under the discussion of the principles of law and equity, is a compromise. A concession to what we believe to be not only abstractly best, but concretely the most practicable. We think that the method here called the *second*, and which is the only method of chancery trial in New York, Missouri, Ohio, Wisconsin, Minnesota, Indiana, California, and, in all the territories, is the only method sustained by sound reason. *Report on Civil Code.*

3. In default cases. 4. In cases where all the parties thereto consent to try by the second method, in which cases the second method shall obtain.

Consent, how expressed.

SEC. 3001. The consent in the last section contemplated, must be expressed in open court, and entered of record, or must be in writing and signed by the parties or the attorney of the parties, and filed in the cause.

How one may early indicate his consent.

SEC. 3002. The plaintiff in his petition, or the defendant in his answer, may state his consent to try the case by the second method, and if the other party, within ten days thereafter, file his consent thereto in the clerk's office, the cause shall be so tried.

May consent at any time.

SEC. 3003. Or if all the parties at any time before trial enter into such consent, the cause shall be so tried.

#### *Precedence of Causes.*

Order of trial.

SEC. 3004. A civil cause shall not be tried save by consent of the bar, in any other order than that in which it stands upon the docket.

Clerk to keep calendar.

SEC. 3005. The clerk shall keep a calendar of all the causes pending in his court, arranging in one part thereof, criminal causes, in the order of their commencement; in another part thereof, ordinary actions, in the same order; and in another, equitable actions, in the same order, and shall enter the causes thereon as soon as the same are commenced, by the filing of the petition or transcript therein, and shall, under the direction of the court or judge, apportion the same to as many days of the term, as shall be thought necessary, and shall on the order of any party, in any cause, issue subpoenas for witnesses returnable on the — day on which such cause is set for trial, and the clerk shall furnish at such term, the court and the bar, each, with a copy of such calendar.

Criminal causes first.

SEC. 3006. The criminal causes shall first be called in their order, and disposed of by trial, or continuance, in such order, unless the court for good cause shall direct otherwise, and after the civil calendar is entered upon, no criminal cause shall be allowed to intervene. But the court shall not protract the trial of the civil causes beyond a day of the term after which all defendants in criminal causes who desire to be tried at such term, may be so tried, during which re-entry upon the criminal calendar, the causes shall be tried, or continued, in their order.

Trial at first term.

SEC. 3007. Except when otherwise provided, causes shall be tried at the first term after due, legal and timely service has been made, unless reasonable cause for continuance be shown.

#### *Continuance.*

When time is asked to apply for continuance.

SEC. 3008. When time is asked for making application for a continuance, the cause shall not lose its place on the calendar, or it may be continued at the option of the other party, and at the cost of the party applying therefor; for which cost judgment may be at once entered by the clerk, unless the contrary be agreed between the parties.

No continuance to be got if in fault.

SEC. 3009. A continuance shall not be granted for any cause growing out of the fault or negligence of the party applying therefor; subject to this rule, it may be allowed for any cause which satisfies the court that substantial justice will thereby be more nearly obtained.

Continuance for want of evidence.

SEC. 3010. Motions for continuance on account of the absence of evidence, must be founded on the affidavit of the party, his agent, or attorney, stating facts as distinguished from legal conclusions which show the materiality of the evidence sought to be obtained, and showing that

efforts which constitute due diligence have been used to obtain its presence.

Due diligence must have been used to obtain absent testimony on account of which a continuance is asked, and the court may consider, in determining the question, what appears in the record of the cause as well as in the affidavit. *Deming v. Patterson*, 10 Ind. R., 251. New trials are rarely granted to enable the defendant to obtain testimony to impeach a witness. *Fleming v. The State*, 11 Ind. R., 234. A continuance might be.

SEC. 3011. If such motion be on account of the absence of a witness, the affidavit so sworn to, as in the last section, must state, 1. The name and residence of such witness, or if that be not known, a sufficient reason why not known, and also, in either case facts showing reasonable grounds of belief that his attendance or testimony will be procured at the next term. 2. It must also state efforts constituting due diligence which have been used to obtain such witness or his testimony. 3. It must also state what particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove, and that the affiant believes them to be true, and that he knows of no other witness by whom such facts can be fully proved. For want of witness.

SEC. 3012. If the affidavit does not contain a sufficient statement of the facts herein required, the court shall overrule the same, as insufficient in statement of facts. If affidavit bad.

SEC. 3013. If on the contrary, the court finds the statement sufficient, it shall so determine, and the cause shall be continued unless the opposite party will admit that the witness, if present, would swear to the facts thus stated, in which event the cause shall not be continued, but the party moving therefor shall read as the evidence of such witness, the facts by the court held to be sufficiently stated. If sufficient the cause continued, else an admission.

SEC. 3014. The motion must be filed on the second day of the term, if it is then certain that it will have to be made before the trial, and as soon thereafter as it becomes certain that it will so need to be made, and shall not be allowed to be made when the cause is called for trial, except for cause which could not, by reasonable diligence, have been before that time discovered, and if made after the second day of the term, the affidavit must state facts constituting an excuse for the delay in making it. If time is taken when the case is called to make such motion, the motion shall be made and determined as soon as the court opens after the next ordinary adjournment. When the motion must be filed.

SEC. 3015. The application shall not be amended but once, unless by permission, and to supply a clerical error. Amendable once.

SEC. 3016. To such motion, both as original and as amended, the adverse party may at once, or within such reasonable time as the court shall allow, file written objections stating wherein he claims that the same is insufficient, and on such motion and objections no argument shall be heard unless the court desire it. Written objections.

SEC. 3017. Such motion and objections shall be a part of the record, and error in refusing a continuance, or in compelling an election, may be reviewed. Motion and objections part of record.

SEC. 3018. No copy need be served of a motion for continuance, or of objections thereto, but a notice of such motion shall be entered on the notice book. Notice of on book.

SEC. 3019. Every continuance granted upon the application of either party, shall be at the costs of such party, unless otherwise ordered by the court. At whose costs.

May agree to continue.

SEC. 3020. The court shall grant continuances whenever the parties agree thereto, and provide as to costs as may be stipulated.

Marriage no ground for continuance.

SEC. 3021. The marriage of a party is no sufficient ground, of itself, for a continuance.

Case remains for all else but trial.

SEC. 3022. A case continued remains for all purposes except a trial on the facts.

One of several may continue.

SEC. 3023. Where the defenses are distinct, any one of several defendants may continue as to himself.

DECISIONS UNDER THE PRIOR PRACTICE. Courts' right to take up causes out of their order, *Mann v. Miller*, Dec. 1859; [but see section 3006 hereof.] Causes to be tried in the order of their commencement, 2 Iowa, 565; [see sections 3004 and 3006;] good cause for continuance must be shown, 6 Iowa, 496; the extent of discretion, 2 Iowa, 565; [see section 3015,] 7 Iowa, 86; *Thurston v. Cavenor*, June, 1859; [see sections 3010 and 3011;] own neglect or that of attorney will not absolutely entitle to continuance, 2 G., 86; 4 Iowa, 146; facts as distinguished from legal conclusions to be stated, 6 Iowa, 498; 8 Iowa, 420; 7 Iowa, 86; the affidavit of facts may be read, 7 Iowa, 484; 8 Iowa, 420; [see section 3113,] insufficient affidavit, 4 Iowa, 551, 355; *Price & James v. Arbuckle*, June, 1859; *Dwyee v. Walker*, 1859; "fully prove," 4 Iowa, 241; can not continue for want of defendant, if you have called on him for sworn answer, and the same is made, 6 Iowa, 538; when a suit in chancery is pending, the law case may be continued till the chancery one is disposed of, 2 Iowa, 565, [see section 2618;] affidavits for a continuance should be construed strictly, and should state the facts relied on as constituting due diligence for the decision of the court thereon, and to aver the conclusion instead of the facts is bad, 4 Iowa, 146; 7 *ibid.*, 86, and *Thurston v. Cavenor*, June, 1859; an application for continuance clearly within the law should be granted, and the refusal is reviewable; and one may continue on the ground that no other witness can "as" fully prove as the absent one, and can not be compelled to rely on one who can fully prove, &c., (*Stockton dissenting*,) 4 Iowa, 241; an affidavit for continuance should show diligence or excuse its want; may be made by the attorney when it shows a good reason for not being made by the party, and an amendment thereof may be refused and should never be allowed, save with great caution, or for causes subsequently arising, and action on it will not be reviewed, but in a case of palpable injustice, 4 Iowa, 357; [see section 3115;] an affidavit for continuance must show diligence, and if a witness is unwell, an excuse must be shown for not having taken his deposition, 4 Iowa, 552; application for its appearance, 4 G., 439; good cause—diligence, 4 Iowa, 149; "fully proved,"—reviewable—right to, 4 Iowa, 241; affidavit by whom made and what show, *ibid.*, 355; discretion, 2 Iowa, 565; names, residences, and facts expected, 6 Iowa, 498; particularity of statement, 7 Iowa, 87; and see 1 Iowa, 515; presumption as to exercise of the discretion of refusal, 2 Iowa, 574.

#### *Separate Trial.*

Separate trial.

SEC. 3024. A separate trial between the plaintiff and any or all of several defendants, may be allowed by the court, whenever, in its opinion, justice will be thereby promoted.

Same as to issue.

SEC. 3025. Where there are several causes of action united in a petition, or where in any controversy there are several issues, and the court shall be of opinion that all or any of them should be tried separately by the court or jury, it may direct such separate trial, and such separate trial may be had at the same, or at different terms of the court, as circumstances in the discretion of the court may require.

#### *Selection of Jury.*

Jurors selected.

SEC. 3026. (1773.) When a jury trial is demanded, the clerk shall select twelve jurors by lot, from the regular panel.

SEC. 3027. (2972.) A challenge is an objection made to the trial jurors, and is of two kinds: Challenge.

1. To the panel:
2. To an individual juror.

SEC. 3028. Where there are several parties, plaintiffs or defendants, and no separate trial is allowed, they are not allowed to sever their challenges, but must join in them. No severance in challenges.

SEC. 3029. (2974.) A challenge to the panel can be founded only on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury. Challenge to panel.

SEC. 3030. (2975.) A challenge to the panel must be taken before a juror is sworn, and must be in writing, specifying plainly and distinctly the facts constituting the ground of challenge. When to be taken.

SEC. 3031. (2976.) A challenge to the panel may be taken by either party, and upon the trial thereof, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge. Proof on the trial thereof.

SEC. 3032. If the facts of the challenge be allowed by the court, the jury must be discharged, so far as the trial in question is concerned; if it be disallowed, the court shall direct the jury to be impaneled. Challenge allowed.

SEC. 3033. (2978.) A challenge to an individual juror is either peremptory or for cause. To the person.

SEC. 3034. (2979.) It must be taken when the juror appears and before he is sworn, but the court may, for good cause, permit it to be taken after the juror is sworn, and before the jury is completed. When made.

SEC. 3035. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him. Peremptory.

SEC. 3036. Each party shall have the right to challenge peremptorily, five jurors, and no more, and the plaintiff first, and afterwards the defendant, shall complete his challenges for cause, and shall then, in turn, in the same order, exercise the right of peremptory challenge. How many challenges.

SEC. 3037. After each challenge, the vacancy shall, if required, be filled before further challenges are made, and any new juror thus introduced, may be challenged for cause, as well as peremptorily. A challenge for cause is an objection to a particular juror, and is either— Vacancy to be filled.

1. General, that the juror is disqualified from serving in any case; or

2. Particular, that he is disqualified in the case on trial.

SEC. 3038. General causes of challenge are:

1. A conviction for felony. General causes of challenge.

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

3. Inability to understand the English language, unsoundness of mind, or such defects in the faculties of the mind or the organs of the body, as render him incapable of performing the duties of a juror.

SEC. 3039. Particular causes of challenge are of two kinds:

1. For such a bias as, when the existence of the fact is ascertained, in judgment of law disqualifies the juror, and which is known in this chapter as implied bias. Particular causes.

2. For the existence of a state of mind on the part of the juror in reference to the case, which, in the exercise of a sound discretion, leads to the inference that he will not act with entire impartiality, and which is actual bias.

- For implied bias. SEC. 3040. A challenge for implied bias may be taken for all or any of the following causes, and for no other :
1. Consanguinity or affinity within the ninth degree, to the adverse party.
  2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family, or in the employment of the adverse party.
  3. Being a party adverse to the challenging party in a civil action, or having complained against, or been accused by him in a criminal prosecution.
  4. Having sat already upon the trial of the same issues.
  5. Having served as a grand juror, or a petit juror, in a criminal case based upon the same transaction.
  6. Having formed or expressed an unqualified opinion or belief as regards the liability of the adverse party, or on the merits of the controversy.
- Exemption. SEC. 3041. (2987.) An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.
- Trial of juror. SEC. 3042. (2988.) Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge, and must answer every question pertinent to the inquiry thereon.
- Court is trior. SEC. 3043. (2990.) In all challenges the court shall determine the law and the fact, and must either allow or disallow the challenge.
- Talesmen. SEC. 3044. When the requisite number of jurors can not otherwise be obtained, the sheriff shall select talesmen to supply the deficiency, from the body of the county.
- Majority verdict. SEC. 3045. The parties may, at any time, either before the jury is sworn, or after, agree to take the verdict of the majority, which agreement being stated to the court and stated on the record to have been made, shall bind the parties, and in such case a verdict signed by any seven or more and duly rendered, when read and not disapproved by said majority, shall, in every particular, be as binding as if made by a full jury ; or when both parties require it a struck jury may be ordered ; whereupon eighteen jurors shall be called into the box, and the plaintiff first and then the defendant, shall strike out one juror in turn until each has struck six, and the remaining six shall try the cause.
- Struck jury.

DECISIONS UNDER THE PRIOR PRACTICE. Where there is a trial by the court and a silent record, trial by jury will be presumed waived, 3 G., 219 ; no challenge to panel in a criminal case, 1 Iowa, 141, 226 ; jurors who have passed on the same question in a criminal form, are incompetent, 1 G., 534 ; jury must be sworn to try the very issue, and re-sworn if that be changed, 4 G., 32 ; duty of examining juror, 3 Iowa, 191 ; right of challenge till sworn, 3 G., 217 ; sec. 1777 is Directory, 1 Iowa, 226 ; meaning and extent of sec. 1778, 4 Iowa, 283.

#### *Order During Trial.*

- Order during trial. SEC. 3046. When the jury has been sworn, the trial shall proceed in the following order :
1. The party on whom rests the burden of proof, may briefly state his claim, and the evidence by which he expects to sustain it.
  2. The other party may then briefly state his defense, and the evidence he expects to offer in support of it.
  3. The party on whom rests the burthen of proof in the whole action, must first produce his evidence ; the adverse party must then produce his evidence.

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

5. But one counsel on each side shall examine the same witness, and upon interlocutory questions, the party moving the court or objecting to testimony, shall be heard first; the respondent may then reply by one counsel, and the mover rejoin, confining his remarks to the points first stated, and a pertinent answer to respondent's argument. Debate on the question shall then be closed, unless the court request further argument.

Evidence offered in support of immaterial issues may be rejected on the trial, although not objected to by the other party. *Corning v. Corning*, 2 Seld., 97; *Nordyke v. Shearon*, 12 Ind. Rep.

SEC. 3047. The parties may then either submit or argue the case to the jury. In the argument the party having the burthen of the issue, shall have the opening and closing, but shall disclose in the opening all the points relied on in the cause; and if in the close, he should refer to any new material point or fact, not relied upon in the opening, the adverse party shall have the right of replying thereto, which reply shall close the argument in the case. Argument.

SEC. 3048. If the party holding the affirmative waive the opening, he shall be limited in the close, simply, to a reply to his adversary's argument, otherwise the other party shall have the concluding argument. Opening and closing.

SEC. 3049. Every plaintiff or defendant shall be entitled to appear by one attorney, and if there be but one plaintiff or defendant, he may appear by two, and where there are several defendants having the same or separate defenses, and appearing by the same or different attorneys, the court shall before argument, arrange their order. Number of counsel.

SEC. 3050. The court may restrict the time of any attorney in any argument to itself, but shall not do so in any case before a jury. Time of argument.

DECISIONS UNDER THE PRIOR PRACTICE. A defendant claiming damages by set-off for wrongful attachment, has the burden of proof, 8 Iowa, 163; so in case of note given for land where deduction is to be made for its not holding out, 3 G., 577; so of partner, seeking to avoid partnership note, 2 G., 368; see case of malicious prosecution, 2 Iowa, 393; of resulting trust, 1 Iowa, 423; he who would lose, if no proof was offered, has right to begin, 8 Iowa, 163; but mistake of court in this not reviewable, 8 Iowa, 334; in cases of negligence of the defendant the plaintiff has the burden of proof, and must show diligence in himself, 6 Iowa, 443, 451; 7 Iowa, 488; and must make a *prima facie* case against an officer, 6 Iowa, 172; where plaintiff charges criminal neglect of duty he must prove it, 6 Iowa, 172; issue should be made up before the jury sworn, 4 G., 32; opening statement does not define right of proof, 1 G., 401; jury trial on a statement of facts agreed to, 2 G., 443; the ground of the objection that a question is leading, should be stated, *Miller, Horner & Co. v. Mabin*, Dec., 1859; [see section 3107;] *res adjudicata*—identity of parties, 4 Iowa, 246; on merits, *ibid.*, 292; pleader of former judgment should produce it with his pleading, 6 Iowa, 339; see 4 Iowa, 199; identity of interest of parties, 1 Iowa, 124; M., 91; proved under the general issue by Reprint, 1 G., 421; [no longer any general issue, see section 2872, nor does a mere denial allow any matter to be given in evidence thereunder, which goes only to contradict some legal and not some fact proposition of the petition, 2944;] a failure in law may leave a right in equity, 2 Iowa, 1; matters growing out of an unsettled partnership transaction between the defendant, plaintiff and another, can not be plead by set-off, 5 Iowa, 376; [but see section 2880;] set-off to be pleaded separately from defense, 4 Iowa, 430; 5 *ibid.*, 460; [see sections 2884 and 2903;] a mere right to a reduction in consequence of defects is no matter of set-off, 2 G., 257; [see section 2889;] set-off based on independent demand, 2 G., 257; as to foreign judgments, see 7 Iowa, 86; 3 *ibid.*, 474; 1 *ibid.*, 1, 143; 2 G., 492; 3 G., 170; *Grason et al. v. Davis*, Dec., 1859; 2 Iowa, 535; an injunction in another state against a suit is a bar when plead here as defense to same claim, *Milne v. Van Buskirk*, Dec., 1859.

*Instructions.*

- Instructions.** SEC. 3051. When the argument is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court. Instructions asked shall be stated in writing by the party, if any one of the other party, or if the court require it. The party on whom is the burden of proof as aforesaid, shall first demand his instructions, then the other party, and the first party may then ask such alone, as go in reply.
- How written.** SEC. 3052. There shall be but two instructions at most, written on one sheet of paper, and the paper shall be written only on one side thereof, and the writer shall leave a margin on the left hand side thereof of about two inches, and each instruction demanded shall distinctly and intelligibly refer to the cause of action to which it is intended to be applied, if there be several, or if one cause of action be divisible into different parts, then to such part as it is intended to be applied.
- Modification how stated.** SEC. 3053. If the court refuse a written instruction as demanded, but give the same with a modification which the court may do, such modification shall not be by interlineation or erasure, but shall be well defined and shall follow some such characterizing words as "changed thus," which words shall themselves indicate that the same was refused as demanded.
- Give or refuse and read instructions.** SEC. 3054. The court must read over all the instructions which it intends to give and none others to the jury, and must announce them as given, and shall announce as refused without reading to the jury, all those which are refused, and must write the words "given" or "refused" as the case may be, on the margin of each instruction.
- Need not state reasons of objection to rulings.** SEC. 3055. If the giving or refusal be excepted to, the same may be without any stated reason therefor, and all instructions demanded must be filed, and shall become part of the record.
- May abandon a ruling.** SEC. 3056. Any decision or instruction of the court in favor of either party, may be abandoned by such party at any time before the case is committed to the jury, unless testimony calculated to influence the minds of the jury has been afterwards admitted or rejected, or when the opposite party can not be placed in the same position which he would have occupied had such decision or instruction not been given.
- Charge in writing**  
**And in paragraphs.** SEC. 3057. After argument, the court may also, of its own motion, charge the jury, which charge shall be exclusively in writing.  
SEC. 3058. The charge shall be expressed in paragraphs, and numbered consecutively.
- To be objected to.** SEC. 3059. Every part or paragraph of the charge shall be deemed approved, unless excepted to before the retiring of the jury; if so excepted to, that fact and by whom excepted to, whether by plaintiff or defendant, shall be stated by the court, on the margin, against such instruction or part of the charge.
- No oral explanation.** SEC. 3060. The court shall not make any oral explanation of any instruction or charge.

**DECISIONS UNDER THE PRIOR PRACTICE.** A party may insist on having the instructions read to the jury, 4 Iowa, 471; a modification of a legal instruction which does not change its legal significance, is unobjectionable, 5 Iowa, 280; the charge must not leave the jury to determine from the pleadings what the issue is, 5 Iowa, 274; after verdict it is too late to object that the instructions were not read to jury; either party may have them so read, 4 Iowa, 43; an instruction working no prejudice is no sufficient error, 4 Iowa, 44; the facts surrounding the instructions must be shown, else the supreme court can not determine their legality, 4 Iowa, 241; an



instruction may be so interwoven with fact as to make it objectionable, 5 Iowa, 400; the instructions must be clearly identified in order to have a review of their being given or refused, 5 Iowa, 475; objections come too late if not made to the giving or refusing of instructions at the time it is done, 4 Iowa, 504; where the instructions by mutual contradiction and false assumption confuse the jury, and make it impossible for them to know the exact question to be determined, there is error in refusing an instruction which would make it clear, although its substance is given in another form, 4 Iowa, 558; may be so confused as to mislead and be error, 2 Iowa, 463; substantial correctness enough; if not explicit enough, let party ask other, 3 G., 161; where special instructions asked have been included in more general ones given, not error to refuse them, 2 G., 427; but see 3 G., 161; legal instructions may be refused and given modified, *ibid.*, 449, but see 4 G., 426; an instruction on legal effect is not on facts, *ibid.*, 499 and 518; relevancy must be shown, or error, 3 Iowa, 463; 2 Iowa, 581; case where some instructions lost, 3 Iowa, 274; refusing an abstract point which would not prejudice, 2 *ibid.*, 30; the ground of objection to evidence must be shown, and no other relied on, 2 *ibid.*, 44; irrelevant instructions which might prejudice, *ibid.*, 463; facts charged, 4 G., 437; must be signed, 1 Iowa, 121; nor be irrelevant, *ibid.*, 539; 3 G., 111; *ibid.*, 509; 4 G., 273; to refuse a good one and give its substance in a different form is error, *ibid.*, 426; must prejudice appellant, *ibid.*, 544; error must be shown affirmatively, 3 Iowa, 344; 1 Iowa, 94, 98, 100; the supreme court will continue a case to allow the district court to supply a lost paper, 1 G., 544; instructions may be modified, 6 Iowa, 191, 443; 3 Iowa, 487; 2 G., 427, 449; need be given but once, 3 Iowa, 502; 8 Iowa, 122; should be certain, 2 Iowa, 481; 4 G., 542, 543; may be refused rather than modified into exactness, 4 G., 542; 8 Iowa, 207; if too general, that fact will be held waived, if more specificness is not requested, 3 Iowa, 58; 4 Iowa, 508; 3 G., 161; should be confined to law, 1 G., 401, 275; should not assume anything, *Robinson v. Chapline*, June, 1859; 3 Iowa, 257; 4 G., 159; 8 Iowa, 122; 4 G., 437; should be relevant, 8 Iowa, 116; a charge may recite facts, as left to the jury to be found, 3 G., 531; and may state the legal effect of facts, 2 G., 499, 518; an instruction or charge given is presumed correct, and its inapplicability must be shown; if refused, such refusal is presumed right, and should be shown by the objector to be wrong, 6 Iowa, 204; 5 Iowa, 271; 3 Iowa, 463; 2 Iowa, 580; 1 Iowa, 456; 4 G., 539; 1 G., 235; abstract propositions of law and inapplicable ones may be refused, 3 Iowa, 337; 2 Iowa, 580; 4 G., 273; 3 G., 111, 280, 599; objections to either the modification, or giving or refusing of them, must be made at the time, so as to suggest to the court the error, 3 Iowa, 213, 337; 6 Iowa, 534; 4 *ibid.*, 469; 1 *ibid.*, 121; 7 *ibid.*, 236, 255, 409; they must be duly produced with proper identification, 2 Iowa, 447, 463, 580; 1 Iowa, 226, 117, 121, 212; as to the particularity of objections to instructions, see 2 Iowa, 463; 6 *ibid.*, 191; 1 *ibid.*, 212; for the case of an instruction which was lost so that all the law given can not be seen by the supreme court, see 3 Iowa, 274; if a proposition of the charge most favorably construed as a general proposition, be *prima facie* law, and if the objector insist, that under the facts of the case the proposition should have been modified so as to be exactly true, then the objector must ask such modification before he can in the supreme court object to such generalness, 4 Iowa, 508.

#### *Rules regarding Jury.*

SEC. 3061. Whenever in the opinion of the court, it is proper for Jury have view. the jury to have a view of the real property which is the subject of controversy, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place which shall be shown to them by some person appointed by the court for that purpose; while the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial.

SEC. 3062. When the case is finally submitted to the jury, they may Jury in retirement. decide in court or retire for deliberation. If they retire, they shall be kept together in some convenient place without food and without drink, except water, under charge of an officer, until they agree upon a verdict, or are discharged by the court. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court, and he shall not before their verdict is ren-

- dèred communicate to any person the state of their deliberations, or the verdict agreed upon.
- Court to advise jury.** SEC. 3063. If the jury are permitted to separate, either during the trial or after the case is submitted to them, they must be advised by the court, that it is the duty of each one of them not to converse with any other of them, or with any person, nor to suffer himself to be addressed by any person on any subject of the trial, and that during the trial it is the duty of each one of them to avoid, as far as possible, forming any opinion thereon until the cause is finally submitted to them.
- Juror sick.** SEC. 3064. If, after the empanneling of the jury and before verdict, a juror becomes sick so as to be unable to perform his duty, he may be discharged. In such case, unless otherwise arranged by the consent of the parties, the vacancy thus made, must be filled, and the trial commence anew, or the court may, in its discretion, order the jury to be discharged.
- Discharged.** SEC. 3065. The jury may be discharged by the court on account of any accident or calamity requiring their discharge, or by the consent of both parties, or when on an amendment a continuance is ordered, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.
- Case tried same as next term.** SEC. 3066. In all cases where the jury are discharged, during the trial or after the cause is submitted to them, it may be tried again immediately, or at a future time, as the court may then direct.
- Adjournment of cause.** SEC. 3067. The court may also, at any time after having entered upon the trial of any cause, where it may deem it right for the purposes of justice, order an adjournment for such time, within the term and subject to such terms and conditions as to costs, and otherwise, as it may think just.\*
- What jury take with them.** SEC. 3068. Upon retiring for deliberation, the jury may take with them all books of accounts, and all papers, which have been received as evidence in the cause, except depositions, which shall not be so taken, unless all the testimony is in writing, and none of the same has been ordered to be struck out.
- Court open till verdict in.** SEC. 3069. (1784.) When the jury is absent, the court may adjourn from time to time, in respect to other business, but is to be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged.
- Correct mistake.** SEC. 3070. (1778.) At any time before the cause is finally submitted to the court or jury, either party may be permitted by the court to give further testimony to correct an evident oversight or mistake, but terms may be imposed upon the party obtaining the privilege. [See *Kerby v. Cannon*, 9 Ind., 371.]
- Jury may come in to inform themselves.** SEC. 3071. After the jury have retired for deliberation, if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, which he shall do, when the information required shall be given, in the presence of, or after notice to the parties or their counsel.
- How given.** SEC. 3072. Such information shall be in writing and shall be held approved, unless it be excepted to in the same way as the charge, and no discussion thereon shall be allowed to either party.
- Verdict.** SEC. 3073. The verdict must be written and signed by a foreman chosen by the jury itself, and when agreed the jury must be conducted

\* This is taken from the English act of 1852, and the remarks upon it in the late books of practice, based on that act, go far in its commendation. *Report on Civil Code*, p. 324.

into court, their names called, and the verdict rendered by him, and read by the clerk to the jury and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again, but if no disagreement is expressed and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case.

SEC. 3074. When the verdict is announced, either party may re-<sup>Jury polled.</sup>quire the jury to be polled, which shall be done by the court or clerk, asking each juror if it is his verdict. If any one answer in the negative, the jury must be sent out for further deliberation.

SEC. 3075. When by consent of the parties and the court, the jury<sup>Sealed verdict.</sup> have been permitted to seal their verdict and separate before it is rendered, such sealing is equivalent to a rendition and a recording thereof in open court, nor shall such jury be polled or permitted to disagree thereto, unless such a course has been agreed upon between the parties in open court and entered on the record.

SEC. 3076. If, while the jury are kept together, either during pro-<sup>Food and lodging for jury.</sup>gress of the trial, or after their retirement for deliberation, the court order them to be provided with suitable food and lodging, they must be so provided by the sheriff, at the expense of the county.

SEC. 3077. The verdict of a jury is either general or special. A<sup>General verdict.</sup> general verdict is one in which they pronounce generally for the plaintiff or for the defendant upon all or upon any of the issues.

SEC. 3078. A special verdict is one in which the jury finds facts<sup>Special one.</sup> only; it must present the ultimate facts as established by the evidence, and not the evidence to prove them so that nothing remains to the court but to draw from them its conclusions of law.

A special verdict must state the facts proved, and not the evidence given to prove the facts, and must not leave the facts to be made out by argument and inference, *Berkhead v. Brown*, 5 Hill, 634; *Fuller v. Van Geisen*, 4 Hill, 171. A special verdict or finding of a judge in the nature of a special verdict, where trial by jury is waived, should find all the conclusions of fact, so as to leave nothing for further determination except questions of law. *Sisson v. Barnett*, 2 Com., 406. It is not necessary that a special verdict should contain facts admitted by the pleadings, such facts, together with the facts found by the jury, constitute a proper subject for consideration on appeal. *Barto v. Himrod*, 4 Seld., 483.

SEC. 3079. In all actions, the jury, in their discretion, may render a general or a special verdict, and in any case in which they render a general verdict, they may be required by the court, and must be so required, on the request of any party to the action, to find specially upon particular questions of fact to be stated to them in writing, or to find that the facts stated in the petition, answer, or reply, or in all or either of them, or in any count of either of them, or in case any count of either of them be divisible, then that any defined part thereof is true, or not true, and such special finding is to be recorded with the verdict.\*

Where several causes of action are joined in one petition, there should be a separate assessment of damages or verdict in such cause. A general verdict for the plaintiff, it seems, will not stand, if one of the causes of action is insufficient to support a judgment. *Mooney v. Kennett*, 19 Mo. Rep., 551. See also *Langsdale v. Bouton*, 12 Ind. Rep.

\* The object of this section is to secure a severance in the verdict on which may be entered a judgment, in such way as to allow one part of the judgment to be enjoyed, while an appeal may be taken on the other. See the remarks on section 3121. *Report on Civil Code*, p. 324.

Special finding prevails.

SEC. 3080. When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.

Assess amount of recovery.

SEC. 3081. When by the verdict either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of such recovery.

In replevin or detinue, what jury must find.

SEC. 3082. In actions for the recovery of specific personal property, the jury must assess the value of the property, as also the damages for taking or detention, whenever, by their verdict there will be a judgment for the recovery or return of the property, and when required so to do by either party, must find the value of each article thereof.

And if they fail to so find, they may be sent back to amend their verdict. Ind. Dig., p. 55, sec. 43; *Reed v. Thayer*, 9 Ind. R., 157.

A verdict for \$100 in damages does not authorize a judgment for the return of specific property, and in cases like this, it is obvious how necessary it is to conform to the requisitions of sections 360, [3081 Iowa.] *Stiles, J., Barrett v. Crabtree*, Mss. opin., June, 1856. *Stanton's Ky. Code.*

To authorize a jury to assess damages for property illegally taken and detained, (hogs,) there must be some evidence of the value, or some description to enable the jury to determine the value from their own knowledge. *Pharis, etc. v. Carver*, 13 B. M., 238.

Under this section the jury should fix, in their verdict, the value of each article of property found to belong to the plaintiff, and the judgment should conform to the verdict. Marshall, C. J., *Graves v. Watkins*, Mss. opin., June, 1856. *Stanton's Ky. Code.* [Yet the Ky. Code does not contain the last clause of ours.]

Verdict moulded to case presented.

SEC. 3083. When there are several defendants, the verdicts and judgments,—whether the pleadings are joint or several, shall be moulded according to the facts, and to meet the exigencies of the case.

Intention is enough.

SEC. 3084. (1790.) The verdict shall be sufficient in form if it expresses the intention of the jury.

If the jury fail in framing their verdict in accordance with the statute, and it is not corrected by them before their discharge, and it is so defective that judgment can not be rendered upon it, *venire de novo* may be awarded. Ind. Dig., 687; see *Dowell v. Richardson*, 10 Ind. R., 573.

Where the plaintiff fails to set forth a good cause of action in his petition, and the fault is not cured by the answer, a verdict for the plaintiff can not stand; a new trial should be awarded. *Fible v. Caplinger*, 13 B. M., 464.

A verdict finding for "the plaintiff the debt in the petition mentioned," held sufficiently certain under the code. *Brannin & Smith v. Foree's adm'r*, 12 B. M., 509.

If all the counts are good in an ordinary petition and one only be proved as alleged, but not as alleged in other counts, and a general verdict, it will be good. 1 State Law, 327; *Noel, etc. v. Hudson*, 13 B. M., 205.

Filed and entered.

SEC. 3085. The verdict shall, in all cases, be filed with the clerk, and entered upon the record, after having been put into form by the court, if necessary.

DECISIONS UNDER THE PRIOR PRACTICE. The court and not the jury must define the issue, 5 Iowa, 274, and 4 Iowa, 154; questions of alterations in notes are of fact and for jury, 4 Iowa, 63; if a jury find a set of facts which have not been put in issue, no judgment should be rendered on them, 5 Iowa, 483; the jury should take in retiring no papers but those containing the issue, 4 Iowa, 461; drawing lots for verdict, 7 Iowa, 90; taking the aggregate of each one's will and dividing by twelve makes a bad verdict, 7 Iowa, 81; a sealed verdict is fixed and binds each juror after it has been made and delivered, 6 Iowa, 456; and such verdict may be put into form by jury even after a separation, *Bass v. Hanson*, Dec., 1859; less than twelve jurors a fatal defect if not consented to, 6 Iowa, 161; a wrongful separation of the jury after agreeing on verdict, will not defeat a verdict, 4 Iowa, 72; misbehaviour of jury, 4 Iowa, 18, 72; 3 G., 47; view by jury, 6 Iowa,

92; jury have right to recall and question witness, &c., 1 Iowa, 205; affidavits for continuance to be kept from jury, 4 Iowa, 453; 4 Iowa, 154; issues of fact *made by the pleadings* only to be found, 3 Iowa, 263; 2 G., 231; intention is a fact to be left to the jury, 3 Iowa, 445.

*Trials by the Court.*

SEC. 3086. (1771.) Upon a decision of a demurrer, if the unsuccessful party fail to amend or plead over, the same consequences shall ensue as though a verdict had passed against the plaintiff, or the defendant had made default, as the case may be. Upon decision of demurrer.

SEC. 3087. Trial by jury may be waived by the several parties to an issue of fact in the following cases: Jury trial waived.

1. By suffering default or 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.

SEC. 3088. Upon the trial of questions of fact by the court, in an action by ordinary proceedings, it shall not be necessary for the court to state its finding, except generally for the plaintiff or defendant, unless one of the parties, before any testimony is offered, requests it, in which case its decision shall be given in writing, stating the facts found, and the legal conclusions founded thereon, separately, all of which shall be entered on the record. When court to state finding of facts

DECISIONS UNDER THE PRIOR PRACTICE. When a demurrer has been sustained to the answer, and defendant does not amend, the case stands as if judgment by default were had, and defendant can only appear to cross-examine, and can not ask for a nonsuit; in such case no judgment can be had on a note unless it be produced, 5 Iowa, 290; chancellor may refuse issue to jury and find facts himself, presumption on appeal, 2 Iowa, 500; issues how tried, 3 G., 511; *nul tiel* record for court, 3 G., 170; consent pre-unded, *ibid.*, 219; jury's province to try facts, 2 *ibid.*, 231; presumption for finding, 1 Iowa, 374; trial by court, 3 G., 511; court need not state facts in finding unless requested, 3 G., 574; the verdict of the court as a jury is to be reviewed in the same way as that of any other jury, *Byington v. Woodward*, Dec., 1859.

*Reference.\**

SEC. 3089. All or any of the issues in an action, whether of fact or of law, or both, may be referred, upon the consent of the parties, either written or oral, in court entered upon the record. Reference.

SEC. 3090. When the parties do not consent, the court may, upon the motion of either, or upon its own motion, direct a reference in either of the following cases: Same and when allowed by court.

1. When the trial of an issue of fact shall require the examination of mutual accounts, or when the account being on one side only, it shall be made to appear to the court that it is necessary that the party on the other side should be examined as a witness to prove the account, in which case the referees may be directed to hear and report upon the whole issue, or 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, or for carrying a judgment or order into effect.
3. When a question of fact, other than upon the pleadings shall arise, upon motion or otherwise, in any stage of an action.
4. When a question of fact shall arise in any action by equitable proceedings.

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\* These provisions on reference are the law of Ohio modified to our wants; something like it is a part of the new system wherever received. *Report on Civil Code*, p. 324.

Proceeding upon a reference is a waiver of all objections to the order of reference on the ground of irregularity; but not of the objection that the court had no jurisdiction to make the order. That objection may be raised at any time. *Garcie v. Sheldon*, 3 Barb., 232.

All referees to meet.

SEC. 3091. Where not otherwise declared in the order of reference, all the referees must meet to hear proofs, arguments, and to deliberate, but a decision by the majority shall be regarded as their decision.

Vacancies.

SEC. 3092. When appointed by a court, the judge thereof may fill vacancies in vacation.

They stand for the court.

SEC. 3093. The referees shall stand in the place of the court, and shall have the same power, so far as necessary, to discharge their duty.

Trial in same mode as by court.

SEC. 3094. The trial by referees shall be conducted in the same manner as a trial by the court. They have the same power to summon and enforce, by attachment, the attendance of witnesses to punish them as for a contempt for non-attendance, or refusal to be sworn, or to testify, and to administer all necessary oaths in the trial of the case, to take testimony by commission, grant continuances, to preserve order, and punish all violations thereof.

*It seems* that the rule of law which protects parties from any undue influence upon the minds of *jurors* should be substantially applied to *referees*. *Yale v. Gwinitts*, 4 How., 253. On this trial of a cause, a *referee* takes the place of a *jury* as well as of the court. His decisions upon questions of fact, like that of a jury, is, as a general rule, conclusive. If therefore, it appears that the report of a referee on questions of fact, has been, even in the slightest degree, affected by any influence exercised by the successful party, it will be set aside for irregularity. See *Yale v. Gwinitts*, 4 How. Pr. R., 253.

Report to state.

SEC. 3095. The report of the referees on the whole issue, must state the facts found, and the conclusions of law, separately, and shall stand as the finding of the court, except as otherwise provided in equitable actions tried by the first method; and judgment may be entered thereon in the same manner as if the action had been tried by the court—the report may be excepted to and reviewed in like manner.

If questions of law are raised and passed upon in the course of the trial, and the party takes proper exceptions, he can present those questions, by a *bill of exceptions*, setting forth as much of the evidence as may be necessary to present such questions. If questions of *law* and *fact*, arise during the trial, and the party desires a review upon both, he may incorporate his exceptions in his case, stating them separately from the facts. But neither a case made for the purpose of reviewing questions of fact, nor exceptions which present only questions of law, raised and passed upon during the trial, will bring up for review the *conclusions of law* or *final decisions* of the referees upon the facts found by them. For the purposes of an appeal, an exception to their *decision*, as to all other decisions upon questions of law arising upon the trial must be taken. Exceptions to all decisions made in the course of the trial, must be taken at the trial, and this would be so of the *final decision* of the referees, if it were required to be made then. There is no authority for reviewing on appeal, a decision to which no exception has been taken. On the contrary, it is plainly prohibited. Therefore, although the referees' report is made by statute a part of the *record*, the court can not review errors appearing on the *face of the record* where no exceptions have been taken. *Brewer v. Ish.*, 12 How., 481.

The finding of a referee on a question of fact where the testimony is not decisive either way, is conclusive; and his report will not be set aside unless some principle of law has been violated. *Durkee v. Mott*, 8 Barb., 423; see *Scranton v. Baxter*, 4 Sandl., 5. The report of a referee is like the verdict of a jury, and must be destitute of any evidence to support it in order to warrant the court in granting a new trial upon the facts. If there be any proof tending to show the facts in issue, it is not the duty of the court to set aside the report, though the evidence be in its judgment too slight to found a decision upon. *Woodin v. Foster*, 16 Barb., 146; see *Kennedy v. New York & Harlem R. R. Co.*, 3 Duer, 69.

SEC. 3096. When the reference is to report the facts, the report shall have the effect of a special verdict, except as is otherwise provided in equitable actions tried by the first method. Effect of report.

SEC. 3097. The referees shall sign any true bill of exceptions taken to any ruling by them made in the case whereto any party demands a bill of exceptions; and the party shall have the same rights to obtain such bill as exist in the court, and such bills shall be returned with their report. Bill of exceptions.

SEC. 3098. 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 persons free from exception, and having the qualifications of jurors, or the court may allow each party to select one, and itself select a third. Appointment of referees.

SEC. 3099. A judge of the court, when a case is pending, may, in vacation, upon the written consent of the parties, make an order of reference. In such case the order of reference shall be written in the written agreement to refer, and shall be filed with the clerk of the court, with the other papers in the case. Vacation appointment.

SEC. 3100. The referees must make an affidavit well and faithfully to hear and examine the case, and to make a just and true report therein according to the best of their understanding. The oath may be administered by any person authorized to administer an oath, and the affidavit shall be returned with the report. Affidavit of referees.

SEC. 3101. The referees shall be allowed such compensation for their services as the court may deem just, which shall be taxed as a part of the costs in the case. Fees of.

SEC. 3102. The order shall not be made until the case is at issue, as to these parties, whose rights are to be examined on the reference. The order may direct when the referee shall proceed to a hearing, and when he shall make his report; but in the absence of such direction, he shall do so on the morning of the tenth day after the day on which was made the order of reference, and shall file his report as soon as done; of the time thus fixed, or determined, the parties shall take notice, and non-attendance of either party within an hour of such time, shall be attended with like consequences as if the case were in court, which consequence shall be reported, as any other fact or finding of the referees. Not made till issue.

SEC. 3103. The referee must be called on by the court to accept or refuse the appointment, and his acceptance shall be entered of record; and he shall be under the control of the court, who may, on the motion of either party, make all proper orders with a view to his proceeding with all due dispatch, and the court or judge may, on his motion, on good cause shown, enlarge the time of making his report. Acceptance of referee.

SEC. 3104. Any one of such referees may issue and sign subpoenas, and other process, administer oaths, necessary for the discharge of their duties, and the full exercise of all their powers. Power of referee.

SEC. 3105. The formula of procedure which, in the court itself, regulates service, pleading proof, trial, and the preparation, progression, and method of each of these shall obtain before the referee, and in every incident of the proceeding before him the rights and responsibilities of parties, and of their attorneys, and of the referee, shall be the same as if the referee was the court, engaged in the same matter. Procedure of

The court will not hear a motion to postpone a trial pending before referees, on the ground of the absence of a witness. The referees must decide

such applications; and, if any errors be committed, the court will correct, on a motion to set aside their report. *Longley v. Hickman*, 1 Sand., 681. See *Green v. Brown*, 3 Barb., 118.

### Exceptions.

**Exception.** SEC. 3106. An exception is an objection taken to a decision of the court, or party acting as the court, on matter of law. The party objecting to the decision, must object at the time the decision is made, and at once present his bill of exceptions; but unless the court or adverse party object, he may have time to do so, not extending beyond the term.

**Evidence needed.** SEC. 3107. No stated form of exception is required. So much of the evidence as is necessary to explain the ruling, should be stated, and the ruling and that it was excepted to when made, unless that fact otherwise appear. If the exception is to the admission or exclusion of evidence, oral or written, the ground of the objection must be also stated, and no other shall be regarded.

A motion to strike out portions of a pleading should be put in such shape that the record which goes to the supreme court will show the objectionable portions. *State, to use, &c. v. Steinman & Lanman*, 18 Mo. Rep., 201.

Unless the bill of exceptions contains the evidence, an instruction based on such evidence will be presumed to be correct. *Bellisime v. McCoy*, 1 Mo. Rep., 227; *Samuel v. Withers & Bristol*, 9 Mo. Rep., 163; *Laurent v. Muliken*, 10 Mo. Rep., 495; *Frazer v. Yeatman, ibid.*, 501; *Walter v. Cuthcart*, 18 Mo. Rep., 256.

It is not necessary in a bill of exceptions to set out all the evidence, except where the verdict is alleged to be against evidence. If the rejection of evidence, or rejection of instructions, be complained of, it is sufficient to show the evidence offered, and that the evidence properly raised the question in the instruction. *Burge Resort v. Brook*, 10 Mo. Rep., 531; *Wallace v. Boston, ibid.*, 660; vide *State, to use, &c. v. Fulkerson*, 10 Mo. Rep., 681; *Lane v. Kingsberry*, 11 Mo. Rep., 402.

The party objecting to the decision of the court must state the objection, with so much of the testimony as is necessary to explain it, and no more. If there was other evidence introduced, bearing upon the point, it was the duty of the other party to see that it was stated on the record. But the court will presume that the statement made of the evidence upon which the decision was based, contained all that was necessary to explain the objection, and enable the court to explain the question before it. *Easley's Executors v. M. A. Easley*, 18 B. M., 94.

**Record may be made.**

SEC. 3108. When the decision objected to is entered on the record, and the grounds of the exception appear in the entry, or when any error appears of record, the exception may be taken by the party causing to be noted at the end of the decision, or in connection therewith, that he excepts.

**Incorporation by reference is enough.**

SEC. 3109. Where an instruction is marked "excepted to," such terms shall sufficiently indicate that it was excepted to at the proper time, and an exception when presented for signature, need not include therein, spread out at length, any writing filed in court, but may incorporate the same, by any unmis-takable reference thereto, and the clerk in making a transcript of the bill of exception shall write therein at length, all of such writing included therein by reference.

**Mode of obtaining signature to bill.**

SEC. 3110. When the decision is not entered on the record, or when the grounds of objection do not sufficiently appear in the record, the party excepting must reduce his exception to writing, and present it to the court for its signature. If the judge deems it true he shall sign it. If he does not deem it true, he shall at once state to the party offer-



ing it, what correction he desires to make thereto, if the party accept the same, or if he and the judge can agree upon any correction, the judge shall, having made the same, sign such exception, and it shall be filed and become part of the record. But if the judge and the party can not agree on such exception, the party shall announce the same to the judge, who shall thereupon deliver the exception back to the party. The party may then proceed to procure the signatures of two or more by-standers to the exception, and the court shall allow him a reasonable time therefor, and shall in no manner interfere with his endeavor to do so. If the party procure the signature of two by-standers, attesting that the exception is true, and that the court has refused to sign the same, the exception shall be filed by the clerk and shall become part of the record. The truth of such exception may be controverted and maintained by affidavits not exceeding five in number, and all affidavits impugning the exception shall be filed with the clerk on the morning of the first day after that on which the exception was filed, and those sustaining it on the next morning thereafter. Such affidavits shall also become part of the record, and the supreme court shall, on becoming satisfied that any exception is true, consider the same.

Where the judge who presided at the trial of the case, did not preside when the motion for a new trial was overruled, the bill of exceptions must be certified by the affidavits of persons present at the trial, and who recollect it sufficiently well to make affidavit thereto. *Simpson, J., Cambron v. Coughtry*, *Miss. opin.*, February, 1856. *Stanton's Ky. Code*.

SEC. 3111. No exception shall be regarded in the supreme court, unless the ruling has been on a material point, and the effect thereof prejudicial to the substantive rights of the party excepting.

What alone considered in supreme court.

DECISIONS UNDER PRIOR LAWS. Bill of exception, object of, 2 Iowa, 488; 4 G., 123; 4 Iowa, 358; should show error, M., 364-493; construed against the party taking it, 7 Iowa, 32; may include many points, 6 Iowa, 486; what formality, 1 G., 476; *Snell & Butterworth v. Kimmell*, June term, 1859; taken at the time, 4 Iowa, 504, 469; 3 *ibid.*, 213, 216; 1 *ibid.*, 121, 123; 4 *ibid.*, 469; 5 *ibid.*, 374; 3 *ibid.*, 337; 6 *ibid.*, 534; 7 *ibid.*, 255, 409, 236; 3 *ibid.*, 385; how to be signed, 1 Iowa, 216; if by by-standers, M., 434; 7 Iowa, 17; M., 371; when to be signed, 1 Iowa, 19, 216; M., 364; necessary in case of instructions, 1 Iowa, 326, 205; 2 *ibid.*, 447; 1 *ibid.*, 121; 2 G., 280; must state evidence, 7 Iowa, 153; 8 *ibid.*, 347; taking a bill of exceptions does not save the error of a ruling or demurrer where the failing party answers over, 4 Iowa, 589; when a state of case can be supposed which would justify the action of the court below, such case will be supposed unless it be contradicted by the record, 5 Iowa, 476; the court will hold an instruction to have been properly refused unless the contrary be shown by the record, 5 Iowa, 274; if a proposition of the charge when most favorably construed as a general proposition be *prima facie* law, and if the objector insist that under the facts of the case the proposition should have been modified so as to be exactly true, then the objector must ask such modification before he can in the supreme court object to such generalness, 4 Iowa, 508; the clerk can not state the evidence to the supreme court, 5 Iowa, 477; supreme court will not review objections not made in the court below, as to the pleadings or proof, if the record disclose the cause of action sufficiently to allow its use as a future bar, 4 Iowa, 292; a case wherein a bill of exceptions is very strongly construed against the exceptor, 5 Iowa, 283, one alleging error, must show it by his record, else all the acts of the lower court will be held right, 4 Iowa, 146; certainty of identification of an instruction, 3 Iowa, 150; no bill needed, if error appear of record without it, *ibid.*, 488; no error of justice considered unless first passed on by district court, 1 *ibid.*, 101; presumption of waiver from silence as to demurrer, 1 Iowa, 177; facts should be shown alleged as error, *ibid.*, 205; the part of the instructions objected should be shown, *ibid.*, 212; the answer of witness to an objected question should be given, *ibid.*, 216; only assigned errors considered, *ibid.*, 263; testimony should be shown such that the instruction could not be correct, *ibid.*, 456; appellant must show prejudice, *ibid.*, 471; error must be shown affirmatively, *ibid.*, 512; equitable reversal

of a case, *ibid.*, 515; bill must purport to give all the evidence, else no error will be found, 4 G., 468; a new objection will not be entertained by the supreme court, *ibid.*, 512; instruction legally correct refused, should not be so framed as to mislead, *ibid.*, 539; an objection to jurisdiction not for the first time, entertained by the supreme court, *ibid.*, 563; this court will not review the charge of the court below, when the objection to the same was first made on a motion for a new trial, 5 Iowa, 374; if the supreme court be required to pass on the testimony, on which a judgment was got, the record must contain all the testimony, and must state that such is all the testimony, and if depositions were in, they must be clearly identified, 5 Iowa, 551; the supreme court will review the finding of district court on a question of fact, when *all* the evidence is brought up, as on a motion for a new trial, 4 Iowa, 230; no bill of exceptions is needed to review the court's action on a motion, 5 Iowa, 489; affidavits may confer jurisdiction on the supreme court, to review a cause when the conduct of the inferior court has precluded any other mode, 4 Iowa, 360; where the evidence is not given the court can not determine that a motion for a new trial, on the ground that the verdict was against instructions, was illegally overruled. So also if the ground of the motion be, that the verdict is contrary to evidence, 5 Iowa, 283.

### *New Trials.*

New trial.

SEC. 3112. A new trial is a re-examination in the same court of an issue of fact, after a verdict by a jury, report of a referee, or a decision by the court. The former report, verdict, or decision, shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes affecting materially the substantial rights of such party:

Ground of.

1. Irregularity in the proceedings of the court, jury referee, or prevailing party, or any order of court or referee, or abuse of discretion, by which the 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. Excessive damages, appearing to have been given under the influence of passion or of prejudice.

5. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property.

6. That the verdict, report or decision, is not sustained by sufficient evidence, or is contrary to law.

7. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

8. Error of law occurring at the trial, excepted to by the party making the application.

A verdict and judgment obtained by a plaintiff, who shows no right to sue, can not be sustained. *Petty v. Malier*, 14 B. M., 247.

Where the plaintiff fails to set forth a good cause of action in his petition, and the fault is not cured by the answer, a verdict for the plaintiff can not stand; a new trial should be awarded. *Fible v. Caplinger*, 13 B. M., 466.

Smallness of damages.

SEC. 3113. A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained.

When to be made.

SEC. 3114. The application for a new trial must be made at the term the verdict, report or decision is rendered, and except for the cause of newly discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the

trial, shall be within three days after the verdict or decision was rendered.

SEC. 3115. The application must be made by motion upon written grounds, filed at the time of making the motion, the causes enumerated in sub-divisions two, three, and seven, of section 3112, must be sustained by affidavits showing their truth, and may be controverted by affidavits. How sustained

SEC. 3116. Where the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition, filed as in other cases, not later than the second term after the discovery; on which notice shall be served and returned as an original notice, and the defendant held to appear as in an original action. The facts stated in the petition shall be considered as denied, without answer. The case shall be tried as other cases, by ordinary proceedings, but no petition shall be filed more than one year after the final judgment was rendered. Petition for, when necessary

SEC. 3117. The costs of all new trials shall either abide the event of the suit, or be paid by the party to whom such new trial is granted, according to the order of the court, to be made at the time of granting such new trial. Cost of.

SEC. 3118. The court may determine not to grant a new trial, unless certain terms or conditions named by the court shall be agreed to by the opposite party; in the event of his agreement to which, the terms or conditions named shall be entered on the record, and no new trial shall be granted if the party refuse to agree to the terms or conditions upon which a new trial shall be awarded. Impose terms.

SEC. 3119. Upon any motion made for a new trial, or for judgment, notwithstanding the verdict, by reason of the non-averment of some material fact, the party whose pleading is thus alleged defective, may, if the court deem it necessary, file a statement of the omitted fact, which, if true, would remedy the alleged defects, and such statement shall be filed before the hearing of the motion, and shall suspend the same. If the facts thus stated would not, if proved, defeat the object of the motion, it shall be granted. If such new averments would, if proved, defeat the object of the motion, and be not admitted, they must be denied or confessed, and avoided by the opposite party, within such time as the court shall direct, unless the same are denied by legal operation, and in such case the law of pleading and of procedure, applicable to actions and pleadings of that kind shall obtain; except that the party stating the new fact shall be held the plaintiff therein, and the statement and response shall not need to be verified.\* If for an omitted statement—that may be alone tried.

SEC. 3120. If the facts thus stated be admitted, or found to be true, the party stating the same shall be entitled to such judgment as he would have been entitled to, if such facts had been stated in the original pleading, and admitted as proved in the trial, together with the costs of, and occasioned by the new pleading and the proceedings therein; but if the fact be found untrue, the opposite party shall be entitled to his costs of, Same

\* This section and the next are from the English Act of 1852, and are well commended. It will not encourage unskillfulness in pleading, for the costs will be a punishment; besides, the party who failed to demur is not blameless. If the real facts have been indisputably proved in the trial, the remedy should be by amendment; but if not, then this furnishes the only remedy, except that of going over the ground again, which would be much waste of time, as all of it has been settled except the one or two omitted facts. *Report on Civil Code, 329.*

and occasioned by the new pleading and the proceedings therein, in addition to any other costs to which he may be entitled.

**DECISIONS UNDER THE PRIOR PRACTICE** The appellate court will grant a new trial when it is clear that the verdict was not the result of a free and unbiased exercise of judgment, and injustice would otherwise result, 5 Iowa, 404, refusal to arrest judgment for want of the averment of a fact in the pleadings, which fact was nevertheless in actual contestation on the trial, *Cotes & Patchin v. City of Davenport*, Dec., 1859, the finding of the court or of a jury, simply as a finding, is not reviewable, if on a motion for a new trial the facts be presented, then the court looks into the evidence, 4 Iowa, 432, [section 1793 was meant to provide for a review of fact by direct appeal to test the sufficiency of the facts found for the legal conclusion rendered thereon, for chancery chiefly?] on a motion for new trial for newly discovered evidence, applicant must say more than that he is *informed* and *believes* he can prove, &c., and he must negative negligence, 4 Iowa, 283, if the supreme court be required to pass on the testimony on which a judgment was got, the record must contain all the testimony, and must state that such is all the testimony, and if depositions were in, they must be clearly identified, 5 Iowa, 351, and writs may confer jurisdiction on the supreme court to review a cause where the conduct of the inferior court has precluded any other mode, 4 Iowa, 360, jurors not allowed to impeach own verdict, 3 Iowa, 484, same, 4 Iowa, 462, jurors not compellible to state how verdict arrived at, 2 Iowa, 372, juror may impugn jury, 7 Iowa, 83, same, 7 Iowa, 90, and *Bull v. Luthall* Dec., 1859 in affidavit of another as to a juror's declaration that they discovered the change can not be received on motion for new trial, 4 Iowa, 462, if the district court overrule a motion for a new trial, based on an affidavit of the jury stating a mistake in law, such decision will not be disturbed, 4 Iowa, 585, a case for malicious prosecution in which it was held that five hundred dollars were not excessive damages, 5 Iowa, 283, see M., 13-20, review of legal proposition, 3 Iowa, 191, point must have been made by the pleadings, 3 Iowa, 263, evidence conflicting, *ibid*, 385, decision on application for review *ibid*, 3 Iowa, 484, after two verdicts, *ibid*, 100, application must show error *id id*, 203, answer of witness given, *ibid*, 216, totality of testimony *ibid*, 226, based on sound discretion, *ibid*, 304, application for new trial to be made in reasonable time *id id*, 370, discretion, 4 Iowa, 245, applicability of instruction 4 Iowa, 539, when extrinsic proof needed, 3 Iowa, 115, insufficiency of evidence, if relied on, must be shown, 3 Iowa, 186, error must be shown, 2 Iowa, 139, newly discovered evidence 2 Iowa, 144, same 2 Iowa, 451, the granting of a new trial by error on a legal proposition will be reviewed, 2 Iowa, 587, the misconduct of the jury should clearly show in unit in trial, or verdict must stand 4 Iowa, 43, this court will not review the charge of the court below when the objection to the same was first made in a motion for a new trial 5 Iowa, 374, this court can not pass on the sufficiency of the evidence to sustain the verdict, unless all the evidence is given in the record 5 Iowa, 374, where the evidence is not given the court can not determine that a motion for a new trial, on the ground that the verdict was against instructions, was illegally overruled, so also if the ground of the motion be that the verdict is contrary to evidence, 5 Iowa, 283.

### Judgment.

**SEC. 3121.** Every final adjudication of the rights of the parties in an action, is a judgment and such adjudication may consist of many judgments, one of which judgments may determine for the plaintiff or defendant on the claim of either as an entirety, or when a claim consists of several parts or items, such judgment may be for either of them, on any specific part or item of such aggregate claim, and against him on the other part thereof, or a judgment may in either of these ways determine on the claims of co-parties on the same side against each other.\*

For a judgment is but a judgment and it may determine all the rights involved

\* All that which the court in its final adjudication pronounces, constitutes a judgment and each distinct part of such adjudication which establishes a complete right or duty is also a judgment. At common law, there could be but one judgment in an action at law, which was because of the original writ by which we are no longer fettered. We unite in many causes of action which before could not be done, because that but one judgment could be at law pronounced, and the united causes would, from the peculiarities of common law, as in trespass and debt, for instance demand dissimilar judgments. As we can pronounce dissimilar judgments in one proceed-

SEC. 3122. To avoid a re-examination of questions and issues which have been once satisfactorily settled, and a re-opening of such parts of a cause as have been satisfactorily tried, any party who succeeds in part of his cause, or in part of his causes, and fails as to part, may have the entry in such case express judgment for him for such part as he succeeds upon, and against him on the other part.\*

Party may have the adjudication pronounced both for and against him.

SEC. 3123. Judgment may be rendered for or against one or more of several plaintiffs, and for or against one or more of several defendants, whether such plaintiffs or defendants be jointly or severally liable, and the court may determine the ultimate rights of the parties, on the same side as between themselves, and may grant to any party any affirmative relief which he may be entitled to, and render judgment accordingly, and may render such and so many judgments, joint, separate, and cross, as may be necessary to express the rights of the parties.

Several defendants.

ing, we can now unite such causes. Our judgment is under no obligation of following the writ, but may invest a party with any right which has been really and legally determined under the actual contestation. In a word, just whatever rights are proved in the proceeding, whether for plaintiff against defendant, or defendant against plaintiff, or plaintiff against co-plaintiff, or defendant against co-defendant, just such rights can be enounced and established in the adjudication, by one or several judgments. *Report on Civil Code, p. 326.*

\* Owing to the fetters imposed by the old original writ, which fetters we remained bound with a long time after the writ itself as a fact had ceased to issue, a judgment at common law was composed of and constituted by the *entirety* of the adjudication. No part of it was properly called a judgment, nor could anything less than the *entirety* be objected to on appeal or otherwise. If a plaintiff sued for two horses, and met with a fair legal ruling on the one, but an unfair one on the other, he could not have a judgment for him as to the one and against him as to the other. But a judgment on the two as one demand was rendered, without any regard to the basis of it as on one or the other, and thus it was made impossible to take an appeal on the bad ruling without also abandoning all the advantage of the good one. The plaintiff had the power to withdraw one horse from the consideration of the jury, if he deemed the ruling against him likely to result in his defeat on such one. But if he did not mean to abandon the right to such claim without taking the action of the supreme court thereon, he would need to come before the court again, and probably would have the same ruling made again, after much delay. Besides, he might not be sure that the cause would be defeated by such ruling, and might desire to test the action of the jury thereon. While but a few causes of action could be united, this evil was not so considerable; but now that any number may be, the advantage of such union would be mainly defeated, unless some such provision as this be established. The English practice has for some time allowed a party in a case divisible to obtain from the jury a severance of the verdict in order to secure this end, and in the act of 1852, it was provided that when a case was "*distributable*," the jury should sever as here required. Let us illustrate this a little further. A. sues B. on four notes of \$100 each, and asks judgment for \$400. Suppose the proof clear as to all, and the legal rulings satisfactory as to three, but adverse as to the plaintiff on the fourth, suppose verdict is *undistributed* for \$300. Now, although every body knows that all that should be reviewed is the ruling as to the fourth note, yet the common judgment does not show that, and because it does not, the plaintiff can not get that bad part reviewed without taking up all the good parts as well. If he does not take up all, he must lose his fourth one hundred dollar note. And if he does, he must incur the expense and trouble and risk of having to re-try his right on the three notes again, which, besides being a great burden and risk, is a needless repetition of what has been once done well, and an unnecessary consumption without any sensible excuse, of the time of the court. The remedy is to let the verdict finding for him so much money, say on what part of his claim such finding is founded, and let it find against him on the other part. Let judgment conform to the verdict. Now, here is a judgment on a note, to which, by the hypothesis, have been applied instructions which are deemed by the plaintiff wrong, and from this judgment let him appeal, if he desires, in such way that all the rest of the adjudication—the judgment for him for the \$300—may be undisturbed and promptly enjoyed.

This principle may be as well applied to a cause of action or claim composed of many *items*. To replevin or detain for several distinct pieces of property. To an action for the possession of land in parcels or claimed in distinct rights, &c. *Report on Civil Code, p. 327.*

The general common law rule that in an action upon an alleged joint contract, the plaintiff must recover against all the defendants or be defeated in the action, has been modified by the code so that a recovery may be had against one of two joint defendants. Therefore, in an action against two persons, on a promissory note, alleged to have been made by them as co-partners in their firm name, it was proved that the note was signed by one in the alleged firm name, and that the other was then his wife; *held*, that the plaintiff could recover against the husband alone. *Brownskill v. James*, 1 Kern., 294.

The judgment adapts itself, or must be adapted by the court, to the case made by the pleadings and proofs, and the nature of the relief sought. *Douglas et al. v. Howland*, 11 Ind. R., 554.

An entry of judgment against the defendants will be regarded as a judgment against such only as have been served with process, or have appeared. *Clark, etc. v. Finnell, etc.*, 16 B. M., 334.

Several were sued in trespass, process served on part only, who appeared, and answered, and judgment against them. *Held*, that the judgment was right, and not reversible, because no disposition was made of the case as to others not served with process. *Waller, etc. v. Martin*, 17 B. M., 188.

In case of matter in abatement.

SEC. 3124. Where matter in abatement is plead in connection with other matter not such, the finding of the jury or court must distinguish between matter in abatement and matter in bar, and the judgment must, if it is rendered on the matter in abatement, and not on the merits, so declare.

Special execution.

SEC. 3125. Where any other than a general execution of the common form is required, the party must state in his pleading the facts entitling him thereto, and the judgment may be entered in accordance with the finding of the court or jury thereon.

Judgment as to some, continuance as to others.

SEC. 3126. In an action against several defendants, the court may, in its discretion, render judgment for or against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others.

It is immaterial so far as the defendant is concerned, against whom a judgment is rendered, whether the action is dismissed or continued as to the other defendants, and the objection is not available to such defendant. *Simpson, J., Fleety v. Bell*, Mss. Opin., Dec., 1855. *Stanton's Ky. Code*.

It is competent for the plaintiff to dismiss as to part of the defendants, instead of continuing, and where the defendants are joint obligors, such dismissal will not discharge such defendants from liability to contribute to those against whom judgment is rendered. *Ibid*.

Dismissal of action.

SEC. 3127. An action may be dismissed, and such dismissal shall be without prejudice to a future action:

1. By the plaintiff before the final submission of the case to the jury, or to the court, when the trial is by the court;
2. By the court, when the plaintiff fails to appear when the case is called for trial;
3. By the court, for want of necessary parties, when not made according to the requirement of the court;
4. By the court, on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence;
5. By the court, for disobedience by the party of an order concerning the pleadings or any proceeding in the action.

Where a defect of parties is made to appear by answer, the court should require the necessary parties to be made, and if not made, dismiss the suit. *Carpenter v. Miles*, 17 B. M., 602.

The legal effect of an order dismissing the plaintiff's action, for his failure

to appear and prosecute, is the same as if the words "without prejudice" had been added. *Simpson, J., Williams v. Berry*, *Miss. Opin.*, Dec., 1853. *Stanton's Ky. Code.*

SEC. 3128. In all other cases upon the trial of the action, the decision must be upon the merits. Else on merits.

SEC. 3129. In any case when a set-off, counter-claim or cross-demand has been filed, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed his action, or failed to appear. Set-off—tried.

SEC. 3130. The defendant may also, at any time before the final submission of the cause to the jury or to the court, when the trial is by the court, dismiss his set-off, counter-claim or cross-demand, without prejudice. Or dismissed.

SEC. 3131. Any party to any claim may dismiss the same in vacation and the clerk shall make the proper entry of dismissal on the record, and if the costs are not paid, may enter judgment against such party therefor, in favor of the party entitled thereto, and issue execution therefor at the order of such party; the party so dismissing shall be liable for no costs made by the other party after notice to him of such dismissal. Costs on dismissal.

SEC. 3132. Though all the defendants have been served with notice, judgment may be rendered against any of them severally, where the plaintiff would be entitled to judgments against such defendants, if the action had been against such alone. Though all served yet judgment good against part.

SEC. 3133. The relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in his petition. But in any other case the court may grant him any relief consistent with the case made by the petition and embraced within the issue. Relief grantable.

If the defendant has answered, the court may grant the plaintiff any relief consistent with the case, made by the complaint, and embraced within the issue. In case no answer has been put in, the relief granted can not exceed that demanded in the complaint. In the former case the demand of relief in the case becomes immaterial. The case made by the complaint and the limits of the issue alone determine the extent of the power of the court. These expressions of the statute include the statement of the right of the plaintiff and its infringement by the defendant. *Marquat v. Marquat*, 2 Kern., 241.

Alternative equitable relief may be alleged and obtained now, as heretofore. For instance—a complaint for the restitution of property, as a substantive ground of relief, may allege, 1. That it was mortgaged under a usurious contract, and, 2. That the sale under the foreclosure of the mortgage was void for other reasons. *Young v. Edwards*, 11 How., 201.

SEC. 3134. Whenever damages are recoverable, the party may claim and recover if he shows himself entitled thereto, any amount of damages which he might have hitherto recovered for the same stated cause of action. Damages.

SEC. 3135. If only part of the claim is controverted by the pleading, judgment may, at any time, be rendered for the part not controverted. Part controverted.

SEC. 3136. When a trial by jury has been had, judgment must be entered by the clerk in conformity with the verdict, unless it is special or the court orders the case to be reserved for future argument or consideration. Judgment entered by clerk.

SEC. 3137. When the verdict is special, or when there has been a special finding on particular questions of fact, or issues, or when the court has ordered the case to be reserved, it shall order what judgment shall be entered. Unless special verdict.

- Judgment from pleadings.** SEC. 3138. When by the statements of the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party, unless the other party proceed as provided in section 3119.
- Judgment for excess.** SEC. 3139. If a set-off, counter-claim or cross-demand established at the time, exceed the plaintiff's claim so established, judgment for the defendant must be given for the excess; or if it appears that the defendant is entitled to any other affirmative relief, judgment must then be given therefor.
- Orders, &c., entered of records.** SEC. 3140. All judgments and orders must be entered on the record of the court and specify clearly the relief granted, or order made in the action.
- Memorandum of satisfaction.** SEC. 3141. Where a judgment is set aside or satisfied by execution or otherwise, the clerk shall at once enter a memorandum thereof on the column left for that purpose in the judgment docket.
- Land case.** SEC. 3142. In cases where the title to land is involved and expressly settled or determined, the clerk shall make a complete record of the whole cause, and enter it in the proper book. But in no other case need a complete entry be made except at the request of a party who will pay the expense of such record.
- An agreed judgment.** SEC. 3143. Any judgment in a case pending which may be agreed upon between the parties interested therein, may at any time be entered, and if not done in open court, the judgment agreed to shall be in writing, signed, and filed with the clerk, who shall thereupon enter the same accordingly, and execution thereon may issue forthwith, unless therein otherwise agreed upon between the parties.
- No distinction of debt or damages.** SEC. 3144. In all actions where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded him by the judgment generally without any distinction being therein made as to whether such sum is recovered by way of a debt or damages.
- Court jury.** SEC. 3145. The provisions of this chapter relative to juries are intended to be applied to the court when acting as a jury on the trial of a cause so far as they are applicable and not incompatible with other provisions herein contained.
- Matter since judgment; motion.** SEC. 3146. A defendant against whom a judgment has been rendered, or any person interested therein having some good matter of discharge which has arisen since the judgment, may, upon motion, in a summary way, have the same discharged either in whole or in part, according to the circumstances.
- Fraudulent assignment of judgment.** SEC. 3147. The court shall have power, on motion, to inquire into the facts attending or connected with the assignment of a judgment, or the entry of the same to the use of any party, and to strike out such use, or to declare such assignment void, either in whole or in part, whenever such assignment or use shall be determined to be inequitable or fraudulent, or in bad faith.

**DECISIONS UNDER THE PRIOR PRACTICE.** Section 1797 is unconstitutional in authorizing any but a judge to so act, 4 G., 104, 120; 3 G., 470; 7 Iowa, 486; dismissal after coming back on *procedendo*, 4 G., 525; at any time before trial, 1 Iowa, 421; without leave of court, *ibid.*, 568; the error of dismissing an action is waived by another successful action on the same claim, *Gordon v. Ell*, Dec., 1859; a motion to dismiss should be made with due diligence, 4 G., 382; *nolle prosequi* as to part of defendants, 4 Iowa, 475; where defendants sever in the defense, whether in action *ex contractu* or *ex delicto*, plaintiff may enter a non-suit as to any without prejudice to his rights as to the rest, 4 Iowa, 476; non-suit involuntary, 3 G., 546; when nonsuit to be forced, 2 G., 205; effect on attachment lien, *ibid.*, 505; plaintiff dismissing his suit is liable for all the costs legally made, or being made in the cause, whether then taxed or not, 4 Iowa, 569; property discharged by a judgment dissolv-



ing an attachment may be kept subjected by prompt appeal and supersedeas bond, 4 Iowa, 230; construction of section 1811, 1 Iowa, 107; costs, in voluntary nonsuit, 1 Iowa, 421; intention the main thing in verdict, M., 19; see a Pennsylvania judgment, 3 Iowa, 480; defense on foreign judgment, 3 Iowa, 586; new trial as to one of joint defendants, 3 Iowa, 385; sections 1815 and 1816, construed away from their apparent intent, 7 Iowa, 495; general verdict, M., 52; improper joinder not objected to, waived, 3 G., 570; non-joinder, plea in abatement, 2 G., 161; no attachment, unless prayed for, 4 G., 157; an intent to injure although averred need not be proved, where not necessary to fix liability, 4 Iowa, 506; a case for malicious prosecution in which it was held that five hundred dollars were not excessive damages, 5 Iowa, 283; to call a woman a "whore" is actionable in itself without proof of damage, 4 Iowa, 321; legitimacy of statement of damages on demurrer, 5 Iowa, 268; see dicta as to compensation of discharged employee, 5 Iowa, 344; specific performance, *Frank v. Purrlington*, 5 Iowa, 347; in an action on the covenants of a bond more may be recovered than the amount of the penalty, 5 Iowa, 354; when sued on his bond to convey, the vendor is subject to the following damages, if his agreement to convey or failure to do so, was dishonest or fraudulent, the value of the land at the time it should have been conveyed; in other cases the purchase money paid, and interest, 5 Iowa, 353; passion and provocation in defendant may mitigate but can not defeat plaintiff's damage, 4 Iowa, 460; the setter out of fire must use all reasonable diligence to prevent any injury or be liable, 4 Iowa, 507; carriers of passengers for hire must use the utmost skill and prudence and are responsible for the slightest negligence, 4 Iowa, 547; provoking language is not a defense to an action, for an assault and battery, mitigation only, 5 Iowa, 480; a contractor endeavoring to perform his contract and prevented by his contractee, is entitled to reasonable compensation for his services at least, and if such contractor could have performed his contract but for such intervention, then he is entitled to such compensation as he would have realized by a performance, subject, in some cases, to recoupment, 5 Iowa, 343; in suit on bond to convey, with a penal clause, the damages will be qualified by the absence, or presence of, good faith in the defendant; may be money back with interest, and may be value of property at the date of contemplated performance, 4 Iowa, 1; in an action on a special contract alone, the plaintiff can not recover the value of his labor less the damage sustained by the defendant by violation of the contract, 5 Iowa, 476; mortgage to secure two notes which matured at different times, foreclosure on first putting payee (pl'tff.) in possession; there were prior incumbrances which plaintiff paid, plaintiff sues on last note; court says such suit does not open foreclosure; that the sum paid on incumbrances should be added to the sum left due on the mortgage at date, of possession taken; from the total should be taken the value of the land when it became, by law, that of plaintiff's irredeemably, credit the mortgage with the remainder, and the balance due after such credit would be that for which the plaintiff should recover, 4 Iowa, 310; error in a judgment, not on some mere jurisdictional fact, is reviewable only on appeal. *Milne v. Van Buskirk*, Dec., 1859; 2 G., 95, 492, 196, 154; extent of its conclusiveness, 4 G., 351; 3 G., 104; erroneous if rendered against one after the suggestion of his death, 2 G., 397; so an irregular judgment held sufficient, 1 Iowa, 150; so the allowance of a claim by the probate court, as distinguished from a judgment, 7 Iowa, 324; judgment may be rendered for plaintiff, against one or many defendants, and for some of such defendants against the plaintiff for costs; in an action of right the judgment is an entirety, 5 Iowa, 157; claim of a sum with interest thereon, means with interest from the commencement of the suit, *Stadler, Bro. & Co. v. Parmelee & Watts*, Dec., 1859; remitting of excess of a judgment, 3 G., 104; effect of appeal and bond is to suspend all proceedings under judgment or attachment, 7 Iowa, 186; 4 Iowa, 230; power to render judgment in vacation limited, *Townslley v. Morehead*, Dec., 1859; jury means twelve men, 4 Iowa, 350; and it is enough that this right be attainable by appeal, *State v. Bencke*, June, 1859; if a jury find a set of facts which have not been put in issue, no judgment should be rendered on them, 5 Iowa, 483; up to judgment, but not after, a party is bound to take notice of all proceedings, having been once in court, 3 Iowa, 221; can a receiver be appointed at law, 6 Iowa, 502; *Saylor v. Mockhe*, June, 1859; separate trial when allowed, 2 Iowa, 571; in civil action for libel, court may instruct jury, 2 Iowa, 571; a case where the confidence necessary between legal adversaries is protected, 4 Iowa, 535; 4 Iowa, 63; judgment same interest as note, M., 106; 1 G., 66; 6 Iowa, 235; a plea of tender admits that sum to be due, 5 Iowa, 462; a tender after suit brought is not good, unless it include costs then accrued, 5 Iowa, 463; if a plea of tender aver falsely that the money has been paid into court on proper motion, the defendant will not be allowed to offer proof on such plea without such payment, 5 Iowa, 462; tender saves costs and interest if kept good, but does not satisfy the demand, 4 G., 97; it admits cause of action to its extent, 5 Iowa, 460; 4 G., 555; and entitles to judgment for so much, 4 G., 97; the money should be brought into court, and a continued readiness ex-

pressed, 5 Iowa, 460; 4 G., 97; plea of tender need not be regarded unless money be paid in, 5 Iowa, 460; nor can evidence of, under the plea be received, if objected, unless such be done, if the objector has notified the defendant to produce money, and he has failed, 5 Iowa, 460; if the tender was abandoned before the justice, it should not be considered an appeal, 4 G., 97; see case of qualified refusal of tender, 5 Iowa, 317; absolute refusal 3 G., 335; alteration, a question of fact, 4 Iowa, 63; 7 *ibid.*, 143; note must be produced, or accounted for, or else no judgment, 5 Iowa, 287; 4 *ibid.*, 148; 7 *ibid.*, 320; 4 Iowa, 72; on a penalty nothing but legal interest can be recovered, 3 Iowa, 244; 3 G., 120; 1 G., 179; where a ministerial officer acts in good faith he is liable only for real, not for exemplary damages, 5 Iowa, 314; how to compute interest, 3 G., 76; interest on an account should be averred in petition, 1 G., 336; M., 417; agreement or usage may qualify mode of computation, 8 Iowa, 163; *Scott & Brewster v. Ogilvie & Co.*, Dec., 1859; see M., 294, as to date from which to compute; where interest alone is payable annually, and is unpaid, it only draws six per cent. interest. *Man v. Cross*, Dec., 1859; a penalty, not usury, M., 425; 1 G., 128; 3 Iowa, 244; in a penal bond the word penalty can rarely be held to mean liquidated damages, and the word liquidated damages in such bond does not fix the sum beyond question; but whether the sum named in a penal bond be penalty or liquidated damages, must be learned by consideration of all the surroundings of the parties to the instrument, 4 Iowa, 1; when an employer and employee after services rendered, settle what shall be paid therefor and when an employee sues for higher wages, he may be met by such settlement and it will define his rights—such is not accord and satisfaction—nor does the principle, that a creditor of a larger liquidated sum can not be held by an agreement, without consideration, to take, therefore, a smaller sum, apply, 4 Iowa, 219; if vendor of land with warranty, sue vendee on notes given for the price, the vendee may reply, that the vendor's title to part of said land was not good, and may deduct from the notes such sum as he reasonably paid for the outstanding title, 5 Iowa, 408; in suit to recover the penalty of a bond the plaintiff makes his inquest of damages, subject to the limitation of the penalty, 5 Iowa, 354.

A judgment can not be given for a larger sum than that demanded in the petition, 5 Iowa, 505; demurrer to evidence, 4 G., 33; 1 G., 541; 4 Iowa, 63; [no longer available under the Code of Civil Practice;] no fact can be held as *res adjudicata*, except such fact as was an ultimate fact, put directly in issue and decided, 4 Iowa, 199; identity of parties is not always demanded to admit a defense of *res adjudicata*, 4 Iowa, 246; *scire facias* on judgment can only be brought in the county of the judgment, 5 Iowa, 506; a prior judgment is a bar only as to the point in issue, actually determined on the merits between the same parties, 4 Iowa, 292; an irregular judgment is conclusive while unreversed, 4 Iowa, 292; on a judgment against a corporation, a judgment that execution issue against the private property of members, is one which may be appealed from, and such judgment can not be questioned in a proceeding to enjoin the issuance of execution thereon, 4 Iowa, 13; when a demurrer has been sustained to the answer and defendant does not amend, the case stands as if judgment by default were had, and defendant can only appear to cross-examine, and can not ask for a non suit; in such case no judgment can be held on a note, unless it be produced, 5 Iowa, 290.

### Default.

[Code—Chapter 106.]

Default.

SEC. 3148. If a party fail to file or amend his pleading by the time prescribed by the rules of pleading, or in the absence of rules by the time fixed by the court; or if having plead, his answer, or reply, on motion or demurrer is held insufficient or is struck out, and he fail to amend or to answer or reply further as required by the rules of or by the court, or if he withdraw his pleading without authority, or permission to replead, judgment by default may be rendered against him on demand of the adverse party, made before such pleading is filed.

Need of notice.

SEC. 3149. Where no appearance is made, default shall not be had until the court determines, from an inspection of the record, that notice has been given as required by this code.

Set aside.

SEC. 3150. Default may be set aside on such terms as the court may deem just, among which must be that of pleading issuably and instanter, but not unless an affidavit of merits be filed, and a reasonable excuse be shown for having made such default, nor unless application

therefor be made at the term in which default was entered, or if entered in vacation, then on the first day of the succeeding term.

After judgment by default, it is irregular to move for leave to plead, before a motion to set aside the judgment is made. *Hickman v. Barnes*, 1 Mo. Rep., 110. If a party, by negligence, suffer judgment by default to go against him, it will not be set aside to admit a defense which the party might have made had he used due diligence. *Weimer v. Morris*, 7 Mo. Rep., 6. Something more than a mere affidavit of merits is necessary to authorize the circuit court to set aside a judgment by default. The "good cause" required to be shown, must not only be a meritorious defense, but the exercise of due diligence by the party. *Barry v. Johnson & Johnson*, 3 Mo. Rep., 263; *Lacombe and wife v. Wash*, 4 Mo. Rep., 557; *Green v. Goodloe*, 7 Mo. Rep., 25. A judgment by default will not be set aside on account of the mistake or negligence of defendant's attorney. No distinction is made between the negligence of the party and the negligence of the attorney. *Field & Colecart v. Matson*, 8 Mo. Rep., 686; *Kirby & Porter v. Chadwell*, 10 Mo. Rep., 392; *Austin v. Nelson*, 11 Mo. Rep., 192. A case where a judgment by default was set aside, *Stout v. Lewis*, 11 Mo. Rep., 438.

SEC. 3151. When the action is for a money demand, and the amount of the proper judgment is a mere matter of computation, the clerk shall ascertain the amount. When long accounts are to be examined, the court may refer the matter. In other cases, the court shall assess the damages, unless a jury be demanded by the party not in default. The proper amount having been ascertained by either of the above methods, judgment shall be rendered therefor. Money.

SEC. 3152. The party in default may appear at the time of the assessment and cross-examine the witnesses against him, but for no other purpose. Right of party defaulting.

SEC. 3153. (1833.) When the proceedings are of an equitable character, the court upon reading the pleadings and proofs, and hearing the testimony offered, shall render such judgment as is consistent with the rules heretofore observed in chancery cases. Equitable proceedings.

SEC. 3154. A defendant served by publication alone, shall be allowed at any time before judgment, to appear and defend the action, and upon a substantial defense being declared, time may be given, on reasonable terms, to prepare for trial. Publication notice.

SEC. 3155. When the plaintiff files with the petition, his own affidavit, stating that any of the allegations of the petition recited in said affidavit are true, and known to be so by the defendant, and that they can not be proved or shown otherwise than by his testimony or his answer, so far as affiant knows or believes; such allegations, unless denied by an answer, shall be taken as true. Plaintiff's affidavit of proof.

SEC. 3156. Before a judgment is rendered against a defendant served by publication alone, and who has not appeared, it shall be necessary that a bond be executed to such defendant by one or more sufficient sureties of the plaintiff, to the effect that if the defendant within the period prescribed by law, shall appear, make defense and set aside the judgment, the plaintiff shall restore to him the property taken under any attachment in the action, or under the judgment thereon, the restoration of which may be adjudged, and pay to the defendant such sums of money as the court may award to him. Bond needed.

The taking of the bond required by civil code, is a pre-requisite, which can not be dispensed with, unless the court retains control of the proceeds of the attached effects. *Stiles, J., Pettitt v. Perry*, Mss. opin., January, 1855.

The failure to execute a bond to a defendant, constructively summoned, required by section 440, is fatal to the judgment, though not to the sale made

under it. Stiles, J., *Bradley's heirs, etc. v. Morriss*, Mss. opin., October, 1857. *Stanton's Ky. Code*.

If not given.

SEC. 3157. If such bond is not given, the court may enter a judgment ascertaining the rights of the parties, but shall retain control over and preserve any money or property, or the proceeds thereof which may have been attached in the action until the expiration of the period allowed to the defendant in which to appear and make defense; when if no defense is made, such money or property, or its proceeds shall be delivered according to the judgment.

Plaintiff also to be questioned.

SEC. 3158. Before rendering judgment against a defendant served by publication alone, and who has not appeared, the court shall cause the plaintiff to appear personally in court or before a referee, and answer under oath, interrogatories concerning the matters in the petition or any matters of defense thereto, including matters of set-off or counter-claim, and may order the examination to be reduced to writing, and filed with the papers of the action.

Set-off adjusted.

SEC. 3159. If upon the examination provided in the last section, any matters of set-off or counter-claim are disclosed, the same may be adjusted and allowed in the judgment.

Two years in which to open default.

SEC. 3160. When a judgment has been rendered against a defendant or defendants, served by publication only, and who do not appear, such defendants, or any one or more of them, or any person legally representing him or them, may at any time within two years after the rendition of the judgment, appear in court, and move to have the action re-tried; and security for the costs being given, they shall be admitted to make defense; and thereupon the action shall be re-tried as to such defendants, as if there had been no judgment, and upon the new trial, the court may confirm the former judgment, or may modify or set it aside, and may order the plaintiff to restore any money of such defendant paid to him under it, and yet remaining in his possession, and pay to the defendant the value of any such property which may have been taken in attachment in the action, or under the judgment, and not restored.

The provision of the code, allowing an absent defendant constructively served with process, to appear in the circuit court, at any time within five years after judgment, and move a re-trial of the action, does not preclude him from reversing an erroneous judgment against him, at any time, for errors apparent in the record. If the judgment be apparently regular, but unjustly obtained, he may pursue the other course. *Payne v. Witherspoon*, 14 B. M., 272.

Unless sooner served.

SEC. 3161. The plaintiff may at any time after the judgment, cause a certified copy thereof to be served on a defendant, served by publication only, whereupon the period in which such defendant is allowed to appear and have a new trial, shall be reduced to one year after such service.

Served any where.

SEC. 3162. The service of the copy of the judgment shall be, whether made within or without the state, actual and personal, by delivery of copy, and made and returned, as in case of original notice.

Title not disturbed.

SEC. 3163. The title of a purchaser in good faith to any property sold under an attachment or judgment, shall not be affected by the new trial permitted by section 3160, except the title of property obtained by the plaintiff and not bought of him in good faith by others.

Personal judgment on all personal services.

SEC. 3164. No personal judgment shall be rendered against a defendant served by publication only, who has not made an appearance. But a personal judgment shall be rendered against a defendant whether he

appear or not who has been served in any mode in this code provided, other than by publication, whether served within or without this state.\*

DECISIONS UNDER THE PRIOR PRACTICE. A judgment by default admits the averment of the cause of action as alleged in the petition, and that something is due but is not a confession of any fact necessary to be proved on the assessment of damages, and the clerk can not take proof of any fact and is authorized on default only to assess where it is a mere matter of computation, 5 Iowa, 464; a complainant must show himself entitled to relief even against a defaulting defendant, 4 Iowa, 416; only on demands of mere computation can the judgment be entered on the clerk's assessment, 5 Iowa, 472; a motion may save default, 4 G., 119; so of an insufficient answer which has not been assailed as such, 1 Iowa, 528; court's discretion to vacate decree by default, 3 G., 415; *nolle prosequi* as to a part of the defendants, not retraxit or release of rest, 4 Iowa, 475; see case declining to observe a rule, &c., 3 G., 487; plea saves default, 2 G., 318; sufficient record, averment of default, 4 Iowa, 72; see 4 G., 343; court may assess damages, M., 99; 5 Iowa, 463; co-defendant in default on joint note bound by assessment of jury as to other co-defendant, 1 G., 388; who to assess, 3 G., 125; 1 G., 365; 2 Iowa, 30; 6 *ibid.*, 538; 4 *ibid.*, 72; 5 *ibid.*, 463; and *Swift et al. v. Benz & Plater*, June term, 1859; right of defaulting party, 4 Iowa, 72 and 75; 4 G., 340; 7 Iowa, 478; defaulter can not object to the sufficiency of the petition, 7 Iowa, 478; for what judgment, 2 G., 154 and 397; 5 Iowa, 503; 7 *ibid.*, 320; 6 *ibid.*, 235; 3 G., 589; when and how a default will be set aside, 3 Iowa, 543; 6 Iowa, 491; *Rice v. Griffith*, Dec., 1859; 8 Iowa, 475, 474; final judgment not to be rendered against a defaulting defendant until the issues raised by the other defendants are disposed of, *Greenough, Cook & Co. v. Sheldon*, Dec., 1859; held that a denial of indebtedness was answer enough to prevent a default, 5 Iowa, 376; [but see sections 2941 and 2943, which preclude the use of mere legal conclusion statements]—judgment by default presumed to be only against those served when indefinitely expressed, *Sweeney v. Hutton*, June, 1859; a denial of dueness of so much money held to be no answer, and not to save default, *Mann v. Miller*, Dec., 1859; what the record should show in case of default, 6 Iowa, 1; 4 G., 324, 465, 534, 372; 2 G., 479; 1 G., 492; 3 G., 357; 6 Iowa, 331; 3 Iowa, 80; 1

\* A judgment obtained in this state in order to be of value as a *judgment*, when taken to another state, must have been obtained on the kind of notice which was the mode when the United States' constitution provided for giving extra-state force to judgments of sister states—the common law mode. Each state has since then invented other modes of getting notice. Each state has a right to make what law she likes as to the kind of notice which must be given to a defendant. But whenever such modes are not or do not include the modes of the common law, such judgment would be of no force in a sister state, as a *personal* judgment. As between a personal judgment and one in rem, good sense seems to demand that a personal notice wherever made should entitle to a personal judgment, and that notice by publication only should only entitle to one in rem. Most of the reasons have ceased to exist, which formerly prevented this. The notice which can be served anywhere stands instead of the summons which was not of value out of the jurisdiction. The judgment now, too, is seldom to be enforced by personal restraint, and is chiefly satisfied with property. If the defendant has then, or shall in future have any property within the state whose laws provide for his personal service with notice without such state, he certainly, to the extent of that property which solicits and receives the protection of such state, should render to her allegiance. This principle is recognized in the judgment ad rem. But the advantage of the proposed extension is this: the judgment in rem is measured by the property in court, which may be quite insufficient to discharge the claim, and if the defendant brings more into the jurisdiction subsequently, the plaintiff has to repeat his process by another suit, and, perhaps, by many in succession, at cost and trouble, before he makes his debt, while by this plan, having got a personal notice anywhere, he has a personal judgment, good here at least, and which may be extended over any property of the defendant, then, or afterwards, within this state.

The possible service of notice on one without the jurisdiction has been the law of France, at least since the Code Napoleon, and has been the law of England, at least, since 1852, with the difference that when an English subject is served abroad, he is served with a summons as if at home, and when one not a subject is served, it is with a notice telling him that a summons has been issued. The great good sense of the codifiers of 1851, got rid of this distinction by the use of the notice in all cases. It is possible for a judgment to be personal by our system against one who has not been in fact personally served, if the same be against a resident. But if the service is made out of this state, it must be actually personal. *Report on Civil Code*, p. 329.

Iowa, 148; 4 Iowa, 72; a defaulter before the justice has no right on appeal to ask instructions, 7 Iowa, 478; default on insufficient petition waived unless objected to before appeal, *Ruddick v. Patterson*, June, 1859; *Davis v. Burt & Kerr*, Dec., 1859; judgment by default defined, 5 Iowa, 260; [but see section 3148, which makes inapplicable this definition and ignores the technical meaning of default]—see a justice case held not to be a default, 5 Iowa, 260; the record entry prevails over the judge's entry, *Keller v. Killion*, Dec., 1859; proof of sending of copy of notice and petition, 3 Iowa, 80; same, 4 G., 372; order of publication by court necessary, 4 G., 324; same, 4 G., 463; same, *ibid.*, 534; same, not presumed, 3 G., 357; defective notice not assailable, collaterally, 2 G., 94; terms imposed, 3 G., 235; petition to vacate, 3 G., 427; discretion, *ibid.*, 415; construction of this section, 6 Iowa, 491; assessment by clerk, 3 G., 125; same, 5 Iowa, 465; constitutionality questioned, 4 G., 340; presumption for rectitude of judgment, 3 Iowa, 543; same, 3 G., 588; need of notice and petition in proceeding under sec. 1835, 3 Iowa, 580; discretion, 3 G., 415.

### Conveyance by Commissioner.

- Commissioner to convey land. SEC. 3165. Real property may be conveyed by a commissioner appointed by the court—
1. Where, by judgment in an action, a party is ordered to convey such property to another.
  2. Where such property has been sold under a judgment or order of the court and the purchase money paid.
- Deed of. SEC. 3166. The deed of the commissioner shall so refer to the judgment, orders and proceedings authorizing the conveyance as that the same may be readily found.
- What passes. SEC. 3167. A conveyance made in pursuance of a judgment shall pass to the grantee the title of the parties ordered to convey the land.
- Same. SEC. 3168. A conveyance made in pursuance of a sale ordered by the court, shall pass to the grantee the title of all the parties to the action or proceeding.
- Approval. SEC. 3169. A conveyance by a commissioner, shall not pass any right until it has been examined and approved by the court, which approval shall be indorsed on the conveyance and recorded with it.
- Name and signature. SEC. 3170. It shall be necessary for the conveyance to be signed by the commissioner only, without affixing the names of the parties whose title is conveyed; but the names of such parties shall be recited in the body of the conveyance.
- Record of. SEC. 3171. The conveyance shall be recorded in the office in which, by law, it should have been recorded, had it been made by the parties whose title is conveyed by it.

## CHAPTER 124.

### ATTACHMENT AND GARNISHMENT.

[Code—Chapter 109.]

- Property may be attached. SEC. 3172. (1846.) The plaintiff in a civil action may cause any property of the defendant which is not exempt from execution, to be attached at the commencement or during the progress of the proceeding, by pursuing the course hereinafter prescribed.
- Separate petition. SEC. 3173. (1847.) If it be subsequent to the commencement of

the action, a separate petition must be filed, and in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings and only auxiliary thereto.

SEC. 3174. The petition which asks an attachment must, in all cases, be sworn to. It must state: 1. That the defendant is a foreign corporation, or acting as such; or, 2. That he is a non-resident of the state; or, 3. That he is in some manner about to dispose of or remove his property out of the state, without leaving sufficient remaining for the payment of his debts; or, 4. That he has disposed of his property (in whole or in part) with intent to defraud his creditors; or, 5. That he has absconded, so that the ordinary process can not be served upon him; or, 6. That he is about to remove permanently out of the county, and has property therein not exempt from execution, with which he refuses to pay or to secure the debt due to the plaintiff residing in such county; or, 7. That he is about to remove permanently out of the state and refuses to pay or secure the debt of the plaintiff.

Petition must state.

SEC. 3175. (1849.) If the plaintiff's demand is founded on contract, the petition must state that something is due, and as nearly as practicable, the amount, which must be more than five dollars in order to authorize an attachment.

If on contract.

SEC. 3176. (1850.) The amount thus sworn to is intended as a guide to the sheriff, who must, as nearly as the circumstances of the case will permit, levy upon property fifty per cent. greater in value than that amount.

Sheriff levy on, how much.

SEC. 3177. (1851.) If the demand is not founded on contract, the original petition must be presented to some judge of the supreme or district court, or the judge of the county court, who shall make an allowance thereon of the amount in value of the property that may be attached. The provisions of this section apply only to cases in the district court.

If not on contract.

SEC. 3178. (1852.) The property of a debtor may be attached previous to the time when the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness and when the petition in addition to that fact states: 1. That the defendant is about to dispose of his property with intent to defraud his creditors; or, 2. That he is about to remove from the state, and refuses to make any arrangements for securing the payment of the debt when it falls due, and which contemplated removal was not known to the plaintiff at the time the debt was contracted.

Before debt is due.

SEC. 3179. If the debt or demand on which the attachment suit is brought, is not due at the time of the service of the attachment, the defendant is not required to file any pleadings until the maturity of such debt or demand; but he may, in his discretion, do so, and go to trial as early as the cause is reached.

Pleading in such case.

SEC. 3180. And no final judgment shall be rendered upon such attachment, unless the party consents, as in the last section, until the debt or demand upon which it is based becomes due. But property of a perishable nature may be sold as in other attachment cases.

Judgment also.

SEC. 3181. Before any attachment can be issued as aforesaid, the plaintiff must file with the clerk a bond, for the use of the defendant, with sureties to be approved by the clerk, in a penalty at least double the value of the property sought to be attached, and in no case less than two hundred and fifty dollars, in the district court, nor less than fifty dollars, if in a justice's court, conditioned that the plaintiff will pay all damages, which the defendant may sustain, by reason of the wrongful suing out of the attachment.

Bond first.

- Additional security.** SEC. 3182. The defendant may, at any time before judgment, move the court for additional security on the part of the plaintiff, and if, on such motion, the court is satisfied that the surety in the plaintiff's bond has removed from this state, or is not sufficient, it may vacate the writ of attachment, and direct restitution of any property taken under it, unless in a reasonable time, to be fixed by the court, and within two clear days thereafter, sufficient security is given by the plaintiff.
- Suit on bond.** SEC. 3183. In an action on such bond the plaintiff therein may recover, if he shows that the attachment was wrongfully sued out, such damages as he has thereby suffered, and if sued out maliciously as well as wrongfully, the jury may, on such trial, give vindictive damages, in their discretion, nor need he wait until the principal suit is determined before he bring suit on the bond.
- Writ may run into other county.** SEC. 3184. Where suits are properly commenced in the district court of any county, the auxiliary process of attachment may run at the same time into any other county where property of the defendant can be found, and several of them may, at the option of the plaintiff, be issued at the same time or in succession and subsequently, but only those executed shall be taxed in the costs, and if more property is attached in the aggregate than the plaintiff is entitled to hold in that manner, he must abandon the surplus and pay all costs incurred in relation to it.
- Form of it.** SEC. 3185. (1856.) The clerk shall issue a writ of attachment directing the sheriff of the county therein named to attach the property of the defendant to the requisite amount therein stated.
- Sheriff's duty.** SEC. 3186. (1857.) The sheriff shall, in all cases, attach the amount of property directed, if sufficient, not exempt from execution, be found in his county, giving that in which the defendant has a legal and unquestionable title, a preference over that in which his title is doubtful or only equitable.
- Order of execution of writ.** SEC. 3187. Where there are several writs of attachment against the same defendant, they shall be executed in the order in which they were received by the sheriff.
- Pursue property.** SEC. 3188. If, after a writ of attachment has been placed in the hands of the sheriff, any property of the defendant is removed from the county, the sheriff may pursue and attach the same in an adjoining county, within twenty-four hours after the removal.
- Defendant may be examined on oath.** SEC. 3189. Whenever it appears by the affidavit of the plaintiff, or by the return of the writ of attachment, that no property is known to the plaintiff, or the officer, on which the order of attachment can be executed, or not enough to satisfy the plaintiff's claim, and it also appears to the court, by affidavit, that the defendant has property within the state, not exempt from the writ, the defendant may be required by the court to attend before it, and give information on oath respecting his property.
- Partnership and also joint property.** SEC. 3190. The sheriff shall not, on attachment against a member of a firm, take possession of partnership property: and in executing a writ of attachment upon personal property held by the defendant jointly or in common with another person, he shall not take possession of such property until there has been executed a bond to such other person, by one or more sufficient sureties of the plaintiff, to the effect, that he shall pay to such person the damages he may sustain by the wrongful suing out of the attachment, not exceeding double the amount of the plaintiff's claim, or double the value of the property, if the latter be the larger sum; but such owner or such firm may be garnished, and such property thereby reached.



SEC. 3191. If the defendant at any time before judgment causes a bond to be executed to the plaintiff, by one or more sufficient sureties, to be approved by the court, or by the judge, to the effect that the defendant shall perform the judgment of the court, the attachment shall be discharged and restitution made of any property taken under it, or the proceeds thereof. Bond to perform judgment.

SEC. 3192. The bond mentioned in the last section, may, in vacation, be executed in the presence of the sheriff, having the writ of attachment in his hands; or after the return of the writ before the clerk, with the same effect upon the attachment, as if executed in court. The sureties in either case to be approved by the officer before whom taken. How executed.

SEC. 3193. Such bond shall be part of the record, and if judgment go against the defendant the same shall be entered against him and the sureties of said bond. Judgment on such bond.

SEC. 3194. (1859 and 1860.) Stock or interest owned by the defendant in any company, and also debts due him, or property of his held by third persons, may be attached, and the mode of attachment must be as follows: 1. By giving the defendant in the action, if found within the county, and also the person occupying, or in possession of the property, if it be in the hands of a third person, notice of such attachment. 2. If the property is capable of manual delivery, the sheriff must take it into his custody, if it can be found. 3. Stock in a company is attached by notifying the president or other head of the company, or the secretary, cashier, or other managing agent thereof, of the fact that the stock has been so attached. 4. Debts due the defendant, or property of his held by third persons, and which can not be found, or the title to which is doubtful, are attached by garnishment thereof. Mode of attachment

SEC. 3195. The attachment by garnishment is effected by informing the supposed debtor or person holding the property, that he is attached as garnishee, and by leaving with him a written notice to the effect that he is required not to pay any debt due by him to the defendant, or thereafter to become due, and that he must retain possession of all property of the said defendant then or thereafter being in his custody, or under his control, in order that the same may be dealt with according to law, and the sheriff shall summon such persons as garnishees, as the plaintiff may direct. Garnishment.

SEC. 3196. A sheriff or constable may be garnished for money of the defendant in his hands. So may a judgment-debtor of the defendant, when the judgment has not been previously assigned on the record or by writing filed in the office of the clerk, and by him minuted as an assignment on the margin of the judgment docket, and also an executor for money due from the decedent to the defendant may be garnished, but a municipal or political corporation shall not be garnished. Same.

SEC. 3197. Where the property to be attached is a fund in court, the execution of the writ of attachment shall be by leaving with the clerk of the court, a copy thereof with a notice specifying the fund. Same on fund in court.

SEC. 3198. If the garnishee die after he has been summoned by garnishment, and pending the litigation, the proceedings may be revived by or against his heirs or legal representatives. If garnishee die.

SEC. 3199. Unless exempted, as provided in the next section, the notice must also require the garnishee to appear on the first day of the next term of the district court, wherein the main cause is depending, or on the day fixed for trial if in a justice's court, and answer such interrogatories as may be then propounded to him, or that he will be Garnishee to appear.

	liable to pay the entire judgment which the plaintiff eventually obtains against the defendant.
Instant answer of garnishee.	SEC. 3200. (1864.) The plaintiff may, in writing, direct the sheriff to take the answer of the garnishee, and append the same to his return.
Oath of.	SEC. 3201. (1865.) In such case the sheriff has power to administer an oath to garnishees, requiring them to make true answers to the questions to be propounded, which questions shall be as follows :
Questions.	1. Are you in any manner indebted to the defendant in this suit, or do you owe him money or property, which is not yet due? If so, state the particulars. 2. Have you in your possession, or under your control, any property, rights or credits of the said defendant? If so, what is the value of the same, and state all particulars. 3. Do you know of any debts owing to the said defendant, whether due or not due, or any property, rights, or credits belonging to him, and now in the possession or under the control of others? If so, state the particulars.
On refusal to answer.	SEC. 3202. If the garnishee refuses to answer fully and unequivocally all the foregoing interrogatories, he shall be notified and required to appear and answer on the first day of the next term of the district court, or on the day fixed for trial, as above provided, and so he may be required in any event, if the plaintiff so notify him.
Questions in court.	SEC. 3203. (1867.) The questions propounded to the garnishee in court, may be such as are above prescribed, to be asked by the sheriff, and such others as the court may think proper and right.
Fees of witness.	SEC. 3204. (1868.) Where the garnishee is required to appear at court, unless he has refused to answer, as contemplated above, he is entitled to the pay and mileage of an ordinary witness, and may, in like manner, require payment before hand, in order to be made liable for non-attendance.
Presumption from non-appearance.	SEC. 3205. (1869.) If, when, duly summoned, and his fees tendered, (when demanded,) he fail to appear and answer the interrogatories propounded to him without sufficient excuse for his delinquency, he shall be presumed to be indebted to the defendant to the full amount of the plaintiff's demand, and shall be dealt with accordingly.
May yet show cause.	SEC. 3206. (1870.) But for a mere failure to appear, he is not liable to pay the amount of the plaintiff's judgment, until he has had an opportunity to show cause against the issuing of an execution.
How he may exonerate himself.	SEC. 3207. (1871.) A garnishee may, at any time after answer, exonerate himself from further responsibility, by paying over to the sheriff the amount owing by him to the defendant, and by placing at the sheriff's disposal the property of the defendant, or so much of said debts and property as is equal to the value of the property to be attached, all of which may afterwards be treated as though attached in the usual manner.
Answer controverted.	SEC. 3208. When the answer of the garnishee is made, whether at the district court or before the justice, or before the sheriff, the plaintiff may controvert by pleading filed, any facts contained in the answer, and specifically set out by the plaintiff, and issue being thereupon joined, may be tried in the usual manner. Upon such trial the answer of the garnishee is competent testimony.
Found indebted.	SEC. 3209. If in any of the above methods, it is made to appear that the garnishee was indebted to the defendant, or had any of the defendant's property in his hands, either at the time of being served

with the garnishee notice aforesaid, or at any time subsequent thereto, he is liable to the plaintiff, in case judgment is finally recovered by him to the full amount of that judgment, or to the amount of such indebtedness, and of the property so held by him, and a conditional judgment shall be entered up against him accordingly, unless he prefers paying or delivering the same to the sheriff as above provided.

SEC. 3210. If the debt of the garnishee to the defendant is not due, If not yet due. execution will be suspended until its maturity.

SEC. 3211. The garnishee shall not be made liable on a debt due Not liable unless paper delivered. by negotiable or assignable paper, unless such paper is delivered, or the garnishee completely exonerated or indemnified from all liability thereon, after he may have satisfied the judgment.

SEC. 3212. The judgment in the garnishment suit, condemning the Judgment conclusive. property or debt in the hands of the garnishee, to the satisfaction of the plaintiff's demand, is conclusive between the garnishee and defendant.

SEC. 3213. The docketing of the original case shall contain a statement of all the garnishments therein, and when judgment is rendered Docket shall contain. against a garnishee, the same shall distinctly refer to the original judgment.

SEC. 3214. An appeal lies, in all garnishment cases, at the instance Appeal in garnishment. of the plaintiff, the defendant, the garnishee, or an intervenor claiming the property or money.

SEC. 3215. (1874.) Property attached otherwise than by garnish- When property bound by attachment. ment is bound thereby, from the time of the service of the attachment only.

SEC. 3216. The court before whom the action is pending, or the Receiver. judge thereof, in vacation may, at any time appoint a receiver to take possession of property attached under the provisions of this chapter, and to collect, manage and control the same, and pay over the proceeds according to the nature of the property and exigency of the case.

SEC. 3217. All money attached by the sheriff, or coming into his Sheriff to pay over. hands by virtue of the proceeding in attachment, shall forthwith be paid over to the clerk to be by him retained till the further action of the court.

SEC. 3218. The sheriff shall make such disposition of other attached And obey orders of judge. property as may be directed by the court or judge, and where there is no direction upon the subject, he shall safely keep the property, subject to the order of the court.

SEC. 3219. The defendant, or any person in whose possession any Forthcoming bond. attached property is found, or any person making affidavit that he has an interest in it, may, at any time before judgment, discharge the property attached, or any part thereof, by giving bond with security, to be approved by the sheriff, in a penalty at least double the value of the property sought to be released, but if that sum would exceed three times the claim, then in such sum as equals three times the claim, conditioned that such property, or its estimated value, shall be delivered to the sheriff to satisfy any judgment which may be obtained against the defendant in that suit, within twenty days after the rendition thereof. This bond shall be filed with the clerk of the court.

SEC. 3220. To determine the value of the property in cases where How value found a bond is to be given, unless the parties agree otherwise, the sheriff shall summon two disinterested persons having the qualification of jurors, who, after being sworn by him to make the appraisal faithfully and impartially, shall proceed to the discharge of their duty. If such per-

sons disagree as to the value of the property, the sheriff shall decide between them.

Defense in suit  
on such bond.

SEC. 3221. (1879.) In an action brought upon the bond above contemplated, it shall be a sufficient defense that the property for the delivery of which the bond was given, did not, at the time of the levy, belong to the defendant against whom the attachment was issued.

Sale without  
delay.

SEC. 3222. When the sheriff thinks the property attached in danger of serious and immediate waste and decay, or when the plaintiff makes affidavit to that effect, the sheriff may summon three persons having the qualifications of jurors, to examine the same. The sheriff shall give the defendant, if within the county, two clear days' notice of such hearing, and he may appear before such jury and have a personal hearing. If they are of the opinion that the property requires soon to be disposed of, they shall specify in writing, a day beyond which they do not deem it prudent that it should be kept in the hands of the sheriff. If such day occur before the trial day, he shall thereupon give the same notice as for goods in execution, and for the same length of time, unless the condition of the property renders a more immediate sale necessary. The sale shall be made accordingly. If the defendant gives his written consent, such sale may be made without such finding of three men.

Money remain  
with clerk

SEC. 3223. The money arising from such sale shall remain in the hands of the clerk to abide the event of the suit.

Sheriff return.

SEC. 3224. The sheriff shall return upon every writ of attachment, what he has done under it. The return must show the property attached, the time it was attached, and the disposition made of it, by a full and particular inventory; also, the appraisement above contemplated, when such has been made. Where garnishees are summoned, their names, and the time each was summoned, must be stated. And where real property is attached, the sheriff shall describe it with sufficient certainty to identify it, and where he can do so, by a reference to the book and page where the deed under which the defendant holds is recorded. He shall return with the writ all bonds taken under it. Such return must be made immediately after he shall have attached sufficient property, or all that he can find; or, at latest, on the first day of the term on which the defendant is notified to appear.

#### *Specific Attachments.*

Specific attach-  
ments.

SEC. 3225. In an action to enforce a mortgage of, or lien upon, personal property, or for the recovery, partition or sale of such property, or by a plaintiff having a future estate or interest therein, for the security of his rights, where it satisfactorily appears by the petition, verified on oath, or by affidavits or the proofs in the cause, that the plaintiff has a just claim, and that the property is about to be sold, concealed, or removed from the state, or where the plaintiff states, on oath, that he has reasonable cause to believe, and does believe, unless prevented by the court, the property will be sold, concealed or removed from the state, an attachment may be granted against the property.

Vendors pursuit  
of property ob-  
tained by fraud.

SEC. 3226. In an action by a vendor of property, fraudulently purchased, to vacate the contract and have a restoration of the property, or compensation therefor, where the petition shows such fraudulent purchase of property, and the amount of the plaintiff's claim, and is verified by his oath, an attachment against the property may be granted.

Controlled by  
judge as to  
terms.

SEC. 3227. The attachments in the cases mentioned in the two last sections, may be granted by the court in which the action is brought, or by the judge thereof, or the judge of the county court, upon such terms

and conditions as to security on the part of the plaintiff, for the damages which may be occasioned by them, and with such directions as to the disposition to be made of the attached property, as may be just and proper, under the circumstances of each case.

SEC. 3228. In every case the plaintiff shall be required to give security for the damages to the defendant, in an adequate sum to be specified in the order granting the attachment; and where it may be proper the court or judge may direct that the defendant in possession of the attached property, shall be permitted to retain it upon giving such bond with security, and for such sum as the court or judge may prescribe. What the terms may be.

SEC. 3229. No writ of attachment shall be issued by the clerk until the bond on the part of the plaintiff required by the order of the court or judge, is executed in his office, by one or more sufficient sureties of the plaintiff. Bond.

SEC. 3230. The writ of attachment shall describe the specific property against which it is issued, and shall have indorsed upon it the direction of the court or judge, as to the disposition to be made of the attached property. It shall be directed, executed, and returned, as other writs of attachment. Writ described.

SEC. 3231. The court may, in any of the cases mentioned under this head of specific attachments, direct the terms and conditions of the bond to be executed by the defendant, with security, in order to obtain a discharge of the attachment. Court may also determine bond

SEC. 3232. If judgment is rendered for the plaintiff, the court shall apply in satisfaction thereof. If judgment in any case be rendered for plaintiff, how money to be applied.

1. The money arising from the sales of perishable property.

2. The proceeds of the debts and funds attached in the hands of the garnishee. If these are not sufficient to satisfy the plaintiff's claim, the court shall order a sale by the sheriff, of any other attached property which may be under his control.

SEC. 3233. The court may, from time to time, make and enforce proper orders respecting the property, sales, and the application of the moneys collected. Court may control attached property.

SEC. 3234. The sheriff shall be allowed by the court the necessary expenses of keeping the attached property, to be paid by the plaintiff and taxed in the costs. Costs of sheriff.

SEC. 3235. Any surplus of the attached property and its proceeds, shall be returned to the defendant. Surplus returned.

SEC. 3236. If judgment is rendered in the action for the defendant, the attachment shall be discharged, and the property attached, or its proceeds shall be returned to him. Judgment for defendant.

SEC. 3237. Any person other than the defendant, may, before the sale of any attached property, or before the payment to the plaintiff of the proceeds thereof, or any attached debt, present his petition verified by oath, to the court, disputing the validity of the attachment, or stating a claim to the property or money, or to an interest in, or lien on it, under any other attachment, or otherwise, and setting forth the facts upon which such claim is founded; and the petitioner's claim shall be in a summary manner investigated. The court may hear the proof or order a reference, or may empanel a jury to inquire into the facts. If it is found that the petitioner has title to, a lien on, or any interest in such property, the court shall make such order as may be necessary to protect his rights. The costs of such proceedings shall be paid by either party, at the discretion of the court. An intervenor may claim the property and have his claim disposed of summarily.

- Defendant's remedy is on the bond—counter-claim.** SEC. 3238. The fact stated as a cause of attachment, shall not be contested in the action by a mere defense. The defendant's remedy shall be on the bond, but he may, in his discretion, sue thereon, by way of counter-claim or cross-demand, and in such case, shall recover damages as in an original action on such bond.
- Motion to discharge.** SEC. 3239. A motion may be made to discharge the attachment, or any part thereof, at any time before trial, for insufficiency of statement of cause thereof, or for other cause making it apparent of record that the writ should not have issued, or should not have been levied on all or on some part of the property held.
- Appeal from discharge.** SEC. 3240. When an attachment has been discharged, if the plaintiff then announce his purpose to appeal from such order of discharge, he shall have two clear days in which to perfect his appeal, and during that time such discharge shall not operate a return of the property, nor divest any lien, if such appeal be so perfected at the end thereof.
- Same.** SEC. 3241. But if judgment in the cause of action be also given against the plaintiff, he must also, within the same time, take his appeal thereon, or such discharge shall be final.
- How this law to be construed.** SEC. 3242. The attachment law shall be liberally construed, and the plaintiff, before or during trial, shall be permitted to amend any defect of form, in the affidavit, bond, attachment, or other proceeding; and no attachment shall be dismissed for any defect in, or want of bond, if the plaintiff, his agent or attorney, will at once substitute a sufficient bond, but the statements of cause of attachment shall not be amended, nor shall such cause be stated in the alternative but the cause or causes relied on shall each be stated in a direct and categorical manner, or shall be insufficient.
- Notice of attachment.** SEC. 3243. No levy of attachment on real estate shall be notice to a subsequent *bona fide* vendee or encumbrancer, unless the sheriff making such levy shall have entered in a book which shall be kept in the clerk's office of each county by the clerk thereof, and called incumbrance book, a statement that the land, describing it, has been attached, and stating the cause in which it was so attached, and when it was done, and signed by such sheriff—and such book shall be open as other books kept by such clerk, to public inspection.
- Sheriff; constable.** SEC. 3244. (1883.) The word "sheriff" as used in this chapter, is meant to apply to constables when the proceedings are in a justice's court or the like officer of any other court.
- Justice; clerk.** SEC. 3245. (1884.) When the proceedings are in a justice's court, the justice is to be regarded as the clerk of the court for all the purposes herein contemplated.

**PRIOR LAWS.** 1. An act allowing and regulating writs of attachment, passed April 12, 1827; M. D., 1833, p. 388. Repealed June 1, 1839; I. T., 1st sess., p. 52, being number 2 hereof.

2. An act allowing and regulating writs of attachment, passed Jan. 7, 1839, took effect June 1, 1839; I. T., 1st sess., p. 52. Repealed by number 3 hereof.

3. An act allowing and regulating writs of attachment, passed Feb. 16, took effect March 16, 1843. Reprint, chap. 16, p. 77.

4. An act amending same, passed June 7, 1845, took effect Aug. 1; I. T., 7th sess., chap. 17, p. 35.

5. An act further amending same, passed Jan. 17, 1846; I. T., 8th sess., chap. 15, p. 14.

6. An act to amend "an Act regulating practice in the district courts of the territory of Iowa," passed Jan. 19, 1846; I. T., 8th sess., chap. 31, p. 29.

7. An act to amend the act of Feb. 16, 1843, passed Jan. 15, 1849? 2d sess., chap. 122, p. 149.

8. Code of 1851, chap. 109.

9. An act to amend section 1848 of Code of Iowa, passed Jan. 24, took effect July 1, 1853; laws of 4th sess., chap. 84, p. 143.

10. An act authorizing writs of attachment \* \* \* to be got on Sunday, passed Jan. 24, took effect Feb. 7, 1855; laws of 5th sess., chap. 125, p. 190.

11. "An act to amend chapter 84 of the laws of 1853, entitled an act to amend section 1848 of the Code of Iowa, approved Jan. 24, 1853," passed Feb. 27, 1858, took effect March 10, 1858; laws of 7th sess., chap. 26, p. 30.

**DECISIONS UNDER THE PRIOR PRACTICE.** Chapter 84 of 4th session, applies only to actions founded on contract, 3 Iowa, 502; 2 Iowa, 535; judgment should be *in rem.*, M., 97; 1 G., 366; but a sale under a general judgment may be valid, 2 G., 385; in cases of attachment, law to be strictly construed, M., 97; 3 G., 77, 387, 523; 4 G., 548, 113, 157; M., 458; [but see section 3242,] such proceedings are only auxiliary, M., 54, 458; 6 Iowa, 524; 4 G., 468, 153; 4 Iowa, 416; 1 Iowa, 459; 3 G., 237; may issue in equity, *Crouch v. Crouch*, Dec. term, 1859; [see section 3225,] state may obtain, 2 Iowa, 52; when one not a party can not intervene, 8 Iowa, 427, 126; *Hargrave v. Edes*, June term, 1859; *Phillips v. Shelton*, Dec. term, 1859; *Tyler & Co. v. Lombard*, June term, 1859; [but see section 3237,] the writ must be demanded in the petition, 4 G., 113, 157; may be by separate petition, 4 Iowa, 56, 60; and may be issued on an old petition, *Van Winkle v. Stevens & Co.*, Dec. term, 1859; and may be issued before notice, 8 Iowa, 309; affidavit may be made by any one and need not state means of knowledge, 4 G., 255; *Chittenden v. Hobbs*, Dec. term, 1859, and 8 Iowa, 318; need not be signed by affiant, 8 Iowa, 318; [see section 4034,] certificate of officer, 8 Iowa, 284; [see sections 4031 and 4032,] for money not due, 1 Iowa, 552; when entitled to judgment in such case, 4 G., 153; and *Stacey & Thomas v. Stichter & Co.*, Dec. term, 1859; affidavit and petition amendable, M., 230; 1 G., 405; 3 G., 157; 4 G., 113; 6 Iowa, 56; 7 Iowa, 404; and if material must be sworn to, 4 G., 113; 1 *ibid.*, 405; *Hanill & Co. v. Phenice*, Dec. term, 1859; [but see section 3242,] the bond amendable, *Churchill, Walkley & Johnson v. Fulliam*, June term, 1859; *Cheever v. Lane*, same term. Section 1848 construed, 3 G., 543, 545; 1 Iowa, 552; 7 *ibid.*, 509; what should be alleged, *ibid.*, and see 8 Iowa, 352; petition may state more than one cause, *Hollaway v. Hanford*, Dec. term, 1859; but not in the alternative, *Stacey & Thomas v. Stichter & Co.*, Dec. term, 1859; [see section 3242,] may have a writ against property of one defendant without any statement as to any other, 3 G., 523; 6 Iowa, 54; *Chittenden v. Hobbs*, Dec. term, 1859; certainty of assurance demanded in affidavit, *Stadler Bro. & Co. v. Parmelee & Watts*, Dec. term, 1859; [see section 4033,] the allegation can not be controverted, 4 Iowa, 416; 5 *ibid.*, 376; 8 *ibid.*, 475, 96, 45; [but see section 3238,] section 1851, refers to action *ex-delicto*, 6 Iowa, 57; 3 *ibid.*, 502; 2 *ibid.*, 535; not applicable to judgment got on a tort, 2 Iowa, 535; nor to penal bond case, 6 Iowa, 57; when writ will be quashed and how assailed—by motion only, 4 Iowa, 56; M., 54; *Hollaway v. Hanford*, Dec. term, 1859; [see section 3239,] case of misnomer, M., 456; will be quashed unless bond and affidavit filed, 3 G., 77; if not sealed, 4 G., 76; if materially defective, 4 G., 352; 3 Iowa, 203; construction of chapter 84 of 4th session, 1 Iowa, 564; 8 Iowa, 318; *ibid.*, 341; writ will not be quashed if defect amended, 1 G., 405; 6 Iowa, 56; 4 G., 113; 5 Iowa, 486; 3 *ibid.*, 203; if new bond be filed, *Van Winkle v. Stevens & Co.*, Dec. term, 1859; [see section 3242,]

Remedy is by action on the bond for wrongful suing out of writ, 8 Iowa, 163; [see section 3238,] if obtained by fraud the writ will be dissolved, *Pomeroy & Co. v. Parmelee*, June term, 1859; appeal lies from order concerning attachment, 1 Iowa, 459; 5 *ibid.*, 486; [see sections 3240 and 3241,] no bill needed, 1 Iowa, 216, 263; effect of appeal, 4 Iowa, 230, 240; 3 G., 157 and 200; 2 G., 505; the levy gives jurisdiction, 4 G., 468; a bond given to a sheriff not to levy is void, 7 Iowa, 167; presumption as to ownership of property based on return, 3 G., 387; 4 G., 468; who may execute writ, *Curran v. Radcliffe*, Dec. term, 1859; exempted property may be released on motion, 4 G., 551; 3 G., 104; duty of officer as to service and return, 6 Iowa, 238; partnership creditor has no lien enforceable by attachment, 7 Iowa, 39; [see section 3190,] case of exemption of buggy, 1 Iowa, 53; alias attachment without new bond, *Hamil, Ralston & Co. v. Phenice*, Dec. term, 1859; need of prompt appeal in order to save lien of attachment, 3 G., 157; 4 Iowa, 230; [see sections 3240 and 3241,] a partial failure no ground for dissolution of attachment, *pro tanto*, 4 Iowa, 416; a vendee with deed recorded *before sale*, on execution under attachment, holds superior to execution vendee, *Norton & Co. v. Williams*, Dec. term, 1859; delivery bond discharges lien, 3 G., 52; property free to other liens or levies, *ibid.*; same is true as to case of garnishment, *Woodward v. Adams*, Dec. term, 1859; sheriff can not hold for costs of keeping property discharged by bond, 3 G., 52; bond to be for whose benefit; 3 G., 523; M., 456; the sum of the bond double what the sheriff might attach, *Churchill, Walkley & Co. v. Fulliam*, June term, 1859; [see section 3181,] by whom signed, *ibid.*, and 1 Iowa, 546; 4 G., 255; 6 Iowa, 400; in suit on attachment bond, burden on plaintiff, 8 Iowa, 96; what must be averred therein, 3 Iowa, 107, 502; 4 G., 314, 121, 320; 8 Iowa, 341; damages therein, 3

Iowa, 502; 4 G., 264; damages may be set off in same suit, when? *Reed v. Chub Bro. & Co.*, June term, 1859; *Zinn & Co. v. Williams & Co.*; *ibid.*, otherwise if the bond is only joint, *Stadler Bro. & Co. v. Parmelee & Co.*, Dec. term, 1859.

Presumption as to time of suing out writ, 4 G., 432, and 4 G., 257; attachment in case of joint defendants, 3 G., 523; the writ of attachment need not aver that bond has been filed, 5 Iowa, 490; 3 *ibid.*, 203; to an action on delivery bond the answer must state whose the property was, if not the attachment defendant's, and is bad if it only state that it was not the attachment defendant's, 5 Iowa, 546; suit on penal bond is on contract, 6 Iowa, 59; mode of signing bond, 1 Iowa, 546; by whom executed, 4 G., 256; averments in suit on bond, 4 G., 314; same, 4 G., 320; see also, 4 G., 426, 121 and 320; meaning of wrongfully, 3 Iowa, 502; evidence of motives in suing out writ, 4 G., 264; must have bond, 4 G., 320; see also, 4 G., 426 and 57; see, 4 G., 357; need of seal, 4 G., 76; writ not amendable, 4 G., 352; a case where sheriff had not right to retain a note handed to him to levy on by an attorney, 4 Iowa, 535; one of two joint obligors not liable in garnishment, 2 G., 125; see 2 G., 486; the assignee of a member of a firm who is transferee of the firm not liable as garnishee by creditors of the firm, 7 Iowa, 59; garnishment in case of assignment for creditors, 3 Iowa, 326; 1 Iowa, 460; 6 Iowa, 61; right of defendant to hold the garnished property as exempt, 4 G., 84; 4 Iowa, 32; garnishee favored, 2 Iowa, 154; 1 Iowa, 404; 2 G., 125; *Smyth, Twogood & Co. v. Mark & Henley*, Dec., 1859; case of garnishment of a negotiable note, 4 G., 155; M., 48; 2 G., 127; 4 G., 296; [see section 3211;] cases of liability where the property is attached with contingencies, 4 G., 296, 536; 2 *ibid.*, 154; see also, 6 Iowa, 61; 3 G., 71; 2 G., 125; [see sections 3209 and 3210;] garnishee may answer with qualifications, 3 Iowa, 325; 1 Iowa, 460; after default a garnishee may file a response denying liability, as well as excusing default, and may vacate default, *Fifield v. Wood*, Dec., 1859; [see section 3206;] answer taken as true, if uncontroverted, 6 Iowa, 61; 1 Iowa, 404, 460; 2 Iowa, 154; 2 G., 125; presumption as to garnishee, 2 Iowa, 154; 1 Iowa, 404; garnishee may appeal, 1 Iowa, 460; [see section 3214;] garnishee liable twice, 7 Iowa, 173; must be judgment against the defendant, 7 Iowa, 85; and judgment against the garnishee may be for costs of original suit, if he have enough in his hands—a voidable judgment will protect a garnishee, 1 Iowa, 86; defendant competent between garnishee and intervenor, 7 Iowa, 474; question to be asked, 1 Iowa, 467; garnishee must take notice, after being brought in of all the proceedings, *Chase v. Foster*, Dec., 1859; and must follow the case, if taken away by change of venue, *ibid.*; corporation garnishable, 4 Iowa, 302; 5 *ibid.*, 114; section 1892 applies only to personal property, 5 Iowa, 285; exemption in garnishee not defendant's privilege, 4 Iowa, 302; garnishment not applicable to subject land, 5 Iowa, 285; no judgment in garnishment save as based on a writ duly issued, 8 Iowa, 251; continuation of answer of garnishee, &c., 4 G., 84; note not garnishable, 4 G., 155; same, 4 G., 296; assignment may be found voidable in a garnishment case, 4 G., 443; see *ibid.*, 536; garnishee an agent and clerk, 3 G., 71; no judgment against garnishee till debt due, 2 G., 125; see liability as garnishee, 2 G., 486; what an attachment will hold, 2 G., 497; a municipal corporation may be subjected to garnishment and held—the objection of exemption from garnishment is the privilege of garnishee, 4 Iowa, 302; a corporation may be garnished, 5 Iowa, 115; [but see section 3196;] where the relations between the defendant in chief and the garnishee are such that the garnishee may on contingencies pay another, then to show garnishee liable you must exclude such contingencies, 5 Iowa, 115; a party suffered to contest with the plaintiff in the original suit a sum which he demands of the garnishee has an appeal from a judgment against him for costs. Is such contestation allowable in one not substituted for the garnishee? 4 Iowa, 341; a garnishee declined answering a question before a commissioner—the court decided the question proper. Garnishee now offered to answer it, but was not allowed, and judgment was rendered against him as for want of an answer. Held error, 5 Iowa, 316.



CHAPTER 125.

[Code—Chapter 110.]

EXECUTIONS.

SECTION 3246. Executions may issue at any time before the judgment is barred by the statute of limitations, and but one execution shall be in existence at the same time. When executions may issue.

SEC. 3247. Judgments or orders requiring the payment of money, or the delivery of the possession of property are to be enforced by execution. Obedience to those requiring the performance of any other act, is to be coerced by attachment for contempt. How judgment and orders to be enforced.

SEC. 3248. (1888.) Executions from the district court may issue in the first instance into any county which the party ordering them may direct. Executions may run into any county.

SEC. 3249. When a judgment has been obtained in one county of this state, and the judgment creditor desires to send an execution into another county, he must also, if it has not been already done, send to be filed in such county a transcript of such judgment, and the sheriff of such county to whom an execution may come from another county, shall return to the clerk of his county a copy of such execution and all his doings thereon, which shall be treated by the clerk of such county, and such entries made in regard thereto, as if such execution had issued in that case from his office, to the end that the record in his county may show all incumbrances by attachment or judgment on any lands therein, and all partial or total discharges of the same. When execution runs into other county what to be done.

SEC. 3250. (1889.) When sent into any county other than that in which the judgment was rendered, return may be made by mail. But money can not thus be sent, except by the direction of the party entitled thereto, or his attorney. Return how made.

SEC. 3251. The execution must intelligibly refer to the judgment, stating the time and place at which it was rendered, the names of the parties to the action as well as to the judgment, its amount, and the amount still to be collected thereon, if for money; and, if not for money, it must state what specific act is required to be performed. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment and interest out of the property of the debtor subject to execution. Form of execution.

SEC. 3252. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment and interest out of such property. If against representatives.

SEC. 3253. If it be for the delivery of the possession of real or personal property it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the sheriff to satisfy any costs, damages, or rents and profits, with interest recovered by the same judgment out of the property of the party against whom it was rendered, subject to execution, and the value of the property for which judgment was recovered, to be specified therein, if a delivery thereof can not be had, and shall in that respect be deemed an execution against property. If for land.

SEC. 3254. When it requires the performance of any other act, a certified copy of the judgment may be served on the person against If for the performance of any act.

- whom it is given, or upon the person or officer, who is required thereby, or by law to obey the same, and his obedience thereto enforced.
- Receipt therefor.** SEC. 3255. Every officer to whose hands an execution may legally come, shall give a receipt therefor, if required, stating the hour when the same was received, and shall make sufficient return thereof, together with the money collected, on or before the seventieth day from such delivery.
- Judgment against husband and wife.** SEC. 3256. (1891.) Where the judgment is against husband and wife, the execution may issue against the property of either or both of them.
- Indorsement to be made by officer.** SEC. 3257. The officer to whom an execution is legally issued, shall indorse thereon, the day and hour when he received it, and the levy, sale, or other act done by virtue thereof, with the date, and the dates and amounts of any receipts or payment in satisfaction thereof; the indorsements must be made at the time of the receipt or act done.
- Rights of surety.** SEC. 3258. When a judgment is against a principal and his surety, it shall be the duty of the officer having the collection thereof, to exhaust the property of the principal before proceeding to sell that of the surety.
- Surety embraces.** SEC. 3259. The term "surety," in the foregoing section, shall embrace accommodation indorsers, stayers, and all other persons whose liability on the claim is posterior to that of another; but the surety shall, if requested by the officer, show property of the principal, to entitle himself to the benefit of this provision.
- Property subjected in the order of liability.** SEC. 3260. After exhausting the property of the principal, it shall be the duty of the officer to subject the property of the other parties in the order of their liability in the execution. But the party subsequently liable, shall, if requested by the officer, show property of the party liable before him, so as to entitle himself to the benefit of this provision.
- All held equal unless.** SEC. 3261. But all the parties will be considered as equally liable in all cases, unless the order of liability is shown to the court, and recited in the judgment, and the clerk issuing execution on the judgment containing such recital, shall state the order of liability in the execution.
- Officer's duty as to execution of writ.** SEC. 3262. When an execution is delivered to an officer, he must proceed to execute the same with diligence; if executed, an exact description of the property, at length, with the date of the levy, shall be indorsed upon or appended to the execution, and if the writ was not executed, or only executed in part, the reason in such case must be stated in the return.
- Sunday.** SEC. 3263. An execution may be issued and executed on Sunday, whenever an affidavit shall be filed by the plaintiff or some person in his behalf, stating that he believes he will lose his judgment unless process issue on that day.
- Sheriff's successor.** SEC. 3264. If the sheriff die or go out of office before the return of any execution, his successor, or other officer authorized to discharge the duties of the office in such case, may proceed thereon in the same manner that the sheriff should have done.
- Execution at once issued and duty of clerk regarding it.** SEC. 3265. Upon the rendition of judgment, execution may be at once issued, and shall be by the clerk, on the demand of the party entitled thereto, and upon its issuance, the clerk shall enter on the judgment docket the date of its issuance, and to what county and officer issued, and shall also enter on said docket the return of the officer with the date of the return, the dates and amount of all moneys received into or paid out of the office thereon, and these entries shall be made at the time of the thing done.
- Clerk's fine if derelict.** SEC. 3266. The clerk willfully neglecting or refusing to perform

any one of the duties in this chapter imposed, shall be liable to a penalty of five hundred dollars, and to damages to the party aggrieved, and shall be guilty of a misdemeanor in office, and on conviction thereof, shall be removed from office.

• *Levy.*

SEC. 3267. (1904.) The officer must execute the writ by levying Mode of levy. on the property of the judgment debtor, collecting the things in action by suit in his own name, if necessary, or by selling the same, selling the other property and paying to the plaintiff the proceeds, or so much thereof as will satisfy the execution.

SEC. 3268. The officer shall in all cases select such property, and in What property he shall take. such quantities, as will be likely to bring the exact amount required to be raised, as nearly as practicable, and having made one levy, may at any time thereafter make other levies if he deem it necessary.

SEC. 3269. Stock or interests owned by the defendant in any com- Stock. pany, and also debts due him, and property of his in the hands of third persons, may be levied upon in the same manner provided for attaching the same.

SEC. 3270. In proceedings by garnishment on execution, the gar- Garnishment on execution. nishee shall be served as in case of attachment; his answer may be taken by the officer in the same way and with the same results; he may be notified to appear at the term of court in the same way, and with the same results, and his default shall be attended with the same consequences. The plaintiff may also, if the garnishee is called into court, have a case docketed against him without docket fee, and upon his answer to the officer, issue may be made and notice thereof given him, or issue may be made on his answer in court without any notice thereon, if made at the same term; and in all these and every other particular, the proceedings shall be the same as under garnishment on attachment, as near as the nature of the case will allow.

SEC. 3271. Proceedings by garnishment on execution shall not be Return regard- ing such garnish- ment. in any manner affected by the expiration of the execution or its return, and where parties thereunder have been garnished, the officer shall return to the next term thereafter a copy of the execution with all his doings thereon so far as the garnishments thereon are concerned.

SEC. 3272. Bank bills and other things in action, may be levied Things in action. upon and sold, or appropriated as herein after provided, and assignments thereon by the officer shall have the same effect as if made by the defendant, and may be treated as so made.

SEC. 3273. (1894.) After the rendition of judgment, any person Any debtor of defendant may pay. indebted to the defendant in execution, may pay to the sheriff the amount of such indebtedness, or so much thereof as is necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge therefor.

SEC. 3274. (1895.) Public buildings owned by the state, or any Public buildings of this state ex- empt. county, city, school district, or other civil corporation, and any other public property which is necessary and proper for carrying out the general purpose for which any such corporation is organized, are exempt from execution. The property of a private citizen can in no case be levied upon to pay the debt of a civil corporation.

SEC. 3275. (1896.) In case no property is found on which to levy, Creditor may take scrip. which is not exempted by the last section, or if the judgment creditor elect not to issue execution against such corporation, he is entitled to the

amount of his judgment, and costs in the ordinary evidences of indebtedness issued by that corporation. And if the debtor corporation issues no scrip or evidences of debt, a tax must be levied as early as practicable, sufficient to pay off the judgment with interest and costs.

SEC. 3276. (1897.) A failure on the part of the officers of the corporation to comply with the requirements of the last section renders them personally responsible for the debt.

SEC. 3277. If an officer who levies, or is required to levy an execution on personal property, doubts whether it is subject to the execution, he may give the plaintiff therein, or his agent or attorney, notice that an indemnifying bond is required. Bond may, thereupon, be given, by or for the plaintiff, with one or more sufficient sureties, to be approved by the officer, to the effect that the obligors will indemnify him against the damages which he may sustain in consequence of the seizure or sale of the property, and will pay to any claimant thereof the damages he may sustain in consequence of the seizure or sale, and will warrant to any purchaser of the property, such estate or interest therein as is sold; and thereupon the officer shall proceed to subject the property to the execution, and shall return the indemnifying bond to the district court of the county, in which the levy is made.

SEC. 3278. If the bond mentioned in the last section is not given, the officer may refuse to levy the execution, or if it has been levied and the bond is not given in a reasonable time after it is required by the officer, he may restore the property to the person from whose possession it was taken, and the levy shall stand discharged.

SEC. 3279. The claimant or purchaser of any property, for the seizure or sale of which an indemnifying bond has been taken and returned by the officer, shall be barred of any action against the officer levying on the property, if the surety on the bond was good when it was taken. Any such claimant or purchaser may maintain an action upon the bond, and recover such damages as he may be entitled to.

SEC. 3280. Where property, for the sale of which the officer is indemnified, sells for more than enough to satisfy the execution under which it was taken, the surplus shall be paid into the court to which the indemnifying bond is directed to be returned. That court may order such disposition or payment of the money to be made temporarily or absolutely, as may be proper, in respect to the rights of the parties interested.

SEC. 3281. The sale of personal property on which an execution is levied, shall be suspended at the instance of any person other than the defendant in execution, claiming the property, who shall execute, with one or more sureties, sufficient for double its value, a bond to the plaintiff in the execution to the effect that, if it shall be adjudged that the property or any part of it is subject to the execution, he will pay to the plaintiff the value of the property so subject, and ten per cent. thereon, not exceeding the amount due on the execution and ten per cent. thereon.

SEC. 3282. For the purpose of taking the bond mentioned in the last section, the officer shall select three disinterested persons having the qualifications of jurors, and administer to them an oath, to make a fair appraisement of each article of the property, whose appraisement in writing shall be recited in the bond. The bond, with the appraisement annexed thereto, shall be returned to the district court of the county in which the levy was made, at the next term thereafter.

SEC. 3283. The party to whom the bond is executed may move the court to which it is returned, for a judgment thereon against all or any

When personal responsibility arises.

Indemnifying bond required.

If not given no need of levy.

Protection of officer if bond good when taken.

When such property is sold, what done with the proceeds.

Any one may give bond and discharge property.

Value of such property how determined

Proceedings on such bond and execution thereon.

of the obligors, or their representatives, having given to them ten days' notice of the motion. The court may cause such issues to be tried as it may prescribe, and direct which party shall be considered plaintiff in the issues. If the property or any part of it is found subject to the execution, judgment shall be rendered in favor of the plaintiff therein for the value of the property so subject, and ten per cent. thereon, not exceeding the amount due on the execution and ten per cent. thereon. An execution may be issued on the judgment forthwith, on which the same indorsement shall be made as on the execution in virtue of which the property had been seized.

SEC. 3284. Upon the trial of the motion, either party may object that the property was not fairly appraised; and thereupon the jury trying the facts shall hear evidence respecting, and find the value of the property.

Upon the trial value may be found.

SEC. 3285. The giving of the bond mentioned in section 3281 shall not discharge the levy of the execution upon the property claimed. But the officer may leave it, subject to the lien of the levy, with the person in whose possession it is found, pending the proceeding on the bond; and may, in the mean time, proceed with the execution against other property of the defendant.

Levy yet remains.

SEC. 3286. The provisions of the preceding sections of this chapter, as to bonds, shall apply to proceedings upon executions, issued by justices of the peace. Indemnifying bonds shall be returned in such cases, with the executions under which they are taken, and bonds of claimants of property may be returned to the justice from whose office the execution issued, and motion thereon shall be made before him on five days' notice. He shall cause a jury as in a civil cause, to be impaneled to find whether the property was subject to the execution, and the judgment shall be subject to an appeal.

These provisions also apply to justice cases.

SEC. 3287. Whenever a sheriff or other officer shall levy an execution upon the property or effects held jointly or in partnership by the debtor or debtors in execution, with others, to satisfy the separate debt of such debtor or debtors, the sheriff or other officers shall not proceed to make sale thereof, except as hereinafter provided, if the person or persons, or any of them holding such joint or partnership interest with the debtor, shall assert an equitable or other claim thereto, and in writing, notify the officer of the existence of such claim.

Case of joint or partnership property.

SEC. 3288. When a claim is asserted by the joint owners or partners to the property levied upon, the officer shall not, by virtue of his levy, deprive the joint owners or partners of the possession of the property levied upon, except for the purpose of making an inventory thereof and having the same appraised.

Possession not to be disturbed save to inventory.

SEC. 3289. The officer shall proceed to have the property levied upon, appraised, as provided in section 3282, unless the value can be agreed upon. He shall return the inventory and the appraisalment with the execution, to the office from which it issued, and in his return shall state all the facts connected with the levy by him, and the claim set up by the joint owner or owners.

Officer's duty.

SEC. 3290. The execution creditor shall have a lien upon the property levied upon, to the extent of his claim, if the same does not exceed the interest of the judgment debtor in the property, and which shall continue until the levy is disposed of.

Lien to continue.

SEC. 3291. Upon the execution being returned by the officer, that he had levied the same upon the property in which the debtor was joint owner or partner, and that the same was claimed by the other joint

Creditor may subject by equitable proceedings

owners or partners, the execution creditor may proceed in an action by equitable proceedings, to subject to the satisfaction of his execution, the interest of the debtor so levied upon.

Condition on which possession may be taken from the claimant.

SEC. 3292. If such creditor, at the commencement of his action, or afterward, shall file an affidavit that he verily believes the property levied upon will be removed from the county, or sold, or otherwise disposed of, with intent fraudulently to defeat his lien, the court, or the judge thereof, in vacation, may make an order directing the officer to possess himself of the property so levied upon, unless bond with approved security shall be executed to the plaintiff in the execution, binding the obligors in said bond to have the same forthcoming in obedience to any order or judgment of the court in the action, which bond shall be taken by the officer and returned by him to the court in which the action is pending.

#### *Stay of Execution.*

Stay of execution.

SEC. 3293. When judgment has been rendered against any one for the recovery of money, he may, by procuring one or more sufficient freehold securities to enter into a recognizance acknowledging themselves security for the defendant for the payment of the judgment, together with the interest and costs accrued and to accrue, have a stay of the execution from the time of rendering judgment, as follows:

Time of stay.

If the sum for which judgment was rendered, inclusive of costs, does not exceed five dollars, one month.

If such sum and costs exceed five, but not twenty dollars, two months.

If such sum and costs exceed twenty, but not forty dollars, three months.

If such sum and costs exceed forty, but not sixty dollars, four months.

If such sum and costs exceed sixty, but not one hundred dollars, six months.

If such sum and costs exceed one hundred, but not one hundred and fifty dollars, nine months.

If such sum and costs exceed one hundred and fifty dollars, twelve months.

Take within ten days.

SEC. 3294. The provisions of the foregoing section shall not be enjoyed by any one who does not take such stay within ten days from the expiration of the term at which judgment is rendered. No appeal shall be taken after such stay has been obtained, nor shall a stay be taken on a judgment entered as herein contemplated, against one who is surety in the stay of execution, nor shall such stay be allowed to any judgment obtained by a laboring man or mechanic for his wages.

When not allowed.

How taken, and form of.

SEC. 3295. The surety for stay of execution may be taken and approved by the clerk, and the recognizance entered of record. The undertaking in the recognizance shall be for the payment of the judgment, interest and costs, that may accrue at or before the expiration of the term of the stay of execution.

Sheriff return execution.

SEC. 3296. When the surety is entered after execution issued, the clerk shall immediately notify the sheriff of the stay, and he shall forthwith return the execution, with his doings thereon.

And relinquish property.

SEC. 3297. All property levied on before stay of execution, and all written undertakings for the delivery of personal property to the sheriff, shall be relinquished by the officer, upon stay of execution being entered.

SEC. 3298. Every recognizance taken as above provided, shall have the effect of a judgment confessed, from the date thereof, against the property of the sureties. Judgment confessed.

SEC. 3299. At the expiration of the stay, it shall be the duty of the clerk to issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein. When stay out.

SEC. 3300. When any court shall render judgment against two or more persons, any of whom is surety for any other in the contract on which the judgment is founded, there shall be no stay of execution allowed, if the surety object thereto at the time of rendering the judgment, whereupon it shall be ordered by the court that there be no stay, unless the surety for the stay of execution will undertake specifically to pay the judgment, in case the amount thereof can not be levied of the principal defendant. Surety may prevent stay.

SEC. 3301. Any surety for the stay of execution may file with the clerk an affidavit, stating that he verily believes he will be liable for the judgment, interest and costs thereon, unless execution issues immediately; and the clerk shall thereupon issue execution forthwith, unless other sufficient surety be entered before the clerk, as in other cases. Surety may determine a stay.

SEC. 3302. If other sufficient surety be entered, it shall have the force of the original surety entered before the filing of the affidavit, and shall discharge the original surety. Substituted security.

SEC. 3303. Where a stay of execution has been taken, such confessed judgment shall not release any judgment lien, by virtue of the original judgment for the amount then due. The officer holding the said execution, shall return thereon what amount was made from the principal debtor, and how much from the surety. No judgment lien released.

*Exemption.*

SEC. 3304. The following property of private individuals is exempt from execution: All wearing apparel kept for actual use, and suitable to the condition of the party, and trunks and other receptacles to contain the same; one musket or rifle; the proper tools, instruments, or books, of any farmer, mechanic, surveyor, clergy man, lawyer, physician, teacher, or professor; the horse, or the team, consisting of not more than two horses or mules, or two yoke of cattle, and the wagon, or other vehicle, with the proper harness or tackle, by the use of which any physician, public officer, farmer, teamster, or other laborer, habitually earns his living; all private libraries, family bibles, portraits, pictures and paintings, not kept for the purpose of sale; a seat or pew, occupied by the debtor or his family, in any house of public worship; and an interest in a public or private burying-ground, not exceeding one acre for any defendant. Exemption.

SEC. 3305. If the debtor is the head of a family, there is further exempt, his homestead, as provided by law; one cow and calf; one horse, unless a horse has been exempted for him under the last section; fifty sheep, and the wool therefrom; five hogs, and all pigs under six months; the necessary food for all animals exempt from execution, for sixty days; all flax raised by the defendant, and the manufactures therefrom; one bedstead, and the necessary bedding, for every two in the family; all cloth manufactured by the defendant, not exceeding one hundred yards in quantity; household and kitchen furniture, not exceeding one hundred dollars in value; all spinning wheels and looms, and other instruments of domestic labor kept for actual use; and the necessary provisions and fuel for the use of the family for six months. Same.

SEC. 3306. The word "family," as used in the last section, does not include strangers or boarders lodging with the family. Same.

**Same.** SEC. 3307. The earnings of such debtor for his personal services, or those of his family, at any time within ninety days next preceding the levy, are also exempt from execution and attachment.

**Exemption of single men and non-residents.** SEC. 3308. None of the exemptions contained in this chapter are for the benefit of a single man not the head of a family, nor of non-residents, nor of those who have started to leave this state, but their property is liable to execution, with the exception in the two former cases of ordinary wearing apparel, and trunks to contain the same; and in the latter case of such wearing apparel with such property as the defendant may select, not to exceed seventy-five dollars, to be selected by the debtor, and appraised according to the provisions of section 3220; but any person coming to this state with the intention of remaining, is a resident within the meaning of this chapter.

**In hands of wife and children.** SEC. 3309. Where a debtor absconds and leaves his family, such property shall be exempt in the hands of the wife and children, or either of them.

### *Sale.*

**Notice of sale.** SEC. 3310. The sheriff must give four weeks notice of the time and place of selling real property, and three weeks notice of that of personal property.

**How given.** SEC. 3311. Notice shall be given by being posted up in at least three public places of the county, one of which shall be at the place where the last district court was held. In addition to which, in case of the sale of real estate, or where personal property to the amount of two hundred dollars or upwards is to be sold, there shall be two publications of such notice, in some newspaper printed in the county, if there be one. In constables' sales, there shall be no newspaper publication, and the notice shall be posted in three public places of the township of the justice, and one of them at his office door; the time of such notice shall be two weeks.

**Fine for sale without such notice.** SEC. 3312. An officer selling without the notice above prescribed, shall forfeit one hundred dollars to the defendant in execution, in addition to the actual damages sustained by either party; but the validity of the sale is not thereby affected.

**Time of sale.** SEC. 3313. The sale must be at public auction, between nine o'clock in the forenoon, and four o'clock in the afternoon, and the hour of the commencement of the sale must be fixed in the notice.

**Sale postponed.** SEC. 3314. When there are no bidders, or when the amount offered is grossly inadequate, or when from any cause the sale is prevented from taking place on the day fixed, the sheriff may postpone the sale for not more than three days, without being required to give any farther notice thereof; but he shall not make more than two such postponements, and such postponement shall be publicly announced when the sale should have taken place.

**Excess, how disposed of.** SEC. 3315. When the property sells for more than the amount required to be collected, the overplus must be paid to the defendant, unless the officer have another execution in his hands, on which said overplus may be rightfully applied.

**Another execution.** SEC. 3316. If the property levied on sell for less than sufficient for that purpose, the plaintiff may order out another execution, which shall be credited with the amount of the previous sale. The proceedings under this second sale, shall conform to those hereinbefore prescribed.

**Levy holds good.** SEC. 3317. When the property is unsold for want of bidders, the levy still holds good; and if there is sufficient time the property may



again be advertised and sold under the same execution, or the execution may be returned and a *venditioni exponas* issued.

SEC. 3318. If the defendant is in actual occupation and possession of any part of the land levied on, the officer having the execution, shall, at least twenty days previous to such sale, serve the defendant with written notice stating that the execution is levied on said land, and mentioning the time and place of sale; and sales made without the notice required in this section, may be set aside, on motion made at the same or the next term thereafter.

Notice to defendant.

SEC. 3319. An any time before nine o'clock, A. M., of the day of sale, the defendant may deliver to the officer a plan of division of the land levied on, subscribed by him, and it shall in that case, be the duty of the officer to sell, according to said plan, so much of the land as may be necessary to satisfy the debt and costs, and no more. If no such plan is furnished, the officer may sell without any division.

Defendant may divide land and have it so sold.

SEC. 3320. When the purchaser fails to pay the money when demanded, the plaintiff or his attorney may elect to proceed against him for the amount; otherwise the sheriff shall treat the sale as a nullity, and may sell the property again on the same day, or after a postponement as above authorized.

If purchaser fail to pay his bid.

SEC. 3321. When any person has heretofore, or shall hereafter, purchase at sheriff's sale, any real estate on which the judgment upon which the execution issued was not a lien at the time of the levy, and which fact was unknown to the purchaser, the district court of the county shall set aside such sale on motion, notice having been given to the debtor, as in case of action, and a new execution may be issued to enforce the judgment, and upon the order being made to set aside the sale, the sheriff or judgment-creditor shall pay over to the purchaser the purchase money; said motion may also be made by any person interested in the real estate.

Sale vacated on motion.

SEC. 3322. (1914.) Money levied upon may be appropriated without being advertised or sold. The same may be done with bank bills, drafts, promissory notes, or other papers of the like character, if the plaintiff will receive them at their par value, as cash, or if the officer can exchange them for cash at that value.

How money appropriated.

SEC. 3323. When a judgment has been obtained against the executor of one deceased, which the personal estate of the deceased is insufficient to satisfy, the plaintiff may file his petition in the office of the clerk of the district court, wherein judgment was rendered against the executor, the heirs and devisees of real estate (if there are such,) setting forth the facts, and that there is real estate of the deceased within the state, describing its location and extent, and praying the court to award execution against the same.

Judgment v. executor.

Real property.

SEC. 3324. A notice shall thereupon be indorsed upon said petition, notifying the persons against whom the petition is filed, to appear on the first day of the term, and show cause, if any they have, why execution should not be awarded.

Notice.

SEC. 3325. The petition and notice shall be served and returned in the ordinary manner, and the same length of time shall be allowed for appearance, as in civil actions.

How served.

SEC. 3326. (1921.) At the proper time, the court shall award the execution, unless sufficient cause be shown to the contrary.

Judgment.

SEC. 3327. (1922.) The non-age of the heirs or devisees shall not be deemed such sufficient cause.

Non-age.

SEC. 3328. (1923.) Mutual judgments, the executions on which are

Mutual judgments set-off.

in the hands of the same officer, may be set off, the one against the other; except that the costs shall be so set off, unless the balance of cash actually collected on the larger judgment is sufficient to pay the costs of both judgments, and such costs shall be paid therefrom accordingly.

**Sale absolute.** SEC. 3329. (1924.) When real property has been levied upon, if the estate is less than a lease-hold, having two years of an unexpired term, the sale is absolute.

SEC. 3330. (1924.) When the estate is of a larger amount, the property is redeemable, as hereinafter prescribed.

**Certificate.** SEC. 3331. (1925.) At the time of the sale, the sheriff shall give to the purchaser a certificate containing a description of the property and the amount of money paid by such purchaser; and stating that unless redemption is made within one year thereafter, according to law, he or his heirs or assigns, will be entitled to a deed for the same.

#### *Redemption.*

SEC. 3332. (1926.) The defendant may redeem such property at any time within one year from the day of sale, as hereinafter provided; and will, in the mean time, be entitled to the possession of the property.

**By creditors.** SEC. 3333. (1927.) For the first six months after such sale, his right to redeem is exclusive, but if no redemption is made by him at the end of that time, any creditor of the defendant, whose demand is a lien upon such real estate, may redeem the same at any time within nine months from the day of sale. But a mechanic's lien, before judgment thereon, is not of such a character as to entitle the holder to redeem.

**Who creditor.** SEC. 3334. (1928.) Any creditor whose claim becomes a lien prior to the expiration of the time allowed by law for the redemption by creditors, may redeem. A mortgagee may thus redeem before or after the debt secured by the mortgage falls due.

**By creditor.** SEC. 3335. (1929.) Creditors having the right of redemption, may redeem from each other within the time above limited, and in the manner herein provided.

**Terms of redemption.** SEC. 3336. (1930.) The terms of redemption in all cases, will be the reimbursement of the amount paid by the then holder, added to the amount of his own lien, with interest upon the whole at the rate of ten per cent. per annum, together with costs, subject to the exception contained in the next section. But where a mortgagee, whose claim is not yet due, is the person from whom the redemption is thus to be made, a rebate of interest, at the rate of ten per cent. per annum, must be made by such mortgagee on his claim.

**Senior creditor.** SEC. 3337. (1931.) When a senior creditor thus redeems from his junior, he is required to pay off only the amount of those liens which are paramount to his own, with the interest and costs appertaining to those liens.

**Junior creditor.** SEC. 3338. (1932.) But the junior creditor may in all such cases prevent a redemption by the holder of the paramount lien, by paying off that lien, or by leaving with the clerk before hand the amount necessary therefor.

**Same.** SEC. 3339. A junior judgment creditor may redeem from a senior judgment creditor, by paying to the party, the clerk or the sheriff, if execution has issued, the full sum due, with interest and costs, and shall become thereby vested with the title to the judgment so redeemed.

**Redemption of judgment.** SEC. 3340. If paid to the sheriff, he shall give to the party redeeming, a certificate that he has paid such sum for the redemption of the

judgment, describing it, which being presented to the clerk, he shall enter such redemption on the judgment docket, as he shall also do if the money is paid to himself.

SEC. 3341. (1933.) Whenever a senior creditor redeems from a Junior creditor. junior creditor, the latter may in return, redeem from the former, and so on, as often as the land is taken from him by virtue of a paramount lien.

SEC. 3342. (1934.) After the expiration of nine months from the Last right. day of sale, the creditors can no longer redeem from each other, except as hereinafter provided. But the defendant may still redeem at any time before the end of the year, as aforesaid.

SEC. 3343. (1935.) Unless the defendant thus redeems, the pur- Who holds. chaser, or the creditor, who last redeemed, prior to the expiration of the nine months aforesaid, will hold the property absolutely.

SEC. 3344. (1936.) In case it is thus held by a redeeming cred- Claim extinct. itor, his lien, and the claim out of which it arose, will be held to be extinguished, unless he pursues the course pointed out in the next section.

SEC. 3345. If he is unwilling to hold the property and credit the Unless. defendant therefor, with the full amount of his lien, he must, within ten days after the nine months aforesaid, enter on the sale book the utmost amount that he is thus willing to credit on his claim.

SEC. 3346. (1938.) Any unsatisfied lien creditor, within ten days Further redemp- after the expiration of the time thus allowed to make the entry re- tions. quired in the last section, may redeem the property by paying the amount of the legal disbursements of the last holder, as hereinbefore regulated, added to the amount thus entered on the sale book, together with interests and costs.

SEC. 3347. (1939.) Such redemptioner shall also credit the defend- Same. ant with the full amount of his lien, unless within ten days after re- deem- ing as aforesaid, he likewise makes a like entry on the sale book, in which case any unsatisfied lien creditor, may in like manner redeem within ten days as aforesaid, and so on until there are no more unsatisfied liens, or until the expiration of the year for redemption, the defendant having the final privilege of redeeming from the last redemp- tion at the end of the year.

SEC. 3348. (1940.) The mode of making the redemption is by Mode of redem- paying the money into the clerk's office for the use of the persons ing. thereto entitled. The person so redeeming, if not defendant in execu- tion, must also file his affidavit, or that of his agent or attorney, stating as nearly as practicable, the amount still unpaid and due on his own claim.

SEC. 3349. (1941.) The clerk shall thereupon give him a receipt Same. for the money, stating the purpose for which it was paid. He must also, at the same time, enter in the sale book a minute of such redemp- tion, of the amount paid, and the amount of the lien of the last redemp- tion, as sworn to by him.

SEC. 3350. (1942.) A creditor redeeming as above contemplated, Entitled to as- is entitled to receive an assignment of the certificate issued by the sher- signments. iff, to the original purchaser, as hereinbefore directed.

SEC. 3351. (1943.) When the property has been sold in parcels, Parcels. any distinct portion may be redeemed by itself.

SEC. 3352. (1944.) When the interests of several tenants in com- Joint interests. mon, have been sold on execution, the undivided portion of any or either of them may be redeemed separately.

- Transferable.** SEC. 3353. (1945.) The rights of a defendant in relation to redemption, are transferrable, and the assignee has the like power to redeem.
- Deed to whom.** SEC. 3354. (1946.) If the defendant or his assignee fail to redeem, the sheriff must, at the end of the year, execute a deed to the person who is entitled to the certificate as hereinbefore provided, or to his assignee. If the person entitled be dead, the deed shall be made to his heirs, but the property will be subject to the payment of the debts of the deceased, in the same manner, as if acquired during his lifetime.
- When to heirs.**
- Deed recorded.** SEC. 3355. (1947.) The purchaser of real estate at a sale on execution, need not place any evidence of his purchase upon record, until twenty days after the expiration of the full time of redemption. Up to that time the publicity of the proceedings is constructive notice of the rights of the purchaser, but no longer.
- Deeds imply regularity.** SEC. 3356. (1948.) Deeds executed by a sheriff in pursuance of such sales, are presumptive evidence of the regularity of all previous proceedings, in the case, and may be given in evidence without preliminary proof.
- Trespass.** SEC. 3357. (1949.) When real estate has been sold on execution, the purchaser thereof, or any person who has succeeded to his interest, may, after his estate becomes absolute, recover damages for any injury to the property committed after the sale and before possession is delivered under the conveyance.
- "Defendant."  
"Plaintiff."** SEC. 3358. (1951.) The term "defendant" as herein used, is intended to designate the party against whom, and the term "plaintiff" the party in favor of whom, any execution has issued.
- Justices' proceedings.** SEC. 3359. (1952.) The provisions of this chapter are intended to embrace proceedings in justices' courts, so far as they are applicable; and the terms "sheriff," and "clerk," are accordingly to be understood, as qualified in this chapter, in the same manner, in this respect, as in that relative to attachment.

### *Appraisement.\**

An Act to provide for the Appraisement of Property sold under Execution.

[Passed April 3, 1860, took effect April 21, 1860; Laws of Eighth General Assembly, Chapter 132.]

- No property to be sold on execution for less than two-thirds of its value.** SECTION 3360. *Be it enacted by the General Assembly of the State of Iowa,* That no goods, chattels, lands or tenements shall be sold on execution issued from any court, for less than two-thirds of the fair value thereof, at the time of sale, exclusive of all liens, mortgages or incumbrances thereon, except as hereinafter provided.
- Officer to ascertain value of property.** SEC. 3361. The officer to whom any such writ shall be delivered to be executed, shall, before sale unless otherwise directed by the execution debtor, proceed to ascertain the fair value of such property.
- Appraisers, how selected.** SEC. 3362. For the purpose of ascertaining the value of property to be sold under execution, two disinterested householders of the neighborhood shall be selected as appraisers; one of whom shall be chosen by the execution debtor, and the other by the plaintiff, his attorney or

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\* This chapter on appraisement was enacted as a separate law, and took effect by publication according to chapter 142 of the laws of the eighth session, for which see special laws of eighth session, page 107. It is here put into connection with its subject-matter.

agent, or, in the absence of the plaintiff his agent and attorney, by the officer executing such writ; and said appraisers shall forthwith proceed to value such property according to its fair value at the time, and in case of their disagreement as to such value, they shall choose another disinterested householder of the neighborhood, and with his assistance they shall complete such valuation. The valuation to be sworn to by the appraisers.

How to proceed.  
Valuation sworn to

SEC. 3363. If the execution debtor shall fail to choose an appraiser within three days after notice of such levy served on him or his attorney by copy or reading, such officer shall choose an appraiser for him, who shall proceed in all respects as if he had been chosen by the execution debtor.

In case of debtor's failure to choose an appraiser, officer to select one

SEC. 3364. In case any of said appraisers shall fail to complete such valuation, the plaintiff, his agent or attorney, or the officer, in their absence, or the execution debtor, or the appraisers if two remain, who were first chosen, as the case may be, shall choose an appraiser in the place of the one before chosen by him, or them, and refusing to act; or if such execution debtor shall in such case fail to choose such appraiser within two days after notice of such refusal to act by the appraiser chosen by him, such officer shall choose an appraiser for him, and any appraiser thus chosen shall proceed in all respects as if he had been chosen in the first instance.

Failure of appraisers, how remedied.

SEC. 3365. Upon the completion of such appraisement the said appraisers shall return to the officer a schedule of the property appraised, with the value of each lot, tract or parcel of real estate, and of the several articles of personal property which may have been levied upon by virtue of such execution. Whenever any property thus appraised, can not be sold for two-thirds of its valuation, it shall be the duty of the officer by whom such levy shall have been made, when he returns such execution, to return such appraisement therewith, stating in his return such failure to sell.

Appraisers to make return to officer.

Officer's return.

SEC. 3366. Such levy and return shall constitute and remain a lien on the property thus remaining unsold, and a writ of *venditioni exponas* may issue for the sale thereof as in other cases.

Writ of *venditioni exponas* may issue.

SEC. 3367. When any such writ of *venditioni exponas* shall issue, either party may have a revaluation of the property levied upon, by paying the expense of such revaluation.

Property may be revalued.

SEC. 3368. The officer to whom such execution may be directed shall proceed to sell without unnecessary delay, but shall not offer the same property more than once, under the same execution, unless the execution creditor will pay the cost and charges of such additional offer to sell.

Officer to sell without delay

But once under same execution.

SEC. 3369. Execution shall not issue on any judgment more frequently than once in six months, unless at the cost and charge of the plaintiff.

Execution upon judgment once in six months.

SEC. 3370. Property conveyed by a debtor with intent to hinder or delay collection or defraud creditors, shall be sold without appraisement.

Property when sold without appraisement.

SEC. 3371. It shall be lawful for any judgment debtor to have his real estate sold on execution subject to redemption as is provided by law, and in case he so elects before a levy on the same by the officer having control of the writ, and files his notice in writing, of election, with the clerk of the court issuing the writ, the officer shall proceed to sell, subject to redemption, and shall execute to the purchaser a certificate of purchase.

Property when sold subject to redemption

SEC. 3372. When the real estate is sold after appraisement according to this act, the officer, on the payment of the purchase money, shall

On payment of money officer to make deed.

execute to the purchaser or purchasers, a deed or deeds, which shall convey all the interest on which the judgment operated as a lien, or which the debtor acquired after the judgment and before the sale, and the said deed when executed according to law shall be presumptive evidence of the regularity of the judgment and sale.

Deed evidence of judgment and sale.  
Fee of appraisers.  
Proviso.

SEC. 3373. The appraisers provided for in this act shall be allowed fifty cents in each case for their services: *provided*, that in all cases where the time necessarily required exceeds five hours, they shall be allowed an additional compensation of ten cents per hour.

Repeal.

SEC. 3374. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

PRIOR LAWS. 1. An act concerning judgments and executions, passed April 12, 1827; M. D., 1833, p. 423, sec. 4; repealed Jan. 19, 1838; Wis., 2d sess., No. 85, p. 287.

2. Same amended and passed April 20, 1833; M. D., 1833, p. 434.

3. An act to amend an act concerning judgments and executions, passed Jan. 19, 1838; Wis., 2d sess., No. 85, p. 287. (Allowing stays, &c.) (Repealing necessity of publication in Detroit, &c.) All the above repealed Aug. 30, 1840.

4. An act subjecting real and personal estate to execution, passed Jan. 25, took effect May 1, 1839; I. T., 1st sess., p. 197; repealed by Reprint, 1843; chap. 155, p. 628, val. law.

5. An act amending same, passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 75, p. 111; repealed, by Reprint, 1843, chap. 155, p. 628.

6. An act further amending same, passed July 24, took effect Aug. 24, 1840; I. T., 2d sess., extra, chap. 4, p. 5; repealed by Reprint, 1843, chap. 155, p. 628.

7. An act relative to the writ of *scire facias*, upon judgments in the district court, passed July 24, took effect Aug. 24, 1840; I. T., 2d sess., extra, chap. 11, p. 10.

8. An act to amend an act concerning executions, passed Jan. 25, 1839, took effect Jan. 13, 1841; I. T. 3d sess., chap. 49, p. 40; repealed by Reprint, 1843, chap. 155, p. 628.

9. An act subjecting real and personal estate to execution, passed Feb. 17, took effect March 17, 1842; I. T., 4th sess., chap. 94, p. 86; repealed by No. 10 hereof.

10. An act repealing above, passed Feb. 16, took effect March 16, 1843; Reprint, 1843, chap. 20, p. 89.

11. An act subjecting real and personal estate to execution, passed Feb. 20, 1843; Reprint, chap. 155, p. 628; valuation law repeals all else.

12. An act amending same, passed Feb. 15, took effect March 15, 1844; I. T., 6th sess., chap., 23, p. 43.

13. An act to authorize sheriff to make and execute deeds for lands sold on execution, under the redemption law, passed Feb. 15, 1844; I. T., 6th sess., chap. 32, p. 55.

14. An act reviving all the laws subjecting property, which were repealed Feb. 20, 1843, so far as concerned all contracts made before said date, passed June 19, 1844; I. T., 6th sess., extra, chap. 10, p. 7.

15. An act amending an act subjecting real and personal estate to execution, passed Jan. 19, took effect April 1, 1846; I. T., 8th sess., chap. 33, p. 31.

16. An act concerning the lien of judgments, passed Jan. 19, 1846; I. T., 8th sess., chap. 34, p. 33.

17. An act requiring all notices of sales by order of courts of record to be advertised in some newspaper, passed Jan. 15, took effect 31st, 1849; 2d sess., chap. 110, p. 138.

DECISIONS UNDER THE PRIOR PRACTICE. The judgment remains in full force after five years, 3 Iowa, 382; judgment in *scire facias*, 6 Iowa, 42; the execution must follow the judgment, 3 G., 489; 2 G., 385; but the sale will be valid though it depart in a slight particular from the judgment, *ibid.*; and though the defendant be dead at time thereof, *ibid.*; an execution against an individual can not issue on a judgment against a corporation, 6 Iowa, 172; and if individual property is wanted it should contain a clause allowing such levy, 4 Iowa, 13; the policy of the law is to protect and favorably construe judicial sales, 1 Iowa, 350; 1 G., 19; 4 G., 455-393; 2 G., 39-385-499-489; the three points of such sale are the judgment, levy, and deed, and if good, the other parts of the proceeding may be irregular without effect, 4 G., 201-293; for instance a defective description in the levy is cured by a correct one in the deed, 2 G., 39; nor will an informal return of levy vitiate title, 2 G., 39; presumption in favor of officer, 4 G., 468-510; attached property sold on special execution, based on general judgment valid, and lien not vacated, 2 G., 137; only the

interest of a joint owner should be sold—may seize *all* and sell *share* of debtor, M., 434; levy divests the title of the execution defendant, 2 G., 208; and *prima facie* discharges the debt, if upon sufficient property, *ibid.*; 6 Iowa, 219; 4 G., 287; 2 G., 208; the loss of such property falls, if the officer's or plaintiff's fault on him, but if the defendant's fault, then on him, 4 G., 287; sale of certificate-title constitutional, M., 235; a stay bond taken by statute as a confessed judgment, may constitutionally support an execution against the parties thereto, 5 Iowa, 157; no need of notice of execution or levy, *Ayres v. Campbell, et al.*, June, 1859; exemption relates to the remedy, 8 Iowa, 140; left with widow, how held, 6 Iowa, 137; statute, how construed, 1 Iowa, 435; "habitually earns his living," defined and limited, *Perkins v. Wisner*, Dec., 1859; exemption, 5 Iowa, 372-438-454; and 3 Iowa, 287; 1 Iowa, 54; earnings for ninety days, 4 G., 84; exemption from garnishment, 4 Iowa, 304; defendant in an action in which his debtor is garnished, may insist that the rights are *exempt* from the process, 4 Iowa, 302; the property exempt, may by the owner be replevied, 5 Iowa, 450; if the property of A. be taken by process against B., then A. may replevy the same, 3 Iowa, 59; execution law part of contract, 4 G., 393; same, *ibid.*, 455; time of executing deed under law of 1843 and 1846, *ibid.*, 385; caveat emptor applies to vendee under execution, 4 G., 312; but if there was no title in judgment debtor vendee may recover purchase money, 6 Iowa, 219; 7 *ibid.*, 97; 4 G., 312; can not avoid bill by showing defective title in judgment debtor, 4 G., 312; a patent relates back to the date of the certificate in assuring the title of the patentee, and in inuring to the benefit of a first execution vendee under the certificate, 5 Iowa, 188; *ibid.*, 157; 2 *ibid.*, 1; 3 G., 363; levy and sale may be set aside upon motion when not necessary to make third persons parties, or to bring in extrinsic facts, 7 Iowa, 97; an administrator has no extendible interest in the real estate of the decedent, before such real estate can be sold the heirs must be made parties to a proceeding looking to such sale, 5 Iowa, 124; execution may constitutionally issue on a stay bond against the makers thereof, 5 Iowa, 185; land held by certificate subject to execution, 3 G., 349; a case where the confidence necessary between legal adversaries is protected, and where sheriff had no right to retain a note handed to him to levy on by an attorney, 4 Iowa, 535; property in section 1892 does not mean equitable estates of the debtor—it means personal property, 5 Iowa, 286; approved, *Harrison v. Kramer*, 3 Iowa, 543; on a judgment against a corporation, a *judgment*, that execution issue against the private property of members is one which may be appealed from, and such judgment can not be questioned in a proceeding to enjoin the issuance of execution thereon, 4 Iowa, 13; a municipal corporation may be subjected to garnishment and held—the objection of exemption from garnishment is the privilege of garnishee, 4 Iowa, 302; bank certificate not money, 3 G., 92; mode of redeeming, 5 Iowa, 319; see 3 Iowa, 543, as to section 1947; the money may be tendered also to the party entitled thereto, 5 Iowa, 331.

## CHAPTER 126.

[Code—Chapter 111.]

### PROCEEDINGS SUPPLEMENTAL TO EXECUTION.\*

**SECTION 3375.** When an execution against the property of a judgment debtor, or one of several debtors in the same judgment has been issued from the district or supreme court to the sheriff of the county where such debtor resides, or if he do not reside in the state, to the sheriff of the county where the judgment was rendered, or a transcript of a justices' judgment has been filed, and execution issued thereon, is returned unsatisfied in whole or in part, the owner of the judgment is entitled to an order for the appearance and examination of such debtor.

Defendant may  
be examined.

\* This proceeding is common to all the new Codes of the new system, except Kentucky, which state having like ourselves an equitable proceeding dissimilar from that at law as to proof and trial yet retains the creditor's bill. As our procedure may be either equitable or ordinary, even as to a chancery right, we have both modes as in *this* and the *next* chapter.

The remedy where a creditor's bill was proper previous to the code, is still preserved in the form of an action. The judgment creditor may commence the action for his own benefit, or in behalf of himself and all others in the same situation with himself who may choose to come in and contribute to the expenses of the suit. The rule has not been changed by the code. *Hammond v. Hudson River Iron Co.*, 20 Barb., 378.

An execution may be returned in less than sixty days, and whenever returned unsatisfied, the creditor may proceed under this chapter without regard to the period it was in the sheriff's hands. The execution must be actually returned by the sheriff before the supplementary proceeding can be commenced. *Engle v. Ronneau*, 2 Sand., 678.

The code requires that "the execution shall be returnable within sixty days after its receipt by the officer," &c. Upon the proper return of the execution therefore, by the sheriff, at any time within the sixty days, proceedings supplementary to execution (in the nature of a creditor's bill,) may be commenced. *Livingston & Mitchell v. Cleveland*, 5 How., 396.

Same.

SEC. 3376. (1954.) The like order may be obtained at any time after the issuing of an execution upon proof, by the affidavit of the party or otherwise, to the satisfaction of the court or officer who is to grant the same, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment.

By whom order granted.

SEC. 3377. (1955.) Such order may be made by the court in which the judgment was rendered, or by any judge thereof in vacation, or by county court of the county to which the execution has been issued as aforesaid, or by the judge thereof. And the debtor may be required to appear and answer before either of such courts or officers, or before a referee appointed by the court or judge who issued the order.

Defendant questioned.

SEC. 3378. The debtor on his appearance, may be interrogated in relation to any fact calculated to show the amount of his property or the disposition which has been made of it, or any other matter pertaining to the purpose for which the examination is permitted to be made. And the interrogatories and answers shall be reduced to writing and preserved by the court or officer before whom they are taken. All examinations and answers under this chapter shall be on oath, and 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 a fraud, but his answers shall not be used as evidence against him in a prosecution for such fraud.

The proceeding under this chapter is regarded as a substitute for the creditor's bill, under our former system, and the rules settled, in reference to proceedings under these bills may be regarded as controlling when not essentially altered by the code or the practice under the code. *Orr's case*, 2 Abb., 458; see *Griffin v. Dominguez*, 2 Duer, 658.

The object of the examination is, to ascertain whether the debtor has any property subject to, or exempt from execution which ought to be applied to the plaintiff's claim. He is required to appear and answer "concerning his property," that is the property belonging to him at the time of the examination, or bound by the judgment; and every question tending to throw light upon that subject is pertinent. It is not sufficient that the defendant answer generally that he has no property; the plaintiff may prosecute his inquiries, notwithstanding such an answer. If the defendant is in possession of any property, the plaintiff may ask when and where and how he obtained the possession, and on what terms he now holds it. If the defendant is not in possession of any property, he may be asked, whether he had any or was interested in any, a short time previous to the judgment, and what has become of it; and if he answer that he has sold it absolutely, he may be asked what was the consideration of the sale, and what has become of the proceeds, so as to ascertain whether any portion of them is in his hands, or due to him.



But if it appear that he has not in his possession, nor under his control, any portion of such proceeds, the inquiry respecting such property or its proceeds can go no further. There is in such case nothing for the creditor to receive. If the answers to the questions show any doubts as to the *bona fides* of the sale, the examination may be thorough on that point; as a fraudulent transfer of property may not afford any protection against a creditor. *Green v. Hicks*, 1 Barb. Chan. Rep., 316, 317.

SEC. 3379. Witnesses may be required by the order of the court or judge, or by subpoena from the referee to appear and testify upon any proceedings under this chapter in the same manner as upon the trial of an issue. Witness brought.

SEC. 3380. If any property, rights or credits, subject to execution, are thus ascertained, an execution may be issued, and they may be levied upon accordingly. The court or judge may order any property of the judgment debtor not exempt by law, in the hands either of himself or any other person or corporation, or due to the judgment debtor, to be delivered up, or in any other mode applied towards the satisfaction of the judgment. If property is found, how applied.

SEC. 3381. The court or judge, may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor, and may also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt by law, or may forbid any interference therewith. Receiver.

Where it appears from the examination that it is doubtful whether the person who is alleged to owe the judgment debtor, or another individual not under examination, is really indebted to him, and as a conclusion of law upon the facts uncertain, a receiver should be appointed to enable the creditor, or the party entitled to the right, to pursue the claim by action. *Corning v. Tooker*, 5 How., 16.

SEC. 3382. If it shall appear that the judgment debtor has any equitable interest in real estate in the county in which proceedings are had, as mortgagor, mortgagee or otherwise, and the interest of said debtor can be ascertained as between himself and the person or persons holding the legal estate, or the person or persons having any lien on, or any interest in the same, without controversy as to the interest of such person or persons, holding such legal estate or interest therein, or lien on the same, the receiver may be ordered to sell and convey such real estate, or the debtor's equitable interest therein. Such sale shall be conducted in all respects in the same manner as is provided by this code for the sale of real estate upon execution. Equitable interest.

SEC. 3383. If the sheriff shall be appointed receiver, he and his sureties shall be liable on his official bond, for the faithful discharge of his duties as receiver. Liability of sheriff as receiver.

SEC. 3384. The judge or referee acting under the provisions of this chapter, shall have power to continue his proceedings from time to time, until they shall be completed. Continuance.

SEC. 3385. The judge may, in his discretion, order a reference to a referee appointed by him to report the evidence, or the facts. Reference.

SEC. 3386. Should the judgment debtor fail to appear after being personally served with notice to that effect, or should he fail to make full answers to all proper interrogatories thus propounded to him, he will be guilty of contempt, and may be arrested and imprisoned until he complies with the requirements of the law in this respect. And if any person, party or witness disobey an order of the court or judge, or Defendant failing to appear.

referee, duly served, such persons, party or witness may be punished as for a contempt.

Service of order. SEC. 3387. The order mentioned herein shall be in writing and signed by the court or judge or referee, making the same, and shall be served as an original notice in other cases.

Compensation. SEC. 3388. Sheriffs, referees, receivers and witnesses, shall receive such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and the collection thereof from such party, or parties as ought to pay the same shall be enforced by an order.

Warrant if he is about to leave state. SEC. 3389. (1959.) Upon proof to the satisfaction of the court, or officer authorized to grant the order aforesaid, that there is danger that the defendant will leave the state, or that he will conceal himself, the said court or officer, instead of the order aforesaid, may issue a warrant for the arrest of the debtor, and for bringing him forthwith before the court or officer authorized to take his examination as hereinbefore provided. After being thus brought before the said court or officer, he may be examined in the same manner and with the like effect as is above provided.

Defendant may give bond and be discharged, & c. SEC. 3390. Upon being brought before the court or officer, he may enter into an undertaking in such sum as the court or officer shall prescribe, with one or more sureties, that he will attend from time to time, for examination, before the court or officer, as shall be directed, and will not, in the mean time, dispose of his property, or any part thereof, in default whereof he shall continue under arrest, and may be committed to jail on the warrant of such court or officer, from time to time, for safe keeping, until the examination shall be concluded.

DECISIONS UNDER THE PRIOR PRACTICE. In a creditor's bill the objection that administrator is not made a party may be made on the hearing, 3 Iowa, 365; and the bill will then be remanded for amendment, *ibid.*; such bill may be against the surviving partners, or the representatives of the deceased partners, *ibid.*; a creditor's bill lies on a dormant judgment, *ibid.*; as to evidence of collusion or of fraud between grantor and grantees, see 4 Iowa, 524; the execution need not to have been first returned unsatisfied, 3 Iowa, 365, 383, 543.

## CHAPTER 127.

### EQUITABLE ACTIONS SUPPLEMENTAL TO EXECUTION.

Creditor's bill. SECTION 3391. After an execution directed to the sheriff of the county in which the judgment was rendered, or to the sheriff of the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the owner of the judgment may, in his discretion, institute an action by equitable proceedings in the court from which the execution issued, or in any court having jurisdiction of the cause, for the discovery of any money, chose in action, equitable or legal interest, or any other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions, persons indebted to the defendant in the execution, or holding the money or property in which he has an interest, or holding the evidences or securities for the same, may be also made defendants.

In a proceeding under this section, it is necessary to state, or to charge that a third person is indebted to the defendant in the execution, in order to take judgment by confession. It is not sufficient to state that plaintiff is informed that such is the case. Crenshaw, C. J., *Lexington & Danville R. R. Co. v. Morrissey*, Mss. Opin., Dec., 1856. *Stanton's Ky. Code*.

A judgment creditor having an execution returned, "no property found," may institute equitable proceedings in the court from whence execution issued, or in the court of any county in which defendant resides or is summoned, and have any interest in land belonging to him, situated in any county, subjected to the payment of his judgment at law. *Nixon v. Jack & Co.*, 16 B. M., 181.

P. recovers a judgment against M., and has execution issued, and a return of "no property found." In the mean time the judgment is reversed by the court of appeals, and a different judgment rendered. P. sued out an attachment, alleging the return of "no property" upon the first judgment, and the fact that M. was insolvent. Held, not to authorize an attachment under this section. Marshall, C. J., *McGuire v. Parsons*, Mss. Opin., June, 1855. *Stanton's Ky. Code*.

SEC. 3392. The answers of all defendants shall be verified by their own oath, and not by that of an agent or attorney, and the court shall enforce full and explicit discoveries in such answers by process of contempt. Verified by the party himself.

SEC. 3393. In the action mentioned in the preceding sections, the plaintiff may have an attachment against the property of the defendant in the execution, similar to the *general* attachments provided for in the chapter 124, on attachment, without either the affidavit or bond therein required. Have general attachment without bond

SEC. 3394. A lien shall in this case be created on the property of defendant, by the levy of the attachment and service of the notice, and copy of petition on the person holding or controlling such property. Lien obtained.

SEC. 3395. The court shall enforce the surrender of the money, or securities therefor, or of any other property of the defendant in the execution, which may be discovered in the action, and for this purpose may commit to jail any defendant or garnishee, failing or refusing to make such surrender, until it shall be done, or the court is satisfied that it is out of his power to do so. Court enforce surrender.

SEC. 3396. The use of the appliances of this equitable action is no waiver of the use of the remedy of the chapter next preceding. Nor is the use of the appliances of that chapter a waiver of the right to also use the appliances of this, but any party entitled to one may use either or both as he may deem it desirable. Right to use either the remedy of this or of last chapter.

• CHAPTER 128.

[Code—Chapter 107.]

JUDGMENT BY CONFESSION.

SECTION 3397. (1837.) A judgment by confession, without action, may be entered by the clerk of the district court, or by a justice of the peace, if within his jurisdiction, in the manner hereinafter prescribed. When allowed.

A judgment by confession, without action, can only be entered against the person who signs the confession. One of two partners or joint debtors can not confess judgment for both. Such judgment is probably valid as against the party signing it, but is void as against the other defendant, and can not be enforced against the joint property. In effect, the party confessing such a judgment makes the debt by his confession his individual debt. Where, after the confession of such a judgment by one partner, a suit was commenced, and judgment *regularly* obtained against both on the same cause of action, and also upon a promissory note not included in the former judgment; *held*, on a question of priority of liens, that other judgment creditors could not avail themselves of the objections that a former recovery had been obtained and that the said note did not belong to the plaintiff. Had the judgment been obtained by fraud or collusion, it would have been competent for them to have avoided it on that ground. *Stantenburgh v. Vendenburgh*, 7 How., 229.

For what.

SEC. 3398. (1838.) Such confession can be only for money due, or to become due, or to secure a person against contingent liabilities on behalf of the defendant, and must be for a specified sum.

Proceeding and statement of facts.

SEC. 3399. (1839.) A statement in writing must be made and signed by the defendant, and verified by his oath to the following effect, and filed with the clerk or justice of the peace:

1. If for money due, or to become due, it must state concisely the facts out of which the indebtedness arose, and that the sum confessed therefor is justly due, or to become due, as the case may be.

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

A statement upon which to enter a judgment without action under the code, is not sufficient where it merely states and sets out a promissory note, executed by the defendant to the plaintiff as the consideration of the indebtedness. The facts out of which the indebtedness evidenced by the note arose, should be concisely stated. The supreme court may set aside a judgment entered therein without action, for a defect in the statement upon which it is entered, upon the application of a junior judgment creditor. *Chappell v. Chappell*, 2 Kern., 215. A confession of judgment which stated that the indebtedness was a promissory note made by the defendant to the order of the plaintiff, for \$2,146.33, dated Dec. 11, 1854, payable four months after date, making it due April 17, 1855, *held insufficient*. A promissory note is a mere evidence of debt, and contains no reference whatever to the facts out of which the indebtedness arose. The court allowed the judgment in this case to be *amended*, but so as not to interfere with the rights of any judgment creditor which might have, in the mean time, attached. *Johnston v. Fellerman*, 13 How., 21.

Entry of record.

SEC. 3400. If in the district court, the clerk shall thereupon make an entry of judgment in his court record, for the amount thus confessed, and costs, and shall issue execution thereon, as in other cases.

In justice court.

SEC. 3401. (1841.) If in a justice's court, the justice shall thereupon enter a judgment on his docket, with costs, and issue execution as above directed. If a transcript of such judgment be filed with the clerk of the district court, a copy of the statement must be filed with it.

On past authority.

SEC. 3402. (1842.) Upon an authority given before this statute takes effect, and which was valid when given, judgment may be rendered up, as herein mentioned, or as nearly so as the circumstances of the case will permit.

DECISIONS UNDER THE PRIOR PRACTICE. The statute must be strictly complied with in confession, 7 Iowa, 136; *Kenedy v. Lowe*, Dec., 1859; when read and

approved by the court, it has all the virtue of a judgment, 7 *ibid.*, 136; [what is the sense of requiring it to be approved by the court? it defeats half the value of the "judgment by confession;" indeed it ceases to be a judgment by confession when the court's approval is needed;] what statement necessary in such judgment, *Kennedy v. Lowe*, Dec., 1859; may be appealed from, 7 Iowa, 136; M., 363, but usury will be no error, *Troxel v. Clark*, June, 1859. See 2 G., 492; 3 G., 223.

CHAPTER 129.

OFFER TO CONFESS.

SECTION 3403. Before an action for the recovery of money is brought against any person, he may go into the court of the county of his residence, or of that in which the person having the cause of action resides, which would have jurisdiction of the action, or before the clerk of either of such courts in his office, and offer to confess judgment in favor of such person for a specified sum on such cause of action as provided for in the foregoing chapter. Whereupon, if such person, having had the same timely notice as if he were defendant in an action, that the offer would be made, of its amount and of the time and place of making it, does not attend to accept the confession, or attending, refuses to accept it, and should afterwards commence an action upon such cause, and not recover more than the amount so offered to be confessed, he shall pay all the costs of the action; and on the trial thereof, the offer shall not be deemed to be an admission of the cause of action or amount to which the plaintiff is entitled, nor be given in evidence.

Party expecting to be sued may give notice of an offer to confess to be made in court.

SEC. 3404. After an action for the recovery of money is brought, the defendant may offer in court to confess judgment, for part of the amount claimed or part of the causes involved in the action. Whereupon, if the plaintiff being present, refuses to accept such confession of judgment, in full of his demands against the defendant in the action, or having had two clear days notice that the offer would be made, of its amount, and of the time of making it, fails to attend, and on the trial does not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant, incurred after the offer. The offer shall not be deemed to be an admission of the cause of action, or amount to which the plaintiff was entitled, nor be given in evidence upon the trial.

After suit he may in court offer to confess.

Where an offer to confess is made in writing, and accepted before a justice of the peace, and an appeal in the cause is subsequently taken to the circuit court to which the papers, including the offer, are transmitted, the offer stands valid in the circuit court, as having been made before the justice. *Lewis v. Morrison*, 10 Ind. R., 394.

For forms of offers to confess judgment, see *Doyle v. Kiser*, 8 Ind. R., 396; *Lewis v. Morrison*, supra, 11 Ind. R., 440. In the latter case a doubt is expressed whether an offer once made and accepted can be withdrawn. *Perkins' Practice*.

## CHAPTER 130.

## OFFER TO COMPROMISE.

Offer to allow judgment for a fixed sum.

SECTION 3405. The defendant in an action for the recovery of money only, may at any time after service of notice, and before the trial, serve upon the plaintiff or his attorney, an offer in writing, to allow judgment to be taken against him for the sum of money, or to the effect therein specified with costs. If the plaintiff accept the offer and give notice thereof to the defendant or his attorney, within five days after the offer is made, the offer and an affidavit that the notice of acceptance was delivered in the time limited, may be filed by the plaintiff, or the defendant may file the acceptance with a copy of the offer verified by affidavit; and in either case, the offer and acceptance shall be entered upon record, and judgment shall be rendered by the court accordingly. If the notice of acceptance is not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence nor mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he can not recover costs, but shall pay the defendant's costs from the time of the offer.

Results.

Same conditioned on failure of defense.

SEC. 3406. In an action for the recovery of money only, the defendant having answered, may serve upon the plaintiff or his attorney, an offer in writing, that if he fails in his defense, the amount of the recovery shall be assessed as a specified sum. If the plaintiff accepts the offer and gives notice thereof to the defendant, or his attorney, within five clear days after it was served, or within two clear days if served in term time, and the defendant fails in his defense, the judgment shall be for the amount so agreed upon. If the plaintiff does not so accept the offer he shall prove the amount to be recovered, as if the offer had not been made, the offer shall not be given in evidence or mentioned on the trial. And if the amount recovered by the plaintiff does not exceed the sum mentioned in the offer, the defendant shall recover his costs incurred in the defense, in respect to the question of amount to be taxed under the direction of the court.

Results.

No cause for continuance.

SEC. 3407. The making of any offer pursuant to the provisions of this chapter, shall not be a cause for a continuance of an action or a postponement of a trial.

## CHAPTER 131.

## SUBMITTING CONTROVERSIES WITHOUT ACTION, OR IN ACTION.

[Code—Chapter 108.]

Agreed statement submitted.

SECTION 3408. Parties to a question in difference which might be the subject of a civil action, may without action present an agreed statement of the facts thereof to any court having jurisdiction of the subject matter.

Controversy real.

SEC. 3409. (1844.) It must be shown by affidavit, that the controversy is real, and that the proceeding is in good faith to determine the rights of the parties thereto.

SEC. 3410. The court shall thereupon hear and determine the case, and render judgment thereon, as if an action were pending. Render judgment as in a case.

When a controversy is submitted under this section, the court can only determine the questions of law that arise upon the facts agreed upon, and has no power to send the cause to a jury for determination of questions of fact, that upon the face of the submission may appear to be doubtful. The court must itself construe the submission. The court itself must settle the matter. *Wilson v. Commercial Mutual Ins. Co.*, 3 Duer, 455.

SEC. 3411. The case, the submission, and the judgment, shall constitute the record. What shall make the record.

SEC. 3412. The judgment shall be with costs, and it may be enforced, and shall be subject to review in the same manner, as if it had been rendered in an action, unless otherwise provided for in the submission.

SEC. 3413. The same may be also done, at any time before trial in any action then pending, subject to the same requirements, and attended by the same results as in a case without action, and such submission of a stated case shall be an abandonment by both parties of all pleadings filed in such cause, and the cause shall stand on the agreed case alone, which must provide also for any lien had by any attachment, and for any property in the custody of the law, else such lien and such legal custody will be held waived. A pending cause may be submitted on agreed facts.

SEC. 3414. The parties may, if they think fit, enter into an agreement, in writing, that upon the judgment of the court being given in the affirmative or negative of the question or the questions of law, raised by such special case, particular property therein described, or a sum of money fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct it, shall be delivered to and vested in one of the parties by the other, or in case of money shall be paid by one of such parties to the other of them, either with or without costs of the action and the judgment of the court may be entered for the transfer and delivery of such property, or for such sum as shall be so agreed, or ascertained with or without costs, as the case may be. An agreement as to damage to be paid by party if facts be found against him.

SEC. 3415. In case no agreement shall be entered into as to the costs of such action, the same shall follow the event, and be recovered by the successful party. Costs in such case.

## CHAPTER 132.

### DEPOSITS.

[Code—Chapter 132.]

SECTION 3416. 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 property capable of delivery, which is in any degree the subject of litigation, and which is held by him as trustee for another party, the court, or judge thereof, may order the same to be deposited in the office of the clerk, or delivered to such party, with or without security, subject to the farther direction of the court. Court or judge may order deposit.

SEC. 3417. Whenever, in the exercise of its authority, a court or judge has ordered the deposit or delivery of money or other property, And compel obedience.

and the order is disobeyed, the court, besides punishing the disobedience, may make an order requiring the sheriff to take the money or property, and deposit or deliver it in conformity with the directions of the court or judge.

Sheriff's power.

SEC. 3418. (2492.) The sheriff has the same power in such cases, as when acting by authority of a writ of replevin.

## CHAPTER 133.

[Code—Chapter 98.]

### RECEIVERS.

Court or judge in vacation may appoint receiver.

SECTION 3419. On the petition of either party to a civil action or proceeding, therein he shows that he has a probable right to any of the property which is the subject of the controversy, and that such property, or its rents and profits, are in danger of being lost or materially injured or impaired, the court, or in vacation, the judge thereof, if satisfied that the interests of one or both the parties will be thereby promoted, and the substantial rights of neither unduly infringed upon, may appoint a receiver to take charge of and control such property under its direction, during the pendency of the action, and may order and coerce the delivery of it to him.

If after the dissolution of a partnership either of the partners makes any use of the partnership property, inconsistent with the winding up of its affairs, it is a fraud on the co-partners, and on the creditors of the partnership, and a court of equity will interfere and take the property out of the hands of such partner, by the appointment of a receiver. *Gortner v. The Trustees of the Village of Canajoharie*, 2 Barb., 625.

Upon a bill filed by one of the partners to close up a partnership concern, it is a matter of course to appoint a receiver, if the parties can not agree among themselves as to the disposition and control of the property. And when it is necessary to preserve the good will of the business the receiver may be directed to carry it on, under the direction of the court until a sale can be effected. *Martin v. Van Schaick*, 1 Paige, 479. When either partner has a right to dissolve the partnership and the articles of copartnership do not provide for the settlement of the concern, upon a complaint, filed for that purpose, by one of the parties, the appointment of a receiver is a matter of course. *Law v. Ford*, 2 Paige, 310; see *Herm v. Walsh*, 2 Edwd. Ch., 129. The principle upon which a receiver of partnership property is appointed, is with the view of winding up the concerns of the partnership, and dividing the surplus, and not for the purpose of carrying on the partnership business. Hence, as a general rule, a receiver is not appointed except in cases where the plaintiff will be entitled to a decree of dissolution. *Jackson v. DeForest*, 14 How., 81; see *Garretson v. Weaver*, 3 Edwd. Ch., 385.

Oath and bond of receiver.

SEC. 3420. Before entering upon the discharge of his duties, he must be sworn faithfully to discharge his trust to the best of his ability, and must also file with the clerk a bond with sureties, to be by him approved, in a penalty to be fixed by the court or judge, and conditioned to the faithful discharge of his duties, and that he will obey the orders of the court in respect thereto.

Receiver's power.

SEC. 3421. (1658.) Subject to the control of the court, a receiver has power to bring and to defend actions, to take and keep possession of



property, to collect debts, to receive the rents and profits of real property, and generally, to do such acts in respect to the property committed to him, as the court may authorize.

A receiver is an officer of the court who appoints him. *Booth v. Clarke*, 17 How., U. S. Rep., 322. And the court will give such directions to a receiver, on the application of one not a party to the suit, as may be necessary to protect his rights. *Vincent v. Parker*, 7 Paige, 65. It is a contempt to attempt to deprive a receiver of property of which he is rightfully in possession. *Noe v. Gibson*, 7 Paige, 513; *Albany City Bank v. Schermerhorn*, 3 Paige, 372; *Parker v. Browning*, 8 Paige, 388.

A receiver is not to be discharged on his own application when his duties are not ended, unless he show good cause, especially when it might affect parties. His mere desire, though coupled with a statement of complication of accounts, and the necessity of losing much time in the business of his receivership, is not sufficient. *Bears v. Chelsea Bank*, 4 Edw. Ch., 77.

A receiver does not merely stand in the place of the debtor, but represents the creditors and may therefore maintain an action to set aside an assignment of real and personal property, made by the debtor in fraud of his creditors. *Porter v. Williams*, 5 Seld., 142; S. C. 12 How., 107; see *Wilson v. Allen*, 6 Barb., 544; *Gillett v. Moody*, 3 Com., 479; *Talmadge v. Pell*, 3 Seld., 328.

## CHAPTER 134.

### SUMMARY PROCEEDINGS.

SECTION 3422. Judgments or final orders may be obtained, on motion, by sureties against their principals, by sureties against their co-sureties, for the recovery of money due them, on account of payments made by them as such; by clients against attorneys; plaintiffs in execution against sheriffs, constables and other officers, for the receiving of money or property collected for them, and damages, and in all other cases specially authorized by statute.

Judgments on motion in certain cases.

SEC. 3423. Notice of such motion shall be served on the party against whom the judgment or order is sought, at least ten days before the motion is made.

Ten days' notice thereof served.

SEC. 3424. The notice shall state, in plain and ordinary language, the nature and grounds of the motion, and the day on which it will be made.

Form of notice.

SEC. 3425. Unless the motion is made and filed with the case, on or before the day named in the notice, it shall be considered as abandoned.

Motion when abandoned.

SEC. 3426. The motion shall be heard and determined without written pleadings, and judgment given according to law and the rules of equity.

No written pleadings.

The proceedings upon a motion for judgment on a bond to suspend the sale of personal property, levied upon by execution, are within that class of remedies denominated special or summary, and it is eminently property that no written pleadings should be required, or even allowed, in such cases. *Watson v. Gabby*, 18 B. M., 662. *Stanton's Ky. Code*.

## CHAPTER 135.

## MOTIONS AND ORDERS.

- What is an order.** SEC. 3427. Every direction of a court or judge, made or entered in writing, and not included in a judgment, is an order.
- What a motion.** SEC. 3428. A motion is a written application for an order addressed to the court, or to a judge, in vacation, by any party to a suit or proceeding, or by any one interested therein.
- What notice to be given of a motion.** SEC. 3429. When a party is in court he shall, without service of notice, take notice of any motion made during term on the filing of the same, and notice thereof being entered on the notice book. The same shall be true of a party constructively in court, who has not in fact appeared as to any motion made, either in term or during vacation; but where a party has in fact appeared, notice of any motion made in vacation, and copy of motion, shall be served on him or his attorney.
- Qualities of a written notice of motion.** SEC. 3430. When notice of a motion is required to be served, it must be in writing, and shall state the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be made, the place where, and the day on which it will be heard, and if affidavits are to be used on the hearing, the notice shall state that fact, and it shall be served ten days before hearing, unless the court or judge direct shorter notice.
- By whom to be served.** SEC. 3431. Notices and copies of motions mentioned in this chapter, may be served by any one who would be authorized to serve an original notice, and may also be served by the attorney of the party making the motion.
- Upon whom.** SEC. 3432. The service shall be on each of the parties adverse to the motion, if more than one, or on an attorney of record, of such party.
- May be personal or by residence.** SEC. 3433. The service may be personal on such party or attorney, or may be left at the usual place of residence of the party, in the same manner as is provided for the service of the original notice in civil actions; or it may be served on the attorney, by being left at his office with any person having the charge thereof.
- Or as the original notice may be.** SEC. 3434. In cases unprovided for specially, the notice and copy may, in order to affect the party adverse, be served on the same persons as those on whom might be served the original notice in the case.
- Duty of officer.** SEC. 3435. It shall be the duty of any officer authorized to serve any notice and copy, and when such notice and copy shall be delivered to him for service within his county, to serve at once the same, and make prompt return to the party who delivered the same to him, and a failure to do so shall be punished as a disobedience of the process of the court.
- Return.** SEC. 3436. The return of proof of service must state the manner in which it was made.
- Court may define mode of its service.** SEC. 3437. When the party has no known place of abode in this state, and no attorney in the county where the action is pending, or where the parties, plaintiffs or defendants, are numerous, the court or judge may direct the mode of serving notices and copies, and to what persons they shall be given.
- Several objects included in same motion.** SEC. 3438. Several objects may be included in the same motion, if they all grow out of, or are connected with the action or proceeding in which it is made.
- Orders made by judge filed.** SEC. 3439. Orders made out of court shall forthwith be filed with

and entered by the clerk in the journal of the court, in the same manner as orders made in the term.

SEC. 3440. Testimony to sustain or resist a motion, may be presented in the form of affidavits, if the same does not appear otherwise. But on the hearing of any motion, it shall be lawful for the court or judge, at his discretion, and upon such terms as he may think reasonable, from time to time, to order such document as he may think fit, to be produced, and such witnesses as he may think necessary, to appear, and be examined, *viva voce*, either before such court or judge.

How proof on motion may be taken.

SEC. 3441. The motions of chapter 122 shall not be affected by the provisions of this chapter, and all motions made in term to dissolve an attachment in whole or part, or in any way regarding security for costs, or to dismiss a cause for any irregularity, or to change venue, or to continue a cause, or to open up a default, shall be served by mere notice, on the notice book, and may be heard on the morning after that on which notice thereof is served, and sooner, if sooner reached, and necessary to be passed upon before trial, any motion made in term affecting an action or proceeding then pending in such court, may be made on such notice as the court shall direct, or without notice, if the court so direct.

What motions this chapter shall not apply to.

## CHAPTER 136.

### SECURITY FOR COSTS.

SECTION 3442. If a defendant shall at any time before answering, make and file an affidavit, stating that he has a good defense in whole or in part, the plaintiff, if he be a non-resident of this state, or a corporation, before any further proceeding in the cause, shall file in the clerk's office a bond, with a sufficient surety, who must be a resident of the county where suit is brought, to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the court.

When security for costs obtainable.

SEC. 3443. An action in which a bond for costs is required by the last section, and has not been given, shall be dismissed on the motion of the defendant at any time before trial, unless in a reasonable time, to be allowed by the court, after the motion is made therefor, such bond is filed securing all past and future costs; and the action shall not be dismissed if a bond for costs is given in such time as the court may allow.

Else case dismissed.

SEC. 3444. If the plaintiff in an action, after its institution, becomes a non-resident of this state, he may be required to give security for costs in the manner and under the restrictions provided in the preceding sections of this chapter.

Resident becoming non-resident

SEC. 3445. In an action in which a bond for costs has been given, the defendant may at any time before trial, make a motion for additional security on the part of the plaintiff; and if on such motion the court is satisfied that the surety in the plaintiff's bond has removed from the state, or is not sufficient for the amount thereof, it may dismiss the action unless in a reasonable time, to be fixed by the court, sufficient security is given by the plaintiff.

Additional security.

Attorney not taken as security.  
Summary judgment may be rendered for costs.

SEC. 3446. No attorney or other officer of the court shall be received as security in any proceeding in court.

SEC. 3447. After final judgment has been rendered in an action in which security for costs has been given as required by this chapter, the court, on motion of the defendant, or any other person having the right to such costs, or any part thereof, may render judgment summarily, according to the chapter on summary proceedings, in the name of the defendant or his legal representatives, against the sureties for costs, for the amount of costs adjudged against the plaintiff, or so much thereof as may remain unpaid.

Application for security and reply thereto

SEC. 3448. In no other than the cases herein stated, except costs of the clerk, shall a plaintiff be required to give security for any costs, the application for such security shall be by motion, in writing, filed with the case, and the facts supporting it must be shown by affidavits annexed thereto, which may be responded to by counter affidavits, on or before the hearing of the motion, and each party shall file all his affidavits at once, and none thereafter.

## CHAPTER 137.

### COSTS.

General rule as to costs.

SECTION 3449. Costs shall be recovered by the successful against the losing party. But where the party is successful as to a part of his demand, and fails as to part, unless the case is otherwise provided for, the court may make, on rendering judgment, an equitable apportionment of costs.

On motions.

SEC. 3450. On all motions the court may give or refuse costs, at its discretion, to the extent of ten dollars, unless where it is otherwise provided by law, which costs may be absolute or directed to abide the event of the action.

Costs in case of several parties, or causes of action.

SEC. 3451. In actions where there are several plaintiffs, or several defendants, the costs shall be apportioned according to the several judgments rendered; and where there are several causes of action embraced in the same petition, or several issues, the plaintiff shall recover costs upon the issues determined in his favor, and the defendant shall recover costs upon the issues determined in his favor.

Costs which can not be collected of the defeated party.

SEC. 3452. All costs accrued at the instance of the successful party, which can not be collected out of the other party, may be recovered, on motion, by the persons entitled to them, against the successful party.

Costs include.

SEC. 3453. The necessary fees paid by the successful party, in procuring copies of deeds, bonds, wills, or other records filed as part of the testimony, shall be taxed in the bill of costs.

Same.

SEC. 3454. Postage paid by the officers of the court, or by the parties in sending process, depositions and other papers, being part of the record, by mail, shall be taxed in the bill of costs.

Case of a plea of subsequent matter.

SEC. 3455. When a pleading contains a defense stating matter which arose after the commencement of the action, whether such matter of defense be alone or with other matter of defense which arose before the action, the party affected by such matter may confess the same, and

thereupon shall be entitled to the costs of the cause, as to the party pleading such matter up to the time of such pleading.

SEC. 3456. When a plaintiff dismisses his action, or any part thereof, or suffers it to abate by the death of the defendant, or other cause, or where the suit abates by the death of the plaintiff, and his representatives fail to revive the same, according to law, judgment for costs may be rendered against such plaintiff or representatives, and if against a representative, shall be paid as other claims against the estate.

Case of death or dismissal.

SEC. 3457. The co-parties against whom judgment has been recovered, are entitled as between themselves to a taxation of the costs of witnesses whose testimony was obtained at the instance of one of the co-parties, and inured exclusively to his benefit.

Successful parties as between themselves.

SEC. 3458. Where an action is dismissed from any court for want of jurisdiction, or because it has not been regularly transferred from an inferior to a superior court, the costs shall be adjudged against the party attempting to institute or bring up the cause.

Case dismissed for want of jurisdiction.

SEC. 3459. *When any party recovers costs, the clerk shall include in the costs for the fee of such party's attorney, (if he have one,) five dollars.\** The clerk shall tax, in favor of the party recovering costs, the allowance of his witnesses, the fees of officers, the compensation of referees, the necessary expenses of taking depositions by commission or otherwise, and any further sum for any other matter which the court may have awarded as costs, in the progress of the cause, or may deem just to be taxed.

What the clerk shall tax.

SEC. 3460. In actions in which the cause of action shall, by assignment, after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such party shall be liable for the costs in the same manner as if he were a party.

Transfer during pendency of case.

SEC. 3461. Any person aggrieved by the taxation of a bill of costs, may, upon application, have the same re-taxed by the court, or by a

Re-taxation.

\* While the act was on its passage, this section was numbered as in the Report on Civil Code, section 845, chapter 31. The lines in italics were by some bitterly assailed as a catch-penny for the lawyers. The friends of the Code who desired, that at that late day in the session, it should not go back to the senate, which it had already passed, urged its passage as it came from the senate with an accompanying assurance that by a separate bill the objectionable matter (the lines *above-aid*,) should be struck out. The Code was passed, and the next day the following act was passed. In enrolling the Civil Code, the sections and chapters, as some had been struck out, had to be re-numbered, and this section came to be §40 in chapter 30. The following is the act; it came into force July 4, 1860. See Special Laws of 8th session, page 34:—An act to repeal part of section 845 of chapter 31 of the Code of Civil Practice.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That the following words be and they are hereby stricken out of section 845, of chapter 31, of the Code of Civil Practice, passed at the present session of the legislature, namely: "When any party recovers costs, the clerk shall include in the costs, for the fee of such party's attorney, (if he have one,) five dollars." And no attorney's fee, or part thereof, shall in any case be taxed as costs against the losing party, anything in the Code of Civil Practice to the contrary notwithstanding.

The following is the brief remark made by the commissioners on this subject:

One who will not pay another a just debt, save at the end of a law-suit, does such other a wrong which is not fully compensated by the payment of costs. For these costs do not include the plaintiff's loss of time, nor his trouble, nor his fee paid an attorney. In some states this idea of securing more perfect compensation is carried to the extent of allowing a fee, of a considerable amount, to the successful party, on motion or demurrer, and on judgment of a sum graduated by the amount involved, being such a per cent. thereof. It is not deemed well to introduce that principle, except in the form indicated, and you will fill the blank with what sum you please. It will be remembered that we have as a security to good pleading: *provided*, that the discretion of the court may tax costs against the failing party within a small margin. *Report on Civil Code, p. 331.*

referee, appointed by the court, in which the application or proceeding was had, and in such re-taxation all errors shall be corrected; and if the party aggrieved shall have paid any unlawful charge, by reason of the first taxation, the clerk shall pay the costs of re-taxation, and also to the party aggrieved, the amount which he may have paid by reason of the allowing of such unlawful charge.

Clerk's duty in appeal.

SEC. 3462. In cases of appeals from the district court, the clerk shall make a complete bill of costs, showing the items which shall accompany the record, and a copy of the same shall be placed upon the execution docket of the court below.

When costs are paid to clerk of supreme court.

SEC. 3463. When the costs accrued in the supreme court and the court below, are paid to the clerk of the supreme court, he shall pay so much of them as accrued in the court below to the clerk of said court, and take his receipt for the same.

Duty of district clerk.

SEC. 3464. On receiving such costs, the clerk of the court below shall charge himself with the money upon his execution docket, and pay it to the persons entitled to the same.

How this chapter construed.

SEC. 3465. The law of costs shall be construed remedially, and not as the penal law. And if any case shall occur not directly or by fair implication embraced in the express provisions of the law, the court may make such disposition of the costs, as in its sound discretion may seem right.

Interest from time of verdict in case of money.

SEC. 3466. When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment be finally entered, shall be computed by the clerk and added to the costs of the party entitled thereto.

## CHAPTER 138.

### SURVIVOR AND REVIVOR OF ACTIONS.

No cause of action dies.

SECTION 3467. No cause of action, *ex delicto*, dies with either or both the parties, but the prosecution thereof may be commenced or continued by or against their personal representatives.\*

\*The reasons which caused the abatement at common law, are now removed. When the king was the source of the original writ, it was not quite without a reason that the action based on it should die with him; and we find that till the time of Edward 1st, such was true. So, also, in cases of trespass, as there was with a judgment for the plaintiff, a fine also adjudged to the king as a punishment on defendant for his breach of the king's peace, such action partook of the nature of a criminal one, and as there remained after the death of the defendant no longer any power of punishment, it was not without reason that such action should, as it did, abate, on the defendant's death. And on such reasons chiefly rested the principle of abatement. As actions for injuries now look to mere compensation, there seems no reason why the death of either the wrong doer or the wrong sufferer should defeat that remedy. The fact that a judgment will or will not be collected, would seem to be the best criterion, and might most safely be left to the plaintiff or his representatives. A distinction was also made to the effect that whether the *estate* of the plaintiff was injured or not, should determine the right of the personal representative to continue or to originate an action. But you can not draw any exact line among rights, and say that the invasion of none on such side ever affect the estate—the wealth of the plaintiff. A slander which cripples the father's power of exertion, and limits his sphere of successful activity—or a grievous assault which does the same thing, may be as severe an injury to his children, as the breach of a contract by which it is very

*Revivor of Actions.*

SEC. 3468. Where there are several plaintiffs or defendants in an action, and one of them dies, or his powers as personal representative cease, if the right of action survive to or against the remaining parties, the action may proceed; the death of the party, or the cessation of his powers, being stated in the record. Proceedings when one of two or more parties dies.

SEC. 3469. When one of the parties to an action dies, or his powers as a personal representative cease before the judgment, if the right of action survive in favor of, or against his representatives or successor, the action may be revived and proceed in their names. Same.

SEC. 3470. The revivor shall be by a conditional order of the court, that the action be revived in the names of the representatives or successors of the party who died, or whose powers ceased, and proceed in favor of or against them. Revivor.

SEC. 3471. The order may be made on the motion of the adverse party, or of the representatives or successors of the party who died, or whose powers ceased, suggesting his death, or the cessation of his powers, which, with the names and capacities of his representatives, or successor, shall be stated in the order. Same.

SEC. 3472. If the order is made by consent of the parties, the action shall forthwith stand revived; and if not made by consent, the order shall be served in the same manner, and returned within the same time, as an original notice, upon the party adverse to the one making the motion, and if sufficient cause be not shown against the revivor at that term of court at which the defendant would be bound to appear were the notice an original one, the action shall stand revived. Same.

SEC. 3473. Upon the death of a plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representatives, the revivor shall be in his name; where it has passed to his heirs or devisees who could support the action if brought anew, the revivor may be in their names. Death of plaintiff.

SEC. 3474. Upon the death of a defendant in an action, wherein the right or any part thereof, survives against his personal representatives, the revivor shall be against him; and it may also be against his heirs or devisees of the defendant, or both, when the right of action, or any part thereof, survives against them. Death of defendant.

SEC. 3475. Upon the death of a defendant in an action for the recovery of real property, only, or which concerns only his rights or claims to such property, the action may be revived against his heirs or devisees, or both, and an order therefor, may be forthwith made in the manner directed in the preceding sections of this title. Real property.

SEC. 3476. An order to revive an action against the representatives, or successor of a defendant, shall not be made, without the consent of Time.

clear that his wealth devolving on them, has been diminished to the extent of one or one thousand dollars. This idea has grown up amid a state of things, wherein *property* was nearly all, and *man* was nearly nothing. We would put man and those attributes that make him such, and those excellencies that adorn him as such—so far as the same are protected by law—upon as high a plane of protection, as mere chattel interests. And as the law has established itself the guardian of this higher class of rights, when such have been illegally invaded, we would transmit the right to his representatives to vindicate these as well as others less cherished. This is getting to be the way of looking at these things now, and we think we are not advancing beyond the intention of our present Code as in section 2502. *Report on Civil Code, p. 332.*

Time	such representatives or successor, unless it be made within one year from the time it could have been first made. SEC. 3477. An order to revive an action in the names of the representatives or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made; but where the defendant shall also have died, or his powers have ceased in the mean time, the order of revivor on both sides may be made in the period limited in the last section.
Case stricken from docket when.	SEC. 3478. When it appears to the court by affidavit, that either party to an action has been dead, or where a party sues, or is sued as a personal representative, that his powers have ceased for a period, so long, that the action can not be revived in the names of his representatives, or successors, without the consent of both parties, it shall order the action to be stricken from the docket.
Suaue.	SEC. 3479. At any term of the court succeeding the death of the plaintiff, while the action remains on the docket, the defendant having given to the plaintiff's proper representatives, in whose names the action might be revived, ten days' notice of the application therefor may have an order to strike the action from the docket, and for costs against the estate of the plaintiff unless the action is forthwith revived.
Trial not to be postponed.	SEC. 3480. When by the provisions of the preceding sections, an action stands revived, the trial thereof shall not be postponed by reason of the revivor; if the action would have stood for trial at the term, the revivor is complete, had no death, or cessation of powers taken place.

## CHAPTER 139.

### REVIVOR OF JUDGMENTS.

Execution may be issued till judgment barred.	SECTION 3481. An execution may be issued on a judgment at any time, until the collection of it is barred by the statute of limitations, although no execution may have been previously issued thereon.
How in case of death.	SEC. 3482. The death of one or all the plaintiffs shall not prevent an execution being issued thereon, but on such execution, the clerk shall indorse the death of such of them as are dead, and if all be dead, the names of the personal representatives, or the last survivor, if the judgment passed to the personal representatives, or the names of the survivor's heirs, if the judgment was for real property.  Where judgment has been rendered against all the defendants, without noticing the death of one, it is proper for the court to order the execution to issue in the names of the survivors. <i>Simpon, J., Webb's admin'r v. Hill, Mss. opin., January, 1856. Stanton's Ky. Code.</i>
How sheriff shall then do.	SEC. 3483. The sheriff, in acting upon an execution indorsed as provided in the last section, shall proceed as if the surviving plaintiff or plaintiffs, or the personal representatives or heirs, were the only plaintiffs in the execution, and take bonds accordingly.
An affidavit to be made.	SEC. 3484. Before making the indorsements named above, an affidavit shall be filed with the clerk by one of the plaintiffs, or personal representatives, or heirs, or their attorney, of the death, and that the



persons named as such, are the personal representatives or heirs, and in the case of personal representatives, they shall file with the clerk a certificate of their qualifications, according to law in this state.

SEC. 3485. The death of part only of the defendants, shall not prevent execution being issued, which, however, shall operate alone on the survivors and their property. How execution shall operate.

SEC. 3486. The defendant may move the court to quash an execution, on the ground that the personal representatives, or heirs of a deceased plaintiff are not properly stated in the indorsement on the execution, and during the vacation of the court, may obtain an injunction, upon its being made to appear that the persons named are not entitled to the judgment on which the execution was issued. When execution may be quashed.

## CHAPTER 140.\*

### WRIT OF CERTIORARI.

[Code—Chapter 113.]

SECTION 3487. The writ of certiorari may be granted whenever specially authorized by law, and especially in all cases where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, when in the judgment of the court applied to for the writ there is no other plain, speedy and adequate remedy. When this writ issues.

SEC. 3488. (1966.) The writ may be granted by the district court of the proper county, but if to be directed to a district court or the judge thereof, then by the supreme court—and shall command the defendant therein to certify fully to the court from which the same issues, at a specified time and place, a transcript of the records and proceedings, as well as the facts in the case, (describing and referring to them, or any of them with convenient certainty) and also to have then and there the writ. By whom granted.

SEC. 3489. (1967.) If a stay of proceedings is sought, the court may require a bond, and may fix the penalty and conditions thereof. Supersedens.

SEC. 3490. The petition for this writ must state facts constituting a case, wherein the writ may issue, and must be sworn to, and the court may require a notice of the application to be given to the adverse party, or may make an order to show cause why the writ should not issue, or may, in its discretion, grant the writ without notice. Petition.

SEC. 3491. (1969.) The writ must be served and the proof of such service made in the same manner as is prescribed for the original notice in a civil action, except that the original shall be left with the defendant and the return or proof of service made upon a copy thereof. Service and return.

SEC. 3492. (1970.) If the return of the writ be defective, the court may order a farther return to be made, and may compel obedience to the writ, and to such farther order, by attachment, if necessary. If defective.

SEC. 3493. (1971.) When a full return has been made, the court must proceed to hear the parties, or such of them as may attend for that Court's action.

\* It will be observed that a change has been made in section 3490, for the purpose of more nearly conforming the proceedings to other actions.

purpose, and may thereupon give judgment affirming or annulling the proceedings below, or in its discretion, correcting those proceedings, and prescribing the manner in which the defendant shall proceed farther in the matter.

Appeal

SEC. 3494. (1972.) From the decision of the district court, an appeal lies to the supreme court, as in other cases.

PRIOR LAW. 1. An act concerning appeals, writs of error, certiorari, &c., passed Dec. 21, 1820; M. D., 1833, p. 400. Repealed Aug. 30, 1840. [See prior laws at the end of PART THIRD.]

DECISIONS UNDER THE PRIOR PRACTICE. Certiorari is a common law writ, M., 89; bond not amendable under law of 1840, M., 340; what is a waiver of the right to it, M., 318; see 1 G., 368; what was the effect of it formerly, 2 G., 191, 128, 575, 379; 3 G., 237; when issues, 4 G., 242, 94; 2 Iowa, 69; 6 *ibid.*, 245; 4 G., 204; 5 Iowa, 552; 7 *ibid.*, 248; *Spray & Burns v. Thompson*, June, 1859; form of and joinder in, *Chambers v. Lewis*, Dec., 1859; an order of the county court establishing a road is not a case appealable from, by an individual, he may in a proper case have certiorari, to try validity of the proceeding, 4 Iowa, 502.

## CHAPTER 141.

### PROCEEDINGS TO REVERSE, VACATE OR MODIFY JUDGMENTS.

[Code—Chapters 112 and 114.]

Where judgment or order may be reversed.

SECTION 3495. A judgment rendered or order made in the district court, or by a judge thereof, may be reversed, vacated or modified, either by the supreme court or by the district court in which the judgment was rendered or order made.

For what in the supreme court.

SEC. 3496. A judgment or order may be reversed or modified by the supreme court for errors appearing on the record.

By appeal.

SEC. 3497. The proceedings to obtain such reversal or modification shall be by appeal as prescribed by law.

Mistake of clerk.

SEC. 3498. A mistake of the clerk shall not be ground for an appeal until the same has been presented and acted upon by the district court.

The court of appeals can not reverse a cause for a clerical misprison until the circuit court refuse on application, to correct it. An error of the clerk in misstating in a judgment, the time when interest begins to run, is such a misprison. *Wilson, etc. v. Barnes*, 13 B. M., 332.

An error in the date from which interest is to be computed, in entering judgment upon a note or bill of exchange, or allowing costs of protest, will not be cause of reversal, unless the circuit court has refused to correct it on motion. *Clark, etc. v. Finnell, etc.*, 16 B. M., 334.

In the court which rendered the judgment.

SEC. 3499. The district court in which a judgment has been rendered, or by which, or by the judge of which a final order has been made, shall have power after the term at which such judgment or order was made to vacate or modify such judgment or order:

For what reasons.

1. By granting a new trial for the cause, within the time, and in the manner prescribed by sections on new trials.

2. By a new trial granted on proceedings against defendants served by publication only, as prescribed in section 3160.

3. For mistake, neglect or omission of the clerk or irregularity in obtaining a judgment or order.

4. For fraud practiced by the successful party in obtaining the judgment or order.

5. For erroneous proceedings against an infant, married woman, or person of unsound mind, when the condition of such defendant does not appear in the record, nor the errors in the proceedings.

6. For the death of one of the parties before the judgment in the action.

7. For unavoidable casualty or misfortune preventing the party from prosecuting or defending.

8. For error in a judgment shown by an infant within twelve months after arriving at full age.

In *Bennett v. East*, 7 Ind. R., 174, it was held that infants on arriving at age, should proceed by way of review for error in judgments upon which their lands had been sold.

It has been held that where a party prosecutes a proceeding to review a judgment, he can not appeal from the judgment reviewed. The appeal must be from the judgment in the proceedings for review. Ind. Dig., 122, section 42; 7 Ind., 25.

SEC. 3500. The proceedings to correct mistakes, or omission of the clerk, or irregularity in obtaining a judgment or order shall be, by motion served on the adverse party, or on his attorney in the action, and within one year, and when made to vacate a judgment because of irregularity in obtaining it, must be made on the second day of the succeeding term.

Mode of application.

SEC. 3501. The proceedings to obtain the benefit of sub-divisions 4, 5, 6, 7 and 8, of section 3499, shall be by petition, verified by affidavit setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and the facts constituting a defense to the action if the party applying was a defendant, and such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto be an infant, married woman or person of unsound mind, and then within one year from the removal of such disability.

Needs to be by petition when.

SEC. 3502. In such proceedings the party shall be brought into court, in the same way, on the same notice as to time, mode of service, and mode of return, and the pleadings shall be governed by the principles, and issues be made up by the same formula, and all the proceedings conducted in the same way as near as can be as in an original action by ordinary proceedings according to this code, except that defendant shall introduce no new cause, and the cause of the petition shall alone be tried.

If party brought in.

SEC. 3503. The judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defense to the action in which the judgment is rendered, or if the plaintiff seeks its vacation, that there is a valid cause of action, and when a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment.

What is to be first considered.

SEC. 3504. The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action.

Same.

SEC. 3505. The party seeking to vacate or modify a judgment or order, may obtain an injunction suspending proceedings on the whole or part thereof, which injunction may be granted by the court or the judge thereof, upon its being rendered probable, by affidavit or petition sworn to, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified.

Obtain an injunction.

Results if the judgment be affirmed.

SEC. 3506. In all cases of affirmance of the judgment or order, when the proceedings have been suspended, judgment shall be rendered against the plaintiff in error for the amount of the former judgment, interest and costs, together with damages at the discretion of the court, not exceeding ten per cent. on the amount of the judgment.

*Appeals from the District Court to the Supreme Court.*

Appeal to the supreme court.

SEC. 3507. The appeal shall not be taken, except within one year from the rendition of the judgment or order, unless the party taking the same was an infant, married woman, or of unsound mind, at the time of its rendition; in which cases, such parties or their legal representatives may take an appeal within one year after the removal of their disability or death, whichever may first happen.

Name of case unchanged.

SEC. 3508. The cause shall be docketed as it was in the court below, and the party taking the appeal shall be called the appellant, and the other party the appellee.

Notice.

SEC. 3509. An appeal is taken by the service of a notice, in writing, on the adverse party, his agent, or any attorney, who appeared for him in the case in the district court, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or or from some specific part thereof, defining such part.

An appeal from part only.

SEC. 3510. An appeal from part of an order, or from one of the judgments of a final adjudication, or from part of a judgment, shall not disturb or delay the rights of any party to any judgment or part of a judgment, or order not appealed from, but the same shall proceed, as if no such appeal had been taken.

When appeal is perfected.

SEC. 3511. An appeal shall not be perfected until the notice thereof has been served upon both the party and the clerk, and the clerk paid or secured, (unless already secured,) his fees for a transcript; whereupon the clerk shall forthwith transmit by mail, express, or a safe and less expensive messenger, not a party, nor the attorney of a party, a transcript of the record in the cause, or of so much thereof as the appellant in writing in the notice has directed, to which shall be appended copies of the notices of appeal, and of the supersedeas bond, if any.

What shall be sent up.

SEC. 3512. In an action by ordinary proceedings, and in an action by equitable proceedings, tried by the second method of trying equitable actions, all proper entries made by the clerk, and all papers pertaining to the cause, and filed therein, (except subpoenas, depositions, and other papers which are used as mere evidence,) are to be deemed part of the record. But in an action by equitable proceedings tried by the first method of trying equitable actions, the depositions and all papers which were used as evidence, are to be certified up to the supreme court, and shall be so certified, not by transcript, but in the original form. But a transcript of a motion, affidavit, or other paper, when it relates to a collateral matter, shall not be certified, unless by direction of the appellant. If so certified, when not material to the determination of the appeal, the court may direct the person blameable therefor to pay the costs thereof.

Fifteen days service.

SEC. 3513. The notices of appeal must be served fifteen days before the first day of the next term of the supreme court, or the same shall not then be tried, unless the appellee shall give the appellant, ten days before the term, notice indicating that he will insist on a hearing at such term, in which event the cause shall be heard at such term, unless the appellant shall, on a sufficient showing, obtain a continuance.

SEC. 3514. If the appellant having taken an appeal fifteen days before the term, fails to file a transcript in the supreme court, on the morning of the first day of that part of the term devoted to causes from the district whence comes the appeal, or if not taken as many as fifteen days before the term, he fail to have the case so filed at the next succeeding term on the morning aforesaid, in either event, unless the appellant file at the time, when such transcript should be filed, the certificate of the clerk stating when he was served with notice, and that he has not had sufficient time to prepare a transcript, the appellee may file a transcript of the judgment, and of the notice served on the clerk, and may, on motion, have the appeal dismissed, or the judgment affirmed.

Promptness exacted in all appeals.

SEC. 3515. If the transcript has been sent up, but the appellant does not file the same, when the same should be filed as herein provided, the appellee may file the same, and may, on motion, have the appeal dismissed, or the judgment affirmed, as the court from the circumstances of the case shall determine.

Same.

SEC. 3516. If, the transcript being filed, errors are not assigned by the morning of the first of those days devoted to causes from the district whence comes the appeal, the appellee may, on motion, have the appeal dismissed, or the judgment or order affirmed, unless a good cause for the failure is shown by affidavit.

Same, as regards errors.

SEC. 3517. (1979.) A part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the clerk of the supreme court.

Part of co-parties may appeal.

SEC. 3518. If the other co-parties refuse to join, they can not nor can any of them take an appeal afterwards; nor shall they derive any benefit from the appeal, unless from the necessity of the case.

Result of refusal to unite.

SEC. 3519. Unless they appear and decline to join, they shall be deemed to have joined, and shall be liable for their due proportion of costs.

When deemed to have joined.

SEC. 3520. The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the district court, and the cause may proceed. The court may also, in such case grant a continuance, when such a course will be calculated to promote the ends of justice.

Abatement by death.

SEC. 3521. Where appellant has no right, or no further right to prosecute the appeal, the appellee may move to dismiss the appeal, and if the grounds of the motion do not appear in the record, or by a writing, purporting to have been signed by the appellant, and filed, they must be verified by affidavit.

Right to appeal determined in some way, the same how urged.

SEC. 3522. The appellee may by answer filed and verified by himself, agent or attorney, plead any facts which render the taking of the appeal improper, or destroy the appellant's right of further prosecuting the same, to which answer the appellant may file a reply, likewise verified by himself, his agent or attorney, and the questions of law or fact therein shall be determined by the court.

How answered.

SEC. 3523. The service of all notices of appeal, or in any way growing out of such right, or connected therewith, and all notices in the supreme court, shall be in the way provided for the service of like notices in the district court, and they may be served by the same person and returned in the same manner, and the original notice of appeal must be returned, immediately after service, to the office of the clerk of the district court where the suit is pending.

Notices served as in district court

The power of party to obtain perfect transcript.

SEC. 3524. It shall be the duty of the appellant to file a perfect transcript, and to that end the clerk of the district court must at any time on his suggestion of the diminution of the record, and on the payment of fees, certify up any omitted part of the record, according to the truth, as the same appears in his office of record; and such applicant shall not be entitled to any continuance, in order to correct the record, unless it shall clearly appear to the court that he is not in fault. Subject to which requirement, either party may, on motion before trial day, obtain an order on the clerk of the district court, commanding him to transmit at once to the supreme court, a true copy of such imperfect or omitted part of the record, as shall be in general terms described in the affidavit or order. Such motion must be supported by affidavit, unless the diminution be apparent or admitted by the adverse party, and must not be granted unless the court is satisfied that it is not made for delay.

Original document.

SEC. 3525. Where a view of an original paper in the action may be important to a correct decision of the appeal, the court may order the clerk of the district court to transmit the same, which he shall do in some safe mode, to the clerk of the supreme court, who shall hold the same subject to the control of the court.

Security for costs.

SEC. 3526. The appellant may be required to give security for costs, under the same circumstances as those in which plaintiffs in civil actions in the district court, may be so required.

Supersedeas.

SEC. 3527. An appeal shall not stay proceedings on the judgment or order, or any part thereof, unless a supersedeas is issued, and no appeal or supersedeas shall vacate or affect the lien of the judgment appealed from.

Bond and its conditions.

SEC. 3528. A supersedeas shall not be issued until the appellant shall cause to be executed before the clerk of the court which rendered the judgment or order, by one or more sufficient sureties, to be approved by such clerk, a bond to the effect that the appellant shall pay to the appellee all costs and damages that shall be adjudged against the appellant on the appeal; also that he will satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render, or order to be rendered, by the inferior court, not exceeding in amount or value the original judgment or order, and all rents, or hire, or damages to property during the pendency of the appeal, out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings, on only a part of the judgment or order, it shall be varied so as to secure the part superseded alone. When such bond has been approved by the clerk, and filed, he shall issue a written order commanding the appellee and all others, to stay proceedings on such judgment or order, or on such part as is superseded as the case may be.

Yet further security may be obtained.

SEC. 3529. If the appellee believe the supersedeas bond defective, or the sureties insufficient, he may move the supreme court, if in session or in its vacation, on ten days' written notice to the appellant, may move any judge of said court, or the judge of the district court where the appeal was taken, to discharge the supersedeas, and if the court, or such judge, shall consider the sureties insufficient, or the bond substantially defective in securing the rights of the appellee, the court or such judge, shall issue an order discharging the supersedeas, unless a good bond, with sufficient sureties, be executed by a day by him fixed. The order, if made by a judge, shall be in writing, and signed by him, and upon its filing, or the filing of a certified copy of the order when made in court, in the office of the clerk of the district court, execution and other pro-

ceedings for enforcing the judgment or order may be taken, if a new and good bond is not filed and approved by the day fixed as aforesaid.

SEC. 3530. But another supersedeas may be issued by the clerk, upon the execution before him, of a new and lawful bond with sufficient sureties, as hereinbefore provided. Further supersedeas if good bond given.

SEC. 3531. If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal. But it shall in no case be less than one hundred dollars. Penalty of bond.

SEC. 3532. The taking of the appeal from a part of a judgment or order, and the filing of a bond as above directed, does not cause a stay of execution as to any part of the judgment or order not appealed from. Stay may be to only part of judgment.

SEC. 3533. (1987.) If execution has issued prior to giving the bond above contemplated, the clerk shall countermand the same. Execution countermanded.

SEC. 3534. (1988.) Property levied upon and not sold at the time such countermand is received by the sheriff, shall forthwith be delivered up to the judgment debtor. Property restored.

*Trial and Decision.*

SEC. 3535. The clerk shall arrange the appeals upon the docket, setting a proper number for each day of the term, and placing together those from the same judicial district. Cases on docket arranged.

SEC. 3536. The supreme court may reverse or affirm the judgment or order below, or the part of either appealed from, or may render such judgment or order as the district court or judge should have done, according as it may think proper. Power of supreme court on appeal.

SEC. 3537. (1986.) The supreme court, where it affirms the judgment, shall also, if the appellee moves therefor, render judgment against the appellant and his sureties on the bond above mentioned, for the amount of the judgment, damages and costs referred to therein, in case such damages can be accurately known to the court without an issue and trial. As to sureties

SEC. 3538. Upon the affirmance of any judgment or order for the payment of money, the collection of which, in whole or part, has been superseded by bond, as above contemplated, the court shall award to the appellee damages upon the amount superseded; and if satisfied by the record, that the appeal was taken for delay only, must award such sum as damages, not exceeding fifteen per cent. thereon, as shall effectually tend to prevent the taking of appeals for delay only. Damages for delay.

SEC. 3539. If the supreme court affirm the judgment or order, it may send the cause to the district court to have the same carried into effect, or it may itself issue the necessary process for this purpose, and direct such process to the sheriff of the proper county, according as the party thereto may require. May remand the same.

SEC. 3540. (1992.) If by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme or district court may direct execution or writ of restitution to issue for the purpose of restoring to such appellant his property or value thereof. It may also order restitution.

SEC. 3541. (1993.) Property acquired by a bona-fide purchaser, under a judgment subsequently reversed, shall not be affected by such reversal. Title when not disturbed.

- May imprison to compel obedience. SEC. 3542. The supreme court shall have power to enforce its mandates upon inferior courts and officers, by fine and imprisonment, which imprisonment may be continued until obeyed.
- Re hearing. SEC. 3543. If a petition for re-hearing be filed, the same shall suspend the decision or procedendo, if the court, on its presentation, or one of the judges, if in vacation, shall so order, in either of which cases such decision and procedendo shall be suspended until the next term.
- Same SEC. 3544. The petition for re-hearing shall be the argument of the applicant therefor, and if the court think that such argument requires a reply, it shall so indicate to the other party, and he may make reply within such time as said court shall allow, and with a view to a re-hearing, the court may extend the suspension of proceedings yet farther, if need be.
- No reversal save of point tried below. SEC. 3545. A judgment or order shall not be reversed for an error which can be corrected, on motion, in the inferior court, until such motion has been made there and overruled.
- Form of errors. SEC. 3546. An assignment of error need follow no stated form, but must, in a way, as specific as the case will allow, point out the very error objected to. Among several points in a demurrer, or in a motion, or instructions, or rulings in an exception, it must designate which is relied on as an error, and the court will only regard errors which are assigned with the required exactness; but the court must decide on each error assigned.
- Motions on book. SEC. 3547. All motions must be entered in the motion book, and shall stand over till the next morning after that morning on which entered, and till after having been publicly called by the court, unless the parties otherwise agree, and the adverse party shall be deemed to have notice of such motion.
- Hear all the causes. SEC. 3548. The court shall hear all the causes docketed, when not continued by consent, or for causes shown by the party, and the party may be heard orally or otherwise, in his discretion.
- Advisement cases. SEC. 3549. When the court takes a cause under advisement, it shall file its opinion at the next term which is held thereafter at the capital.
- Opinion to be filed. SEC. 3550. No cause is decided until the opinion in writing is filed with the clerk.
- District court's power on remanded case. SEC. 3551. If remanded to the district court to be carried into effect, such decision, and the order of the court thereon, being certified thereto and entered on the records of that court, shall have the same force and effect as if made and entered during the session of the court in that district.
- Executions in supreme court. SEC. 3552. Executions issued from the supreme court shall be the same as those from the district court, and attended with the same consequences, and shall be returnable in the same time.

DECISIONS UNDER THE PRIOR PRACTICE. Need of notice, or voluntary appearance, 2 Iowa, 312; within one year, 4 G., 95; error *coram nobis* lies on fact committed by the court, which itself reviews such error, 4 Iowa, 423; applicability of this writ defined, 4 Iowa, 420; advance of fees for transcript, 2 G., 460; if the district court overrule a motion for a new trial, based on an affidavit of the jury, stating a mis-take in law, such decision will not be disturbed, 4 Iowa, 585; the finding of the court or of a jury, simply as a finding, is not reviewable, if on a motion for a new trial the facts be presented, then this court looks into the evidence, 4 Iowa, 432; [section 1793 was meant to provide for a review of fact by a direct appeal, to test the sufficiency of the facts found for the legal conclusion rendered thereon—for chancery chiefly ?] The record of the court below may be aided as against one, by a showing of his conduct regarding it, 4 Iowa, 72; mere formal objections are made too late in the supreme court, 5 Iowa, 543; an objection to the district judge should be first made in the district court, 5 Iowa, 488; record should show rule of court, *Holt v. Smith*, Dec., 1859; and if act be done under rule of court not set out



presumption of rectitude, *ibid.*, [but see section 2927 hereof;] value of an appeal in chancery, right to have facts tried, 2 Iowa, 20; 1 G., 115; 2 G., 131; 2 G., 56; 3 Iowa, 543; 3 G., 207; 1 Iowa, 449; [see section 2999;] as to set-off in equity, see 3 Iowa, 163; 1 Iowa, 449; [but see sections 2620, 2886;] motion to strike from a pleading redundant or scandalous matter, discretionary and not reviewable, 6 Iowa, 191, 553; nor is a case of nonsuit, 6 Iowa, 76; applicability of testimony rejected must be shown, or else presumed rightly rejected, 3 Iowa, 344; 7 Iowa, 85; when a state of case can be supposed that would justify the action of the court below, such case will be supposed, unless it be contradicted by the record, 5 Iowa, 476; a question of change of venue is reviewable, 4 Iowa, 241; so of a new trial, M., 15; 7 Iowa, 90; 3 Iowa, 191, 484; 7 Iowa, 3; what presumption the supreme court will make as to the action of the court below, 1 Iowa, 116, 121; 3 Iowa, 207; 5 Iowa, 472; 6 Iowa, 553; 1 G., 74, 157, 165; 4 Iowa, 146; 4 G., 92; M., 15; writ of error lies from judgment by confession or default, 1 G., 271; but not if the judgment has been arrested, M., 20, 287; but there must have been a judgment, 6 Iowa, 545; 7 Iowa, 136, and *Troxel v. Clarke*, June, 1859; the supreme court will only pass on question considered by district court, 5 Iowa, 196; 4 *ibid.*, 292; 2 *ibid.*, 30, 44; 1 *ibid.*, 101, and 1 *ibid.*, 86; and not only error, but that the same was prejudicial to the appellant must be shown by the record, 1 Iowa, 8, 121, 177, 456, 471, 482, 513; 4 Iowa, 146; 3 G., 205; 3 Iowa, 344, 487; 1 Iowa, 94; 4 G., 94, 413; 3 Iowa, 207; 5 Iowa, 472; 2 *ibid.*, 44; 3 G., 205; 4 Iowa, 463, 158; 1 Iowa, 8; 1 G., 79; [see section 3111;] the exception must be taken at the time, 2 Iowa, 447; [see section 3106;] if enough appear of record unobjected to, to sustain the judgment, the court will sustain it, 1 Iowa, 100; the error of overruling or sustaining a demurrer waived by pleading over, 4 Iowa, 551; 3 *ibid.*, 209; M., 354; 5 Iowa, 277; but the point may occur again on an instruction or motion for a new trial, 5 Iowa, 277; all facts not apparent of record which need be shown must be in the bill of exception, 1 Iowa, 205; M., 494, 439; motion for new trial is part of record, 1 Iowa, 216; not so before code of 1851; 1 G., 153, 447; 2 G., 535, 270; M., 439; bill is necessary to the review of ruling respecting parts of a deposition, 2 Iowa, 504, 520; it must identify papers, 1 G., 153, 223; M., 442; 1 Iowa, 226, 263; M., 366; 3 Iowa, 150; 4 Iowa, 349; 1 Iowa, 117, 121, 590; 2 *ibid.*, 447; 1 G., 476; should state all the evidence, 3 G., 246; 4 G., 84, 135, 468; 1 Iowa, 471; else presumed that no error, 7 Iowa, 255; 8 *ibid.*, 74; 1 Iowa, 226, 471; 6 Iowa, 72; must show objection made at time, *Swift v. Smith*, Dec. term, 1859; 4 G., 468; objected testimony received should be stated, 1 Iowa, 216; 6 Iowa, 553; 7 *ibid.*, 153; 8 *ibid.*, 62; justice may allow, *O'Neil v. Miller*, Dec. term, 1859; case may be remanded for bill, 4 Iowa, 544; what bill should make part of record, 1 Iowa, 205; indorsement on indictment, 1 Iowa, 171; motion presumed waived, unless record shows contrary, 3 Iowa, 63; under section 1977, instructions not part of record, 1 Iowa, 226; what are parts of record, 4 G., 123; can not show by affidavit the appearance below, 7 Iowa, 183; assignments of error must be specific, 1 Iowa, 121; 8 Iowa, 420; *Flanders v. Hovey*, June term, 1859; 2 Iowa, 165; 3 Iowa, 150; 3 *ibid.*, 467; that the court erred in rendering judgment against the defendant is too vague an assignment save where all the facts are taken up, 5 Iowa, 269; appeal lies for less than \$25, M., 287; from order sustaining or dissolving an attachment, 1 Iowa, 459, 460; lien of attachment preserved by prompt supersedeas bond, 4 Iowa, 230; intermediate orders, 1 Iowa, 23, 35; order remanding, when made, 1 Iowa, 23, 35; 2 G., 55, 132; decisions under chapter 251, of sixth session, 2 Iowa, 69; 6 *ibid.*, 245; *City of Muscatine v. Steck*, June term, 1859; new bond allowed, 3 G., 205; when the bond sufficiently identified, 8 Iowa, 214; appeal lies from judgment by default, 6 Iowa, 1; 1 G., 271; 3 G., 357; 3 Iowa, 543, 80; 1 Iowa, 148; 4 G., 120; by confession, *Troxel v. Clark*, June term, 1859; 7 Iowa, 136; from order quashing notice, 4 Iowa, 564; or dissolving an injunction, 7 Iowa, 213; taken how and when? 4 G., 95, 561; in chancery cases before Code, 1 G., 115; not allowed in contempt, 6 Iowa, 245, which is reversible by certiorari, *ibid.*; if the supreme court be required to pass on the testimony on which a judgment was got, the record must contain all the testimony, and must state that such is all the testimony, and if depositions were in, they must be clearly identified, 5 Iowa, 551; on a judgment against a corporation, a judgment, that execution issue against the private property of members is one which may be appealed from, and such judgment can not be questioned in a proceeding to enjoin the issuance of execution thereon, 4 Iowa, 13; decision of a territorial court will be respected, 2 G., 360; *stare decisis*, 4 G., 448; joinder in error, 1 G., 383; the rule giving relaxing, 4 G., 398; 3 Iowa, 528.

## CHAPTER 142.

## REPLEVIN.\*

[Code—Chapter 115 ]

Petition in replevin

SECTION 3553. The petition in replevin must be sworn to, and it must state:

1. A particular description of the property claimed.
2. Its actual value, and where there are several articles, the actual value of each.
3. The facts constituting the plaintiff's right to the present possession thereof, and must define the extent of his interest in the property, whether it be full or qualified ownership.
4. That it was neither taken on the order or judgment of a court against him, nor under an execution or attachment against him, or against the property. But if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process.
5. The facts constituting the alleged cause of detention thereof, according to his best belief.
6. The amount of damages which the affiant believes the plaintiff ought to recover for the detention thereof.†

\* Sections 4175 and 4176 are as follows

Sec 4175 In replevin there shall be no joinder of any but another cause of replevin; nor shall there be allowed any set-off, counter-claim, or cross demand

Sec 4176 A money judgment obtained in replevin for property, which property was in whole or part exempt from execution, shall also be to the same extent exempt from execution to the party obtaining it, and from all set-off or diminution, either by the party against whom the same is, or by any other person, and where the facts are so and the party desires it, the record shall state the facts of such total or partial exemption, and all the provisions of this and the preceding section shall also obtain as to an action of detinue And concerning these sections the report on the Civil Code, p 343, says

To allow a cross demand in replevin, would let a man take by force his debtor's goods, which were exempt from execution, and when sued in replevin, to keep them away and make his debt a cross demand, to cancel the money judgment which might be got against him To prevent this defeat of the exemption law, this and the next sections are provided

†The action of replevin was peculiar at common law in allowing a defendant to become an actor or plaintiff The defense herein, while it is strictly mere defense and may consist of matter somewhat in the nature of counter claim, as allowed in other actions, can not be by an actual plea of counter claim which would allow an actual reply, and thus narrow the issue And so there is need that the plaintiff state more than a *prima facie* case, or in other words that he, as in the former chancery bill, anticipate the defense and meet it Such petition contains the matter which would be found in the declaration and replication, according to the common law The result is that a denial of such petition makes the same issue as would have been done by a rejoinder This is the theory of replevin, as used in the new system, wherever adopted The statement of the extent of the interest which the plaintiff has in the property, required by subdivision 3 of this section, will avoid the necessity of giving a bailee, who has a mere temporary right, a money judgment for the whole value of the property, but will secure him in the use of the property, or if that can not be got, in the real value of his interest therein A sheriff who levies on property has an interest to the extent of the execution in his hands, if on replevin from him, he succeeds, let him have alternative judgment for the possession, or the value of such interest, which will be measured by what he had the right to make out of it, and no more By section 3562, it is provided, that if one party have no interest, then the other shall have a money judgment for the total value The fourth sub-division of this section will remove some doubt which has existed since a late decision. *Report on Civil Code*, p 333.

It seems that an answer averring property in the defendant, or a third person, amounts to a denial of the plaintiff's right, and puts the burden of the issue on him. Ind. Dig., p. 52.

In determining who has the affirmative of an issue, regard is had to the substance and effect of the issue, rather than to the form of it. *McLees et al. v. Felt*, 11 Ind. R., 218

Replevin for a quantity of merchandize. Answer in avoidance, setting up that the defendant was entitled to a lien upon the goods for freight, wherefore the plaintiffs were not entitled to the possession of them. Reply in denial. Held, that the burden of the issue was upon the defendant, and that he was entitled to open and close; and this, notwithstanding the rule that allegations of value and amount of damage are not considered as true, if not controverted, and notwithstanding the duty of the jury, in such cases, to assess the value of the property and the damages for its detention; for the question as to such value and damages were merely incidental to the main question, as to the right to the possession of property. *Ibid.*

Under issues where a successful defendant would be entitled to the return of the property, the jury should find its value; and failing to do so, may be sent back to perfect their verdict. Ind. Dig., p. 55. But they need not find whether the property is capable of being returned. The court may determine that question. Ind. Dig., p. 56.

If the party in possession, by any act of his, puts it out of the power of the other party to prove the precise value of the property, the jury may assess the highest value of an article of that description. *Lea v. Gates*, 10 Ind. R., 164; Ind. Dig., 261.

SEC. 3554. He shall also execute a bond to the defendant, with Bond. sureties, to be approved by the clerk, in a penalty at least equal to twice the value of the property sought, conditioned that he will appear at the next term of the court, and prosecute his suit to judgment, and return the property, if a return be awarded, and also pay all costs and damages that may be adjudged against him. This bond shall be filed with the clerk of the court, and is for the use of any person injured by the proceeding, and a judgment for money rendered against the plaintiff shall go against the sureties on the bond.\*

SEC. 3555. (1997.) The clerk shall thereupon issue a writ of replevin directed to the sheriff, to take the property therein described and deliver the same to the plaintiff. The ordinary original notice must also be served on the defendant in the usual manner. Issuance of writ

SEC. 3556. When any of the property is removed to another county after the commencement of the action, counterparts of the writ of replevin may issue on the demand of the plaintiff, to such other county, and may be executed upon such goods found in such county, and farther writs of replevin and the necessary counterparts thereof may issue as often as may be necessary. Follow the pro-  
cedure.

SEC. 3557. The sheriff must forthwith execute the writ by taking possession of the property therein mentioned, if it is found in the possession of the defendant, or of his agent, or of any other person who obtained possession thereof from the defendant, directly or indirectly, after the writ was placed in the sheriff's hands, for which purpose he may break open any dwelling house or other inclosure, having first demanded entrance and exhibited his authority, if required. How writ exe-  
cuted.

SEC. 3558. When it appears by affidavit that the property claimed has been disposed of or concealed, so that the writ can not be executed, the court may compel the attendance of the defendant, and examine May examine  
the defendant on  
oath to discover  
property.

\* It will prevent cost, delay, and circuity of action, to allow, as is here done, the judgment which is for money, to be rendered also against the sureties on the bond. *Report on Civil Code*, p. 333.

When writ returned.	him on oath as to the situation of the property, and punish a willful obstruction or hindrance of the writ, and a disobedience of the order of the court in this respect, as in case of contempt.
Delivery of property to plaintiff.	SEC. 3559. The sheriff must return the writ on or before the first day of the trial term, and shall state fully what he has done thereunder. If he has taken any property he shall describe particularly the same.
New parties.	SEC. 3560. The officer having taken the property, or any part thereof, shall forthwith deliver the same to the plaintiff.
Form of judgment or replevin.	SEC. 3561. If a third person claim the property or any part thereof, the plaintiff may amend and bring him in as a co defendant, or the defendant may obtain his substitution by the proper mode, or the claimant may himself intervene by the process of intervenor.
	SEC. 3562. The judgment shall determine which party is entitled to the possession of the property, and shall designate his right therein, and if such party have not the possession thereof, shall also determine the value of the right of such party, which right shall be absolute as to an adverse party having no right in such property, and shall also award such damages to either party as he may be entitled to, for illegal detention of such property.*

If the plaintiff in an action of replevin take a nonsuit, the defendant is entitled to the same judgment and damages as if he had recovered a verdict against the plaintiff. *Smith v. Winston*, 10 Mo. Rep., 299. Where the plaintiff fails to prosecute his suit with effect, the assessment of damages is imperative. *Reed v. Wilson and Garner*, 13 Mo. Rep., 28.

SEC. 3563. The party entitled thereto, may have execution for the money found due him, or may, in his discretion, have execution for the delivery of the property, and if the property, or any article thereof, can not be obtained on execution, he may have execution for the value of such article.†

SEC. 3564. When it appears by the return of the officer, or by the affidavit of the plaintiff, that any specific property which has been adjudged to belong to one party, has been concealed or removed by the other, the court, or a judge may require him to attend and be examined on oath, respecting such matter, and may enforce its order in this respect as in cases of contempt.

PRIOR LAWS. 1. An act allowing and regulating writs of replevin, passed April 4, 1833; M. D., 1833, p. 394; repealed Aug. 30, 1840.

2. An act regulating replevin, passed Jan. 23, took effect Feb. 23, 1839; I. T., 1st sess., p. 398; also Reprint of 1843, p. 534.

DECISIONS UNDER THE PRIOR PRACTICE. An action of replevin may be dismissed, on motion, when the petition states a fact which defeats the right of action, 5 Iowa, 453; action of detinue will lie in Iowa, &c., 2 G., 266; conversion what, 2 Iowa, 580; 3 G., 211; *Haas v. Damon*, Dec., 1859; the quashal of a writ of replevin abates not the action, *Beard v. Smith*, June term, 1859; if the property of A. be taken by process against B., then A. may replevy the same, 3 Iowa, 59; peaceable possession is good against all persons in replevin, save such as have a better right to possession, 4 Iowa, 558; when demand necessary, 1 Iowa, 573-578; *Pomeroy & Co. v. Parmelee*, June, 1859; 2 Iowa 580; 4 G., 23; 7 Iowa, 9; the term sale in an instruction will be construed to imply all needed to constitute that contract, 3

\* See section 3082 and the notes thereunder.

† Why should a party be allowed to obtain wrongfully and then keep another's property, on his choice to pay for it, and to remit the wronged party to a money judgment? And why should the party who fails to obtain his property before a judgment, be compelled to accept of mere money? Better not leave this choice to the wrong doer, but on the contrary, confer it on the party injured. *Report on Civil Code*, p. 333.

Iowa, 59; replevin lies against the owner of property by one entitled to possession, 4 Iowa, 558, 370; when an action of replevin is dismissed on motion of defendant, he is entitled at once to a judgment for the return of the property or its value, without a resort to the bond, 5 Iowa, 454; the exemption of this section only extends to the articles of sections 1898 and 1899, when claimed by those meant therein to be benefited, 5 Iowa, 450; if the property of another than the attachment or judgment debtor be taken by process, replevin lies, 5 Iowa, 372; 4 G., 551; property in the custody of the law can not be taken by replevin unless it be such as is exempt by sections 1898 and 1899, exempting from execution, 5 Iowa, 450; if property be wrongfully taken by legal process, the remedy is in action for damages against the officer, 5 Iowa, 450—[dictum]; the body of this action is as at common law, 6 Iowa, 39; plaintiff must recover upon the strength of his own title, 6 Iowa, 223; replevin is based in tort, 2 G., 481; it will lie for promissory notes, 7 Iowa, 508; petition for tools as exempt need not state facts showing them to be exempt, *Perkins v. Wisner*, Dec. 1859; [but see fourth clause of section 3553;] see also 8 Iowa, 140; as to sufficient certainty of description of property, see 4 G., 417; defendant can not move to quash a writ after answering the petition, *Beard v. Smith*, June, 1859; as to affidavit, see 6 Iowa, 505; the claim in the notice in a justice case of damage entitles to that sum if proved, 6 Iowa, 505; on a voluntary non suit property is awarded to defendant, 6 Iowa, 34; as to correspondence of claim and recovery of damages, see 6 Iowa, 204; in action on the bond the papers of the suit are evidence, 6 Iowa, 204; what constitutes a replevy as against a defendant in suit on bond, 6 Iowa, 204; "that the defendant is rightfully entitled to the property and to the possession thereof," held to be not new matter, 4 G., 512; plaintiff must identify property, 4 G., 512; "we the jury find for the defendant fifty dollars," does not entitle to a judgment for the property, 4 G., 512; replevin for liquors taken by process of criminal law, 5 Iowa, 438; *Jansen v. Effeey*, Dec., 1859; see a verdict which did not find value of property, but found property and right of possession and damages for defendant, 2 Iowa, 504.

CHAPTER 143.

DETINUE.\*

SECTION 3565. An action may be had in which the plaintiff may claim the delivery of personal property to be made after judgment, or the value thereof, in his discretion, if the specific property can not then be obtained. Specific property obtained after judgment.

SEC. 3566. The petition must be sworn to, and must conform to the requirements of sub-divisions one, two, three, four, five and six, of section 3553 of the chapter on replevin. Petition in such case.

SEC. 3567. The judgment shall define and declare the plaintiff's title, if he establishes the same, and shall also declare the value of such right, as in replevin. Judgment therein.

SEC. 3568. The plaintiff having obtained such alternative judgment, shall stand in the position of a party in replevin, having such judgment, and shall enjoy the same right of choice and the same appliances to enforce the same and all his rights therein, which such party in replevin enjoys. Rights of party having got such judgment.

\* It is very unjust to make a man's legal right to get back his only cow taken from him by a wrong doer, depend on his ability to give a bond for twice its value. It would be better to provide that a judgment obtained should stand to him instead of a bond, and entitle him to the same rights. This we have done. By allowing the plaintiff and not the defendant to choose whether he will take the money judgment or insist upon having the actual thing taken where it can be got, we only restore the action of detinue to its original use. See Finlason, p. 428. The English common law commissioners recommended, and the act of 1852 provided, that the court or judge might in all cases, where chattels were determined to belong to a party, compel, where it was practicable, their delivery to him. And the working of the act is well approved. *Report on Civil Code*, p. 334.

## CHAPTER 144.

## ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

[Code—Chapter 116.]

- SECTION 3569. (2000.)** Any person having a valid subsisting interest in real property and a right to the immediate possession thereof, may recover the same by action, which may be brought against any person acting as owner, landlord, or tenant of the property claimed.
- Form of petition.** **SEC. 3570.** The petition need but state generally, without stating the facts constituting the right, that the plaintiff is entitled to the possession of the premises, particularly describing them, also the quantity of his estate and the extent of his interest therein, and that the defendant unlawfully keeps him out of possession, and the damages, if any, which he claims for withholding the property; but if he claims other damages than rents and profits, he shall state the facts constituting the cause thereof.\*
- Substitution of landlord.** **SEC. 3571.** Whenever it appears that the defendant is only a tenant, the landlord may be substituted, notice thereof being given him, as in an original action.
- Agent of record.** **SEC. 3572.** When the defendant is a non-resident, having an agent of record for the property in the state, service may be made upon such agent in the same manner and with the like effect as though made on the principal.
- Form of answer.** **SEC. 3573.** The answer of the defendant and of each, if more than one, must set forth what part of the land he claims, and what interest he claims therein, generally and without the facts constituting the right, and if as mere tenant, the name and residence of his landlord, and need state nothing more than this.
- Continuances.** **SEC. 3574. (2006.)** The court may grant continuances in cases of this nature, for reasons of less importance than those required to be set forth in ordinary civil actions.
- Possession.** **SEC. 3575. (2007.)** Where the defendant makes defense, it is not necessary to prove him in possession of the premises.
- Limitation of damages.** **SEC. 3576. (2008.)** The plaintiff can not recover for the use and occupation of the premises for more than six years prior to the commencement of the action.
- Writ of possession.** **SEC. 3577. (2009.)** When the plaintiff shows himself entitled to the immediate possession of the premises, judgment shall be entered and a writ of possession issued accordingly.
- Not prejudiced by alienation.** **SEC. 3578.** An action for the recovery of real property against a person in possession can not be prejudiced by any alienation made by such person either before or after the commencement of the action.
- Judgment for damages only.** **SEC. 3579. (2010.)** If the interest of the plaintiff expire before the time in which he could be put in possession, he can obtain a judgment for damages only.

\* To require a full statement of all the facts constituting the right to the immediate possession, it was thought would involve much labor, and was not in fact necessary to warn the defendant, who was in most cases practically apprized by the record of the true grounds of the plaintiff's claim. This is but the current practice now, but this section makes clear what is now in some doubt. *Report on Civil Code*, p. 334.

SEC. 3580. (2011.) Where there is no proof against some of the defendants, the court may order a discontinuance as to them before the testimony in the case is closed. Discontinuance in part.

SEC. 3581. Where there are two or more plaintiffs or defendants, any one or more plaintiffs may recover against one or more of the defendants, the premises or any part thereof or any interest therein, or damages according to the rights of the parties; but the recovery shall not be for a greater interest than that claimed. Partial recovery

SEC. 3582. (2012.) Judgments in proceedings of this nature are as conclusive as those in actions relating to personal property, except as herein otherwise provided. Judgment.

SEC. 3583. (2013.) The preceding section is intended to apply only to interests existing at the time of the trial, and is not intended to prevent a new action to test the validity of rights acquired subsequently to the former trial. Same.

SEC. 3584. (2014.) The court in its discretion may grant a new trial on the application of a party or those claiming under him, made at any time within two years after the determination of the former trial. New trial.

SEC. 3585. If the application for a new trial is made after the close of the term at which the judgment was rendered, the party obtaining a new trial shall give the opposite party ten days notice thereof before the term at which the action stands for trial. Notice of new trial.

SEC. 3586. (2015.) The result of such new trial if granted after the close of the term at which the first trial took place, shall in no case affect the interest of third persons, acquired in good faith for a valuable consideration, since the former trial. Third persons.

SEC. 3587. (2016.) But the party who, on such new trial, shows himself entitled to lands which have thus passed to a bona-fide purchaser, may recover the proper amount of damages against the other party either in the same or a subsequent action. Damages.

SEC. 3588. (2017.) The party who has been successful in such new trial shall (if the case require it) have his writ of restitution to restore him his property. Restitution.

SEC. 3589. (2018.) In an action against a tenant the judgment shall be conclusive against the landlord who has received notice as hereinbefore provided. Judgment against landlord.

SEC. 3590. (2019.) If not notified, he shall be regarded as a defendant who has not been served with the original notice, and shall be treated accordingly. Exception.

SEC. 3591. (2020.) The plaintiff must recover on the strength of his own title. Own title.

SEC. 3592. The court, on motion, and after notice to the opposite party may, for cause shown, grant an order allowing the party applying therefor to enter upon the land in controversy and make survey and admeasurement thereof, for the purposes of the action. Power to enter land and survey.

SEC. 3593. (2022.) The order must describe the property and a copy thereof must be served upon the owner or person having the occupancy and control of the land. Title.

SEC. 3594. The verdict may specify the extent and quantity of the plaintiff's estate, and the premises to which he is entitled with reasonable certainty by metes and bounds, and other sufficient description, according to the facts as proved. Form of verdict.

SEC. 3595. A general verdict in favor of the plaintiff without such General verdict.

- specifications, entitles the plaintiff to the quantity of interest or estate, in the premises as set forth and described in the petition.
- Improvement, set-off.** SEC. 3596. (2023.) When the plaintiff in an action of this nature is entitled to damages, for withholding or using, or injuring his property, the defendant may set off the value of any permanent improvements made thereon to the extent of the damages, unless he prefers to avail himself of the law for the benefit of occupying claimants.
- Damages.** SEC. 3597. (2024.) In case of wanton aggression on the part of the defendant the jury may award exemplary damages.
- Extent of liability of tenant for rents.** SEC. 3598. A tenant in possession in good faith, under a lease or license from another, is not liable beyond the rent in arrear at the time of suit brought for the recovery of land and that which may afterwards accrue during the continuance of his possession.
- Retention till crop matured.** SEC. 3599. If the defendant aver that he has a crop sowed, planted or growing on the premises, the jury finding for the plaintiff, and also finding that fact shall further find the value of the premises from the date of the trial until the first day of January next succeeding, and no execution for possession shall be issued until that time, if the defendant executes with surety to be approved by the clerk, a bond in double such sum to the plaintiff, conditioned to pay at said date, the sum so assessed. This bond shall be part of the record, and shall have the force and effect of a judgment, and if not paid at maturity, the clerk on the application of the plaintiff shall issue execution thereon against all the obligors.
- Bond therein.** SEC. 3600. The plaintiff may have judgment for the rent of the possession which accrues after judgment, and before delivery of possession, by motion in the district court in which the judgment was rendered, ten days' notice thereof in writing being given, unless judgment is stayed by appeal, and bond given to suspend the judgment, in which case the motion may be made after the affirmance thereof.
- Reversionary interest.** SEC. 3601. (2025.) An action in the nature of that authorized in this chapter, may also be brought by one having a reversionary interest, or by one either in or out of possession, against another who claims title to real property, although the defendant may not be in the possession thereof, for the purpose of determining and quieting the question of title.
- To quiet title.** SEC. 3602. If the plaintiff is in possession, he may file a petition setting forth his estate, whether of inheritance for life or years, and describing the premises, and averring that he is credibly informed and believes that the defendant makes some claim adverse to the estate of the petitioner, and praying that he may be notified to show cause why he should not bring an action to try the alleged title, if any, and thereupon the court shall order notice to be given to the defendant, and upon the return of such order of notice, duly executed, if the defendant so notified shall make default, or having appeared, shall disobey the lawful order of the court to bring an action and try the title, the court shall enter a judgment that he be forever debarred and estopped from having or claiming any right or title adverse to the petitioner, and those claiming by or through him, to the premises described.
- Disclaimer.** SEC. 3603. If the defendant shall appear and disclaim all right and title adverse to the petitioner, he shall recover his costs; if he shall claim title, he shall, by answer, show cause why he should not be required to bring an action and try such title, and the court shall make such judgment or order respecting the bringing and prosecuting of such action, as may seem just.
- Rules applicable to last three sections.** SEC. 3604. In other particulars, the rules above prescribed shall,



in the cases in the last three sections contemplated, be observed as far as they are applicable.

SEC. 3605. (2027.) In an action for the recovery of dower before admeasurement, or by a tenant in common, or joint tenant of real property against his co-tenant, the plaintiff must show, in addition to his evidence of right, that the defendant either denied the plaintiff's right, or did some act amounting to such denial. Need of demand in some cases.

PRIOR LAWS. 1. An act to regulate the action of right and for other purposes, passed Feb. 26, 1821; M. D., 1833, p. 380; repealed Aug. 30, 1840.

2. An act to allow and regulate the action of right, passed Dec. 29, took effect Jan. 29, 1839; I. T., 1st sess., p. 419; also, Reprint, 1843, p. 526.

3. An act to amend an act entitled an act to allow and regulate the actions of right and ejectment, passed Feb. 16, took effect March 16, 1843; Reprint, chap. 69, p. 257; repealed I. T., 6th sess., chap. 36, p. 57; Feb. 15, 1844.

4. An act to allow and regulate the action of ejectment, passed Feb. 16, took effect March 16, 1843; Reprint, chapter 70, p. 258.

5. An act for the settlement of half-breed land titles, June 11, 1845; I. T., 7th sess., chap. 22, p. 41.

6. An act to amend that of Dec. 29, 1838, passed Jan. 1, 1846; I. T., 8th sess., chap. 2, p. 2.

7. An act concerning the rights of married women, passed Jan. 2, took effect Feb. 2, 1846; I. T., 8th sess., chap. 5, p. 4.

DECISIONS. Under the Reprint of 1843, after property and possession had passed by legal process to a third person, a trial of the right could not be had, 2 G., 9; the rights of heirs not provided for in the will are defined by the law in force at the death, 5 Iowa, 200; improvement damages, 3 G., 63; an entire judgment in right must be reversed as to all if so as to any, 5 Iowa, 195; as to the pleadings of the defendant, see 8 Iowa, 380; 6 Iowa, 439; possession as a bar, 7 Iowa, 92; 6 Iowa, 439; dower right is no defense, 8 Iowa, 360; mesne profits may be secured in the same suit which determines the title, 6 Iowa, 466; for what time defendant is liable for rents and profits, 8 Iowa, 360; 3 G., 63; judgment may be entered against one of many defendants, M., 405; must recover on own title, 4 G., 45; 2 G., 15; this action does not lie for a claim, M., 226; an unpaid vendor can bring this action without paying back what he has received or tendering unpaid notes, 6 Iowa, 153; M., 323; it supersedes ejectment, 2 G., 196; the verdict may be for less than the whole, and should respond to the proof, 3 G., 30; 2 G., 393; a co-tenant can use this action, *ibid.*; the prior judgment prevails over the latter, even if the latter has been first executed, 3 G., 363; 5 Iowa, 157; title must be traced back to the government, 4 G., 45; legal title prevails at law, 6 Iowa, 163; *Haman v. Steinman*, June, 1859; a dowress can not be compelled, when entitled to dower in many pieces of land, to take her whole share out of one piece, 4 Iowa, 404; the dowress is entitled to recover damages for detention from her husband's vendee, as measured by the use and profits, at least from the time of the demand, if not made more than six years before inception of suit, 4 Iowa, 403.

## CHAPTER 145.

### PARTITION.

[Code—Chapter 117.]

SECTION 3606. (2028.) When the object of the action is to effect a partition of real property among several joint owners, the petition must describe the property and the respective interests of the several owners thereof, if known. Petition.

SEC. 3607. (2029.) If the number of shares or interests is known but the owners thereof are unknown, or if there are, or are supposed What to be stated.

- to be, any interests which are unknown, contingent, or doubtful, these facts must be set forth in the petition with reasonable certainty.
- Lien creditors.** SEC. 3608. (2030.) Creditors having a specific or general lien upon all or any portion of the property may or may not be made parties, at the option of the plaintiff.
- Same.** SEC. 3609. (2031.) If the lien is upon one or more undivided interests of any of the parties, it shall, after partition or sale, remain a charge upon those particular interests or the proceeds thereof. But the due proportion of costs is a charge upon those interests paramount to all other liens.
- Costs.** SEC. 3610. (2032.) The answers of the defendants must state among other things, the amount and nature of their respective interests. They may deny the interest of any of the plaintiffs, and by supplemental pleading, if necessary, may deny the interest of any of the other defendants.
- Answers.** SEC. 3611. (2033.) Where there are two or more plaintiffs, they may reply jointly, or either of them may reply to any or all the answers of the defendants.
- Reply.** SEC. 3612. (2034.) Issues may thereupon be joined and tried between any of the contesting parties, the question of costs on such issues being regulated between the contestants agreeably to the principles applicable to other cases.
- Issues.** SEC. 3613. (2035.) Each of the parties appearing, whether as plaintiff or defendant, must exhibit his documentary proof of title, (if he has any,) and must file the same, or copies thereof, with the clerk.
- Proofs of title.** SEC. 3614. (2036.) If the statements in the petition and answers are not contradicted in the manner aforesaid, or by the documentary proof exhibited as above required, they shall be taken as true.
- Pleadings true.** SEC. 3615. (2037.) After all the shares and interests of the parties have been settled in any of the methods aforesaid, judgment shall be rendered confirming those shares and interests, and directing partition to be made accordingly.
- Judgment.** SEC. 3616. (2038.) Upon entering such judgment the court shall appoint referees to make partition into the requisite number of shares.
- Referees.** SEC. 3617. (2039.) For good and sufficient reasons appearing to the court, the referees may be directed to allot particular portions of the land to particular individuals. In other cases the shares must be made as nearly as possible of equal value.
- Special allotments.** SEC. 3618. (2040.) If it appears to the referees that a partition can not be made without great prejudice to the owners, they shall so report to the court.
- Partition can not be made.** SEC. 3619. (2041.) If satisfied with such report, the court shall cause an order to be entered directing the referees to sell the premises so situated, and shall also fix the terms of sale.
- Order to sell.** SEC. 3620. (2042.) Before proceeding to sell, the referees shall each give security, to be approved by the court or judge thereof, conditioned for the faithful discharge of his duties. At any time thereafter, the court may require farther and better security.
- Security by referees.** SEC. 3621. (2043.) The same notice of sale shall be given as when lands are sold on execution by the sheriff and the sales shall be conducted in like manner.
- Notice of sale.** SEC. 3622. (2044.) After completing said sale the referees must report their proceedings to the court, with a description of the different parcels of land sold to each purchaser, and the price bid therefor, which report shall be filed with the clerk.
- Report.**

SEC. 3623. (2045.) After making the order of sale as aforesaid, Incumbrances. the court shall direct the clerk to report whether there be any general incumbrance by mortgage, judgment, or otherwise, upon any portion of the property.

SEC. 3624. (2046.) If deemed advisable, the court may appoint Same. a referee to inquire into the nature and amount of incumbrance, and to report accordingly. From that report an appeal lies to the court.

SEC. 3625. (2047.) The referees shall give the parties interested at Notice. least five days' notice of the time and place when he will receive proof of the amounts of such incumbrances.

SEC. 3626. (2048.) In taking such proof he may receive, with other Proof. evidence, the affidavit of the parties interested.

SEC. 3627. (2049.) If any incumbrance be ascertained to exist, the How disposed of. proceeds of the sale of that portion, (after the payment of costs,) or so much thereof as is necessary, shall, if the owner consent, be paid over to the incumbrancer.

SEC. 3628. (2050.) If the owner object to the payment of such Same. incumbrance, the money shall be retained or invested by order of the court to await final action in relation to its disposition, and notice thereof shall be forthwith given to the incumbrancer, unless he has already been made a party.

SEC. 3629. (2051.) The court may direct an issue to be made up Issue. between the incumbrancer and the owner, which shall be decisive of their respective rights.

SEC. 3630. (2052.) If an estate for life or years be found to exist Life estates, &c. as an incumbrance upon any part of said property, and if the parties can not agree upon the sum in gross which they will consider an equivalent for such estate, the court shall direct the avails of the incumbered property to be invested, and the proceeds to be paid to the incumbrancer during the lifetime of the incumbrance.

SEC. 3631. (2053.) The proceedings in relation to incumbrances Delay. shall not delay the distribution of the proceeds of other shares in respect to which no such difficulties exist.

SEC. 3632. (2054.) The court, in its discretion, may require all or Refunding. any of the parties, before they receive the moneys arising from any sale authorized in this chapter, to give satisfactory security to refund such moneys, with interest, in case it afterward appears that such parties were not entitled thereto.

SEC. 3633. (2055.) If the sales aforesaid be approved and confirmed Conveyances. by the court, an order shall be entered directing the referees, or any two of them, to execute conveyances pursuant to such sales. But no conveyances can be made until all the money is paid, without receiving from the purchaser a mortgage of the land so sold, or other equivalent security.

SEC. 3634. (2056.) Such conveyances so executed, being recorded Effect of. in the county where the premises are situate, shall be valid against all subsequent purchasers, and also against all persons interested at the time, who were made parties to the proceedings in the mode pointed out by law.

SEC. 3635. (2057.) If the owner of any share thus sold has a hus- Party married. band or wife living, and if such husband and wife do not agree as to the disposition that shall be made of the proceeds of such sale, the court must direct it to be invested in real estate, under the supervision of such person as it may appoint, taking the title in the name of the owner of the share sold as aforesaid.

- Sales disapproved.** SEC. 3636. (2058.) If the sales are disapproved, the money paid and the securities given must be returned to the persons respectively entitled thereto.
- Partition.** SEC. 3637. (2059.) When a partition is deemed proper the referees must mark out the shares by visible monuments, and may employ a competent surveyor and the necessary assistants to aid them therein.
- Report.** SEC. 3638. (2060.) The report of the referees must be in writing, signed by at least two of them. It must describe the respective shares with reasonable particularity, and be accompanied by a plat of the premises.
- Shares.** SEC. 3639. (2061.) Unless the shares are allotted to their respective owners by the referees, as hereinbefore contemplated, the clerk shall number the shares and then draw the names of the future owners by lot.
- Partition in part.** SEC. 3640. (2062.) When partition can be conveniently made of part of the premises, but not of all, one portion may be partitioned and the other sold as hereinbefore provided.
- Report.** SEC. 3641. (2063.) On good cause shown, the report may be set aside, and the matter again referred to the same or other referees.
- Judgment.** SEC. 3642. (2064.) Upon the report of the referees being confirmed, judgment thereon shall be rendered that the partition be firm and effectual forever.
- Effect of.** SEC. 3643. (2065.) When all the parties in interest have been duly notified to appear and answer, either by the service of the petition and notice, or by the publication prescribed by law, any of the proceedings above authorized shall be binding and conclusive upon them all. If only a portion of such parties be served, they only shall be bound by such proceedings.
- As evidence.** SEC. 3644. (2066.) This judgment of partition shall be presumptive evidence of title in all cases, and as between the parties themselves it is conclusive evidence thereof, subject however to be defeated by proof of a title paramount to, or independent of, that under which the parties held as joint tenants or tenants in common.
- Costs.** SEC. 3645. (2067.) All the costs of the proceedings in partition shall be paid in the first instance by the plaintiffs, but eventually by all the parties in proportion to their interests, except those costs which are created by contests above provided for.
- Incumbrancer may appear.** SEC. 3646. (2068.) Any person claiming to hold an incumbrance upon any portion of the property involved in the suit, may, in default of the owner, appear and act as his representative in any of the proceedings under this act.
- Contingent interests.** SEC. 3647. (2069.) Persons having contingent interests in such property may be made parties to the proceedings, and the proceeds of the property so situated, (or the property itself in case of partition,) shall be subject to the order of the court until the right becomes fully vested.
- Absent owners.** SEC. 3648. (2070.) The ascertained share of any absent owner shall be retained, or the proceeds invested for his benefit.

**PRIOR LAWS.** 1. An act to provide for the partition of lands, passed April 12, 1827; M. D., 1833, p. 269; repealed by No. 4 hereof.

2. An act for the partition of half-breed lands and other purposes, passed Jan. 16, 1838; Wis., 2d sess., No. 54, p. 101; repealed by No. 4 hereof.

3. An act supplementary to the above, passed June 22, 1838; Wis., June sess., No. 9, p. 341; repealed Jan. 23, took effect Feb. 23, 1839; I. T., 1st sess., p. 225; repealed by No. 4 hereof.

4. An act repealing the above acts, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 225.
5. An act to provide for the partition of real property, passed Jan. 4, took effect Feb. 4, 1839; I. T., 1st sess., p. 354; also, Reprint, 1843, p. 458.
6. An act to amend the same, passed May 29, took effect June 29, 1845; I. T., 7th sess., chap. 6, p. 23.
7. An act amending that of Jan. 4, 1839, passed Feb. 24, took effect March 18, 1847; 1st sess., chap. 92, p. 123.

DECISIONS. The action combines law and equity, 3 G., 120; 2 G., 94; [but see section 4178, making the remedy obtainable by ordinary proceedings;] value of a judgment in partition, 1 G., 575; 3 G., 422; M., 467; 2 G., 94; collateral impeachment, 2 G., 94; equitable title no defense, 6 Iowa, 153.

## CHAPTER 146.

### FORECLOSURE OF MORTGAGES.

[Code—Chapter 118.]

SECTION 3649. Any mortgage of personal property to secure the payment of money only, and where the time of payment is therein fixed, may be foreclosed by notice and sale, as hereinafter provided, unless a stipulation to the contrary has been agreed upon by the parties. Sale on mere notice.

SEC. 3650. (2072.) The notice must contain a full description of the property mortgaged, together with the time, place, and terms of sale. Notice.

SEC. 3651. Such notice must be served on the mortgagor, and upon all persons having recorded liens upon the same property, which are junior to the mortgage, or they will not be bound by the proceedings. On whom.

SEC. 3652. (2074.) The service and return must be made in the same manner as in case of the original notice by which civil actions are commenced, except that no publication in the newspapers is necessary for this purpose, the general publication directed in the next section being a sufficient service upon all the parties in cases where service is to be made by publication. Service.

SEC. 3653. (2075.) After notice has been served upon the parties, it must be published in the same manner and for the same length of time as is required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner. Publication

SEC. 3654. (2076.) The purchaser shall take all the title and interest on which the mortgage operated as a lien. Purchaser.

SEC. 3655. The sheriff conducting the sale, shall execute to the purchaser a bill of sale of the personal property, which shall be effectual to carry the whole title and interest purchased. Sheriff bill of sale.

SEC. 3656. (2079.) Evidence of the service and publication of the notice aforesaid, and of the sale made in accordance therewith, together with any postponement or other material matter, may be perpetuated by proper affidavits thereof. Evidence.

SEC. 3657. Such affidavits shall be attached to the bill of sale, and shall then be receivable in evidence, to prove the facts they state. Same

SEC. 3658. (2081.) Sales made in accordance with the above requirements, are valid in the hands of a *bona fide* purchaser, whatever may be the equities between the mortgagor and mortgagee. Effect.

- Rights contested.** SEC. 3659. (2082.) The right of the mortgagee to foreclose as well as the amount claimed to be due, may be contested by any one interested in so doing, and the proceeding may be transferred to the district court, for which purpose an injunction may issue if necessary.
- Civil action.** SEC. 3660. The holder of any mortgage of real estate must proceed by civil action, in the district court, when he wishes to foreclose the same.
- In a suit to foreclose a mortgage, one who claims adversely to the title of the mortgagor, and prior to the mortgage, can not properly be made a party defendant for the purpose of trying the validity of such adverse claim of title. *Corning v. Smith*, 2 Selden, 82.
- In an action for the specific performance of a contract to convey several lots of land, being part of a tract owned by one of the defendants, and upon which he had given mortgages prior to the contract to sell; held, that the prior mortgages were improperly made defendants to the action. *Chapman v. Draper*, 10 Pr. R., 367.
- Judgment.** SEC. 3661. (2084.) If any thing be found due the plaintiff the court shall render judgment therefor and must direct the mortgaged property, or so much thereof as is necessary, to be sold to satisfy the amount due with interest and costs. A special execution shall issue accordingly.
- General execution.** SEC. 3662. (2085.) If the mortgaged property does not sell for sufficient to satisfy the execution, a general execution may be issued against the mortgagor unless the parties have stipulated otherwise.
- Plaintiff's election.** SEC. 3663. (2086.) If separate suits are brought on the bond or note and on the mortgage given to secure it, the plaintiff must elect which to prosecute. The other will be discontinued at his costs.
- Judgment on bond.** SEC. 3664. (2087.) When a judgment is obtained in an action on the bond, the property mortgaged may be sold on the execution issued thereon, and the judgment shall be a lien thereon from the date of the recording of the mortgage. The mortgagor or any other person having a lien on the mortgaged premises, or any part thereof, may redeem the same after sale within the same time and on the same terms as are provided in chapter 125, in cases of real estate, sold on ordinary or general execution.
- Junior incumbrancer.** SEC. 3665. (2088.) At any time prior to the sale made in accordance with either of the above modes of foreclosure, a person having a lien on the property which is junior to the mortgage, will be entitled to an assignment of all the interest of the holder of the mortgage by paying him the amount secured with interest and costs, together with the amount of any other liens of the same holder which are paramount to his. He may then proceed with the foreclosure, or discontinue it at his option.
- Overplus.** SEC. 3666. (2089.) If there is an overplus remaining after satisfying the mortgage and costs, and if there are no other liens upon the property, such overplus shall be paid to the mortgagor.
- Other liens.** SEC. 3667. (2090.) If there are any other liens on the property sold, or other payments secured by the same mortgage, they shall be paid off in their order. And if the money secured by any such lien is not yet due, a suitable rebate of interest must be made by the holder thereof, or his lien on such property will be postponed to those of a junior date, and if there are none such the balance will be paid to the mortgagor.
- Sale.** SEC. 3668. (2091.) As far as practicable, the property sold must be only sufficient to satisfy the mortgage foreclosed in either of the methods aforesaid.

SEC. 3669. (2092.) The same costs and fees shall be allowed for services rendered and acts performed under the provisions of this chapter, as for like acts and services in other cases, which will be paid out of the proceeds of the sales made. Costs and fees.

SEC. 3670. (2093.) Whenever the amount due on any mortgage is paid off, the mortgagee or those legally acting for him must acknowledge satisfaction thereof in the margin of the record of the mortgage. If he fails to do so within six months after being requested, he shall forfeit to the mortgagor the sum of twenty-five dollars. Satisfaction entered.

SEC. 3671. (2094.) The vendors of real estate, when part or all the purchase money remains unpaid after the day fixed for payment, whether time is or is not the essence of the contract, may file his petition asking the court to require the purchaser to perform his contract or to foreclose and sell his interest in the property. Contracts

SEC. 3672. (2095.) The vendee shall in such cases, for the purpose of the foreclosure, be treated as a mortgagor of the property purchased and his rights may be foreclosed in a similar manner. Same.

SEC. 3673. (2096.) Deeds of trust of real or personal property may be executed as securities for the performance of contracts, and sales made in accordance with their terms are valid. Or they may be treated like mortgages and foreclosed by action in the district court. *Be it enacted by the General Assembly of the State of Iowa, That no deed of trust, or mortgage, with power of sale on real estate made after the first day of April, A. D., 1861, for the security of the payment of money, shall be foreclosed in any other manner than by proceeding in the district, state, or federal courts.\** Deeds of trust

SEC. 3674. (2097.) Nothing herein contained is intended to prevent parties from fixing their own terms to any contract and prescribing the manner in which those contracts shall be enforced; nor to change the rule, or affect the rights of the vendor of real estate, in those cases where time is the essence of the contract. Agreements.

PRIOR LAWS. 1. "An act concerning mortgages," passed April 19, 1833; M. D., 1833, p. 283.

2. An act to prescribe the mode of proceeding in chancery, passed April 23, 1833; M. D., 1833, p. 354. The above repealed Aug. 30, 1840.

3. An act subjecting real estate to execution, passed Jan. 25, took effect May 1, 1839; I. T., 1st sess., p. 197, section 17.

4. An act concerning mortgages, passed Feb. 14, took effect July 4, 1843; Reprint, chap. 103, p. 442.

DECISIONS. The donee of a power of sale in a mortgage may sell without the aid of a court; 4 Iowa, 485; the trustees in a deed of trust need not sign the same to entitle them to sell, 4 Iowa, 485; the mortgagee of a chattel has the legal title, 3 G., 586; in land the mortgagor is held owner subject to lien, 3 G., 37; see mortgage as distinguished from deed considered, 7 Iowa, 114; 4 G., 34; admissibility of parol in such case, 7 Iowa, 60; inability to deny the title of him from whom you derive, M., 275; record notice, M., 367; 4 Iowa, 571; 6 Iowa, 238; mistake of description corrected in equity, 2 G., 420, merger of legal and equitable title, 1 Iowa, 413; what is the nature of a foreclosure under Code, *Kramer v. Robman*, June, 1859; the mere assignment of a mortgage creates no liability, 4 G., 214; may foreclose against husband and wife, and take judgment against husband for sum due on a note, 8 Iowa, 358 and 337; may foreclose although a suit in law be pending on the note, 1 G., 382; mortgage to secure two notes which matured at different times, foreclosure on first putting payee (plaintiff,) in possession—there were prior incumbrances, which plaintiff pays—plaintiff sues on last note—court says such suit does not

\* The last part of this section is "an act to regulate the foreclosure of deeds of trust and mortgage, with power of sale on real estate," passed March 30, 1860, took effect July 4, 1860; laws of eighth general assembly, chapter 79.

open foreclosure—that the sum paid on incumbrances should be added to the sum left due on the mortgage at date of possession taken—from the total should be taken the value of the land when it became by law that of the plaintiff irredeemably—credit the mortgage with the remainder, and the balance due after such credit would be that for which the plaintiff should recover, 4 Iowa, 310; no power in court to allow stay, 7 Iowa, 389; time of sale, 4 G., 511; evidence of publication, 4 G., 468; time, essence considered, 1 Iowa, 24; time, essence, 3 Iowa, 158; a publication for five successive weeks, thirty days having elapsed between the first day of publication and the day of sale meets the requirement of “first giving thirty days’ notice,” 4 Iowa, 485; the mortgagor who mortgages to secure the debt of another, is liable to pay the debt unless he stipulates to the contrary, 7 Iowa, 70; no power of redemption, *Kramer v. Robman*, June, 1859; see partial redemption, 3 Iowa, 194; 2 *ibid.*, 423; a mortgagee may be allowed for lasting improvements in some cases, 7 Iowa, 114; when part of mortgaged land is sold, the remainder in the mortgage is first liable, 2 Iowa, 423; heir is liable to pay off mortgage to the extent of his assets decending, 2 Iowa, 423; when a debt is assigned, not only does the mortgage also go, but if there are any other incidents or additional securities held by the assignor, he will be so far held as a surety of the debt assigned, as that such additional security will enure also to the benefit of the assignee, 4 Iowa, 443; case of installments, 4 Iowa, 309; the whole sum though not due may become due by virtue of a stipulation making it so, on failure to pay the sum due as interest on any installment, and all may be then treated as due, *Kramer v. Robman*, June, 1859; may recover judgment for the debt, and also a judgment for the foreclosure, 8 Iowa, 358; may be a foreclosure for want of paying interest, though the principal be not due, *Baker v. Arnott*, June, 1859; notes secured by mortgage, and transferred to many persons shall be paid in the order in which they become due, *Rankin v. Major*, Dec., 1859; when the donee of a power may delegate it, *Singleton v. Scott*, June, 1859; sufficiency of title under deeds of trust, 3 Iowa, 84; 7 *ibid.*, 26; vendor’s lien, M., 492; 8 Iowa, 144; deed of trust need not be signed by the trustee—time of notice, 4 Iowa, 482; stating no paper leaves the paper in the choice of the trustee, *Singleton v. Scott*, June, 1859; as to selling in parcels, *ibid.*, inadequacy of price, *ibid.*, and 1 Iowa, 307, 355; *Ayres v. Campbell*, June, 1859; *Grapenjeter v. Fegerwany*, June, 1859; chapter 24 of seventh session did not repeal section 2097 of Code of 1851, only the mode of selling by sheriff without action, 7 Iowa, 463, 450; a mortgagee who is donee of a power of sale, may sell, 8 Iowa, 404; and such power may be exercised by an administrator, 7 Iowa, 463; the notice may be given by any one, *Singleton v. Scott*, June, 1859; what irregularities in the sale will be disregarded, 4 G., 468; no injunction to restrain a sale without a tender of the sum admitted due, 7 Iowa, 33; the mortgagee’s interest is a mere chattel interest, is inseparable from the debt, and is transferred by mere transfer of the debt, 4 Iowa, 437; liens on land being equal, superior diligence in garnishment of proceeds of sale thereof, confers superior rights, *Cook & Sargeant, v. Dillon*, Dec., 1859.

## CHAPTER 147.

### ARBITRATIONS.

[Code—Chapter 119.]

- Of what.** SECTION 3675. (2098.) All controversies which might be the subject of civil actions, may be submitted to the decision of one or more arbitrators, as hereafter provided.
- How submitted.** SEC. 3676. (2099.) The parties themselves, or those persons who might lawfully have controlled a civil action in their behalf for the same subject matter, must sign a written agreement specifying particularly what demands are to be submitted, the names of the arbitrators, and the court by which the judgment on their award is to be rendered.
- Same.** SEC. 3677. (2100.) They shall then appear before some justice of



the peace of the county, and acknowledge the instrument by them signed to be their free act and deed.

SEC. 3678. (2101.) The submission may be of some particular What submitted. matters or demands, or of all demands which the one party has against the other, or of all mutual demands on both sides.

SEC. 3679. (2102.) A submission to arbitration of the subject mat- Of suit. ter of a suit may also be made by an order of court upon agreement of parties after suit is commenced.

SEC. 3680. (2103.) All the rules prescribed by law in cases of Rule. referees are applicable to arbitrators except as herein otherwise expressed, or except as otherwise agreed upon by the parties.

SEC. 3681. (2104.) Neither party shall have the power to revoke Irrevocable. the submission without the consent of the other.

SEC. 3682. (2105.) If either party neglect to appear before the Default. arbitrators after due notice, they may nevertheless proceed to hear and determine the cause upon the evidence which is produced before them.

SEC. 3683. (2106.) If the time within which the award is to be Award. made is fixed in the submission, no award made after that time shall have any legal effect unless made upon a recommitment of the matter by the court to which it is reported.

SEC. 3684. (2107.) If the time of filing the award is not fixed in Same. the submission it must be filed within one year from the time such submission is signed and acknowledged, unless by mutual consent the time is prolonged.

SEC. 3685. (2108.) The award must be in writing, and shall be Same. delivered by one of the arbitrators to the court designated in the agreement, or it may be enclosed and sealed by them and transmitted to the court and not opened until the court so orders.

SEC. 3686. (2109.) The cause shall be entered on the docket of the When docketed. court at the term to which the award is returned, and shall be called up and acted upon in its order. But the court may require actual notice to be given to either party when it appears necessary and proper before proceeding to act on the award.

SEC. 3687. (2110.) The award may be rejected by the court for In court. any legal and sufficient reasons, or it may be recommitted for a rehearing to the same arbitrators or any others agreed upon by the parties.

SEC. 3688. (2111.) When the award has been adopted it shall be Filing effect. filed and entered on the records, and shall have the same force and effect as the verdict of a jury. Judgment may be entered and execution issued accordingly.

SEC. 3689. (2112.) When an appeal is brought on such judgment, Appeals. copies of the submission and award together with all affidavits shall be returned to the supreme court.

SEC. 3690. (2113.) If there is no provision in the submission Costs. respecting costs, the arbitrators may award them at their discretion.

SEC. 3691. (2114.) The compensation of the arbitrators shall be Compensation. two dollars per day for the time actually and necessarily spent, unless the court fix a less amount, and the fees of the justice of the peace shall be twenty-five cents for making out the agreement of submission, (in case he does so,) and the like amount for taking and certifying the acknowledgment thereto.

SEC. 3692. (2115.) Nothing herein contained shall be construed to Saving. affect in any manner the control of the district court over the parties, the arbitrators, or their award; nor to impair or affect any action upon an award or upon any bond or other engagement to abide an award.

**PRIOR LAWS.** 1. An act for regulating references and determining controversies by arbitration, passed April 12, 1827; M. D., 1833, p. 421; repealed Aug. 30, 1840.  
2. An act on arbitrators and referees, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 49; also, Reprint, 1843.

**DECISIONS.** The regularity of proceedings by arbitrators will be presumed, and that they have considered that which they should under the submission, 4 Iowa, 423; there should be no recommitment unless it be in some manner shown that the arbitrators have abused the discretion given them by the law and the agreement of the submission, 5 Iowa, 425; what is sent up by the clerk duly certified, will be presumed to be all which was before the court below, 5 Iowa, 425; value of report of arbitrators, 6 Iowa, 469; power of arbitrators over costs, 5 Iowa, 425; certainty of submission, &c., 3 Iowa, 61; causes of vacating, *ibid.*, 66; power of fixing rules to guide, 2 Iowa, 44; award returned to justice, valid, 4 G., 401; party may agree upon their own rules, 2 Iowa, 44; recommitment of award, 2 G., 260; vacation of award, 3 Iowa, 66; same, *ibid.*, 575; parties may agree upon their own rules of arbitration, 2 Iowa, 44; subject of arbitrament must be defined, 3 Iowa, 61; the common law right not taken away, 3 Iowa, 463; if judgment is to be asked on the award then the law of Code is to be followed, 3 Iowa, 463; otherwise, if not; and then any means mutually adopted will bind, and if not obeyed the remedy is by action on the agreement or the award, 4 G., 401; 7 Iowa, 154; 8 Iowa, 313; civil actions in 2098, means all cases except criminal ones, 7 Iowa, 154; *Tomlinson v. Fritch*, June term, 1859; definiteness of the award, 3 Iowa, 61; correctness presumed, 2 Iowa, 44-29; 6 Iowa, 466; 4 *ibid.*, 420; 3 Iowa, 575; *Tomlinson v. Fritch*, supra, 5 Iowa, 423; 2 G., 260; assailable, 7 Iowa, 154; judgment on by clerk, 4 Iowa, 420; good between the parties, 3 Iowa, 463; its value in bar, 3 Iowa, 61; award recommitment, 2 G., 260; what is a want of jurisdiction to make an award, 2 Iowa, 44; award set aside, 3 Iowa, 66; 7 *ibid.*, 159; 2 *ibid.*, 44; 7 *ibid.*, 154; parol testimony in, M., 241; costs, 1 Iowa, 106; 5 *ibid.*, 423.

## CHAPTER 148.

### ACTIONS AGAINST BOATS AND RAFTS.

[Code—Chapter 120.]

Boats when  
liable.

**SECTION 3693. (2116.)** Any boat found in the waters of this state is liable:

1. For all debts contracted by the master, owner, agent, clerk, or consignee thereof on account of supplies furnished for the use of such boat; on account of work done or services rendered for such boat; or on account of work done or materials furnished in building, repairing, fitting out, furnishing, or equipping such boat.

2. For all demands or damages accruing from the non-performance or mal-performance of any contract of affraightment, or any contract relative to the transportation of persons or property, entered into by the master, owner, agent, clerk, or consignee thereof.

3. For all injuries to persons or property by such boat, or by the officers or crew, done in connection with the business of said boat.

Liens

**SEC. 3694. (2117.)** Claims growing out of any of the above causes are liens upon the boat, its apparel, tackle, furniture, and appendages, including barges and lighters, if owned by the owners of the boat, and used therewith at the time the suit is commenced.

Order of liens

**SEC. 3695. (2118.)** Such liens take preference of any claims against the boat itself or any or all of its owners, growing out of any other causes than those above enumerated, and as between themselves they are to be preferred in the following order:

1. Those resulting from wages for services rendered on board of such boat within the year then passed, provided suit be commenced within twenty days after the cessation of such labor.

2. Those resulting from contracts made within this state.

3. All other causes.

SEC. 3696. (2119.) Actions against boats under the provisions of this chapter can not be brought after the lapse of one year from the time the cause of action accrued. Limitation.

SEC. 3697. (2120.) The lien attaches from the commencement of the suit, subject only to such other liens as are of a preferred class. Lien attaches.

SEC. 3698. Any raft found in the waters of this state shall be liable for all debts contracted by the owner, agent, clerk or pilot thereof, on account of work done or services rendered for such raft. Liability of raft.

SEC. 3699. Claims growing out of either of the above causes shall be liens upon the raft, its tackle and appendages, for the term of twenty days from the time the right of action therefor accrued. Lien on raft.

SEC. 3700. The same rules shall govern and the same process shall be had, to enforce the lien, that is prescribed for similar liens against boats. Process as against boats.

SEC. 3701. (2121.) The original petition must be in writing, sworn to and filed with the clerk or justice of the peace, who shall thereupon issue a warrant to the proper officer, commanding him to seize the boat, its apparel, tackle, furniture and appendages, and detain the same until released by due course of law. Petition and warrant.

SEC. 3702. And the warrant may be issued on Sunday, if the plaintiff, his agent or attorney, shall state in his petition and swear thereto, that it would be unsafe to delay proceedings till Monday. May issue on Sunday.

SEC. 3703. (2122.) The usual notice shall also be issued, directed to the boat by name, and served upon the master, owner, agent, clerk, or consignee thereof, and if none of them can be found it may be served by posting up a copy in some conspicuous part of the boat. The warrant shall be served according to the direction it contains. Notice.

SEC. 3704. Any constable or marshal of any corporate town may serve and execute the warrant provided for in said section, whether the same issue from the office of the clerk of the district court, or of a justice. Who to serve it

SEC. 3705. (2123.) Any person interested in the boat may appear for the defendant by himself, his agent, or attorney, and conduct the defense of the suit, and no continuance shall be granted to the plaintiff while the boat is held in custody. Appearance

SEC. 3706. (2124.) The boat may be discharged at any time before final judgment by the giving of a bond with sureties, to be approved by the officer serving the warrant, or by the clerk or justice who issued it, in a penalty double the plaintiff's demand, conditioned that the obligors therein will pay the amount which may be found due to the plaintiff, together with costs. Boat how released.

SEC. 3707. (2125.) If judgment be rendered for the plaintiff before the boat is thus discharged, a special execution shall be issued against it. If it have been previously discharged, the execution shall issue against the principal and sureties in the bond without farther proceedings. Execution.

SEC. 3708. The officer may sell any of the furniture or appendages of the boat, if by so doing he can satisfy the demand. If he sell the boat itself, he must sell it to the bidder who will advance the amount required to satisfy the execution, for the lowest fractional share of the What may be sold.

boat, unless the person appearing for the boat desire a different and equally convenient mode of sale.

**Purchaser.** SEC. 3709. (2127.) If a fractional share of the boat be thus sold, the purchaser shall hold such share or interest jointly with the other owners.

**Appeal bond.** SEC. 3710. (2128.) If an appeal be taken by the defendant before the boat is discharged as above provided, the appeal bond, if one be filed, will have the same effect in discharging the boat as the bond above contemplated, and execution shall issue against the obligors therein after judgment in the same manner.

**Cumulative.** SEC. 3711. (2129.) Nothing herein contained is intended to affect the rights of a plaintiff to sue in the same manner as though the provisions of this chapter had not been enacted.

**Complaint.** SEC. 3712. (2130.) In actions commenced in accordance with the provisions of this chapter, it is sufficient to allege the contract to have been made with the boat itself.

The owners of a steamboat sued by the general appellation, are not parties to a suit unless designated by name, and served with process, actually or constructively. *Kountz v. Brown, etc.*, 16 B. M., 585.

The statute of this state providing for the enforcement of liens on boats, &c., does not extend to contracts made and broken in other states. *Steamboat, etc. v. Richardson*, 9 Ind., 525.

**PRIOR LAWS.** 1. An act for the collection of demands against boats, passed Jan. 15, 1838; Wis., 2d sess., No. 50, p. 91.

2. An act to prevent disasters on steamboats navigating our waters, passed Jan. 19, 1838; Wis., 2d sess., No. 87, p. 294; repealed Aug. 30, 1840.

3. An act to provide for the collection of demands against boats and vessels, passed Dec. 20, 1838; I. T., 1st sess., p. 67, also Reprint, 1843, p. 100.

4. An act to prevent disasters on steamboats navigating our waters, passed Jan. 4, 1839; I. T., 1st sess., p. 447, also Reprint, 1843, p. 569.

5. An act to protect from wrongs by steamboatmen, passed June 10, took effect July 4, 1845; I. T., 7th sess., chap. 23, p. 43.

6. An act to amend that of December 20, 1838, passed Feb. 25, 1847? 1st sess., chap. 97, p. 126.

**DECISIONS.** Averments of petition, 2 Iowa, 522; 1 G., 398; a lien of a citizen of Iowa on a boat is not defeated by a sale under a judicial proceeding in Missouri, 4 Iowa, 472; action against boat is proceeding in rem, 2 Iowa, 460; construction of this statute, 1 G., 398; 3 G., 295; 2 Iowa, 460; how owners to be sued, 1 G., 379; sec. 2121 must be conformed to, to give jurisdiction, 2 Iowa, 460; 4 G., 191; the limitation need not be pleaded, 3 G., 295; time not fixed by date of note, 4 G., 191; effect of sale in sister state on lien here, 4 Iowa, 472; the form of judgment should define the right, 4 G., 191; liabilities and duties of boat as carrier, 4 G., 516; 3 Iowa, 532, 541.

## CHAPTER 149.

### NUISANCE, WASTE, AND TRESPASS.

[Code—Chapter 121.]

**Definition.** SEC. 3713. (2131.) Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property is a nuisance and the subject of an action.

SEC. 3714. (2132.) Such action may be brought by any person Action by whom. whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance.

SEC. 3715. (2133.) Where a proper case is made the nuisance may Remedy. be enjoined or abated and damages recovered therefor.

SEC. 3716. (2134.) If a guardian, tenant for life or years, joint Treble damages. tenant or tenant in common of real property commit waste thereon, he is liable to pay three times the damages which have resulted from such waste to the person who is entitled to sue therefor.

SEC. 3717. (2135.) Judgment of forfeiture and eviction may be Forfeiture. rendered against the defendant whenever the amount of damages so recovered is more than two-thirds the value of the interest such defendant has in the property wasted and when the action is brought by the person entitled to the reversion.

SEC. 3718. (2136.) Any person whose duty it is to prevent waste Who liable. and who has not used reasonable care and diligence to prevent it, is deemed to have committed it.

SEC. 3719. (2137.) For willful trespasses in injuring any timber, Treble damages. tree or shrub on the land of another, or in the street or highway in front of another's cultivated ground, yard or town lot, or on the public grounds of any town, or any land held by this state for any purpose whatever, the perpetrator shall pay treble damages at the suit of any person entitled to protect or enjoy the property aforesaid.

SEC. 3720. (2138.) Nothing herein contained authorizes the recov- Exception. ery of more than the just value of timber, taken from uncultivated wood-land for the repair of a public highway or bridge upon the land in its immediate neighborhood.

SEC. 3721. (2139.) The owner of an estate in remainder or rever- Remainder. sion may maintain either of the aforesaid actions for injuries done to the inheritance; notwithstanding any intervening estate for life or years.

SEC. 3722. (2140.) An heir, whether a minor or of full age, may Heir. maintain these actions for injuries done in the time of his ancestor as well as in his own time, unless barred by the statute of limitations.

SEC. 3723. (2141.) Whenever lands or tenements are sold by vir- Purchasers. tue of an execution, the purchaser at such sale may maintain his action against any person for either of the causes above mentioned occurring or existing after his purchase.

SEC. 3724. (2142.) This provision is not intended to prevent the Qualification. person who occupies the lands in the meantime from using them in the ordinary course of husbandry or from using timber for the purpose of making suitable repairs thereon.

SEC. 3725. (2143.) But if for this purpose he employs timber vastly Same. superior to that required for the occasion, he will be deemed to have committed waste and will be liable accordingly.

SEC. 3726. (2144.) Any person settled upon and occupying any Settlers on public lands. portion of the public lands held by the state is not liable as a trespasser for improving it or cultivating it in the ordinary course of husbandry, nor for taking and using timber or other materials necessary and proper to enable him to do so, provided the timber and other materials be taken from land properly constituting a part of the "claim" or tract of land so settled upon and occupied by him.

PRIOR LAWS. 1. An act to allow and regulate the action of waste, passed Jan. 21, took effect Feb. 21, 1839; I. T., 1st sess., p. 460; Reprint, 1843, p. 157.

2. An act to prevent trespass on the lands of the territory of Iowa, passed June 19, 1844; I. T., 6th sess., extra, chap. 9, p. 6.

3. An act to punish trespass on lands, passed June 10, took effect Aug. 1, 1845; I. T., 7th sess., chap. 25, p. 46.

DECISION. As to trespass on timber, sec 2 Iowa, 499.

## CHAPTER 150.

### ACTIONS OF OFFICIAL SECURITIES, AND FOR FINES AND FORFEITURES.

[Code—Chapter 122.]

- Official bonds. SEC. 3727. (2145.) The official bond of a public officer is to be construed as a security to the body politic or civil corporation of which he is an officer, and also to all the members thereof severally who are intended to be thereby secured.
- Judgment no bar. SEC. 3728. (2147.) A judgment in favor of a party for one delinquency does not preclude the same or another party from an action on the same security for another delinquency, except that sureties can be made liable in the aggregate only to the extent of their undertaking.
- Fines, &c. SEC. 3729. (2148.) Fines and forfeitures not otherwise disposed of go into the treasury of the county where the same are collected, for the benefit of the school fund.
- Actions by whom. SEC. 3730. (2149.) Actions for the recovery thereof may be prosecuted by the officers or persons to whom they are by law given in whole or in part, or by the public officer into whose hands they are to be paid when collected.
- Collusion. SEC. 3731. (2150.) A judgment for a penalty or forfeiture rendered by collusion, does not prevent another prosecution, for the same subject matter.

DECISIONS. The liabilities of treasurer as keeper of public money are defined by his bond, and but reasonable diligence as such keeper is required of him, 5 Iowa, 149; liability of officer, 3 G., 584; 1 Iowa, 593; 3 G., 246; judicial notice of officers, 7 Iowa, 56; see 7 *ibid.*, 167; proof of official character, 2 Iowa, 75; liability of sheriff's sureties, 4 G., 117; courts will disregard technical objections, in construction of bond given the public, 8 Iowa, 533, and *Wappello Co. v. Bigham*, admr., Dec., 1859; action on school fund commissioners' bond, presumption of approval drawn from its being found in proper custody, 8 Iowa, 533.

## CHAPTER 151.

### INFORMATIONS.

[Code—Chapter 123.]

- When to be filed. SECTION 3732. (2151.) An information may be filed against any person unlawfully holding or exercising any public office or franchise

within this state, or any office in any corporation created by the laws of this state, and when any public officer has done or suffered any act which works a forfeiture of his office; or when any persons act as a corporation within this state without being authorized by law, or if being incorporated they do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law.

SEC. 3733. (2152.) Such information may be filed by the district attorney of the proper county whenever he deems it his duty so to do. By whom.

SEC. 3734. (2153.) He must file such information when directed to do so by the governor, the general assembly, or the district court. Same.

SEC. 3735. If the district attorney, on demand, neglect or refuse to file an information, any citizen of the state claiming any public office which is usurped or unlawfully exercised by another, may do so, and he may prosecute the same in his own name, to final judgment in all other respects as provided herein. Private person may have this process.

SEC. 3736. (2154.) Such information shall consist of a plain statement of the facts which constitute the grounds of the proceeding addressed to the court, which shall stand for an original petition. Statement.

SEC. 3737. (2155.) Such statement shall be filed in the clerk's office and notice issued and served in the same manner as hereinbefore provided for the commencement of actions in the district court. Filed.

SEC. 3738. (2156.) The defendants shall appear and answer such information in the usual way, and issue being joined it shall be tried in the ordinary manner. Answer.

SEC. 3739. (2157.) When the defendant is holding an office to which another is claiming the right the information should set forth the name of such claimant, and the trial must if practicable determine the rights of the contesting parties. Contesting claimant

SEC. 3740. (2158.) If judgment be rendered in favor of such claimant he shall proceed to exercise the functions of the office after he has qualified as required by law. Judgment.

SEC. 3741. (2159.) The court, after such judgment, shall order the defendant to deliver over all books and papers in his custody or under his control belonging to said office. Same.

SEC. 3742. (2160.) When the judgment has been rendered in favor of the claimant, he may at any time within one year thereafter bring suit against the defendant and recover the damages he has sustained by reason of the act of the defendant. Damages.

SEC. 3743. (2161.) When several persons claim to be entitled to the same office or franchise, an information may be filed against all or any portion thereof in order to try their respective rights thereto. Several claimants.

SEC. 3744. (2162.) If the defendant be found guilty of unlawfully holding or exercising any office franchise or privilege, or if a corporation be found to have violated the law by which it holds its existence or in any other manner to have done acts which amount to a surrender or forfeiture of its privileges, judgment shall be rendered that such defendant be ousted and altogether excluded from such office franchise or privilege, and also that he pay the costs of the proceeding. Judgment of ouster.

SEC. 3745. (2163.) If the defendant be found to have exercised merely certain individual powers and privileges to which he was not entitled, the judgment shall be the same as above directed, but only in relation to those particulars in which he is thus exceeding the lawful exercise of his rights and privileges. Same.

SEC. 3746. (2164.) When an information is upon the relation of a On private relation.

- private individual it shall be so stated in the petition and proceedings, and such individual shall be responsible for costs in case they are not adjudged against the defendant. In other cases the title of the cause shall be the same as in a criminal prosecution, and the payment of costs shall be regulated by the same rule.
- Costs.** SEC. 3747. (2165.) In case judgment is rendered against a pretended, but not real, corporation the costs may be collected from any person who has been acting as an officer or proprietor of such pretended corporation.
- Trustees.** SEC. 3748. (2166.) If a corporation is ousted and dissolved by the proceedings herein authorized the court shall appoint three disinterested persons as trustees of the creditors and stockholders.
- Bond.** SEC. 3749. (2167.) Said trustees shall enter into bond in such a penalty and with such security as the court approves, conditioned for the faithful discharge of their trust.
- Same.** SEC. 3750. (2168.) Suit may be brought on such bond by any person injured by the negligence or wrongful act of the trustees in the discharge of their duties.
- Their duties.** SEC. 3751. (2169.) The trustees shall proceed immediately to collect the debts and pay the liabilities of the corporation, and to divide the surplus among those thereto entitled.
- Books and papers.** SEC. 3752. (2170.) The court shall, upon an application for that purpose, order any officer of such corporation or any other person having possession of any of the effects, books, or papers of the corporation in any wise necessary for the settlement of its affairs, to deliver up the same to the trustees.
- Inventory.** SEC. 3753. (2171.) As soon as practicable after their appointment the trustees shall make and file in the office of the clerk of the court an inventory of all the effects, rights and credits which come to their possession or knowledge, the truth of which inventory shall be sworn to.
- Act as executors.** SEC. 3754. (2172.) They shall sue for and recover the debts and property of the corporation and shall be responsible to the creditors and stockholders respectively to the extent of the effects which come to their hands, in the same manner as though they were the executors of a deceased person.
- Officers liable.** SEC. 3755. (2173.) When judgment of ouster is rendered against a corporation on account of the misconduct of the directors or officers thereof, such officers shall be jointly and severally liable to an action by any one injured thereby.
- contempt.** SEC. 3756. (2174.) Any person, who without good reason refuses to obey any order of the court as herein provided, shall be deemed guilty of contempt of court and shall be fined in any sum not exceeding five thousand dollars and imprisoned in the county jail until he comply with said order, and shall be farther liable for the damages resulting to any person on account of his refusal to obey such order.
- Patent annulled.** SEC. 3757. (2175.) A proceeding of this kind may be instituted in the manner above contemplated for the purpose of annulling or vacating any letters patent granted by the proper authorities of this state when there is reason to believe that the same were obtained by fraud, or through mistake or ignorance of a material fact, or when the patentee or those claiming under him have done or omitted an act in violation of the terms and conditions on which the letters were granted, or have by any other means forfeited the interest acquired under the same.



**PRIOR LAW.** 1. An act relating to informations and quo-warranto, and the mode of proceeding therein, passed Dec. 20, 1838, took effect May 1, 1839; I. T., 1st sess., p. 390. Reprint, 1843, p. 504.

**DECISIONS UNDER THE PRIOR PRACTICE.** Form of information, 1 Iowa, 70; 2 Iowa, 96; 4 Iowa, 443; proceeding by information, 1 Iowa, 71; 2 Iowa, 96.

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## CHAPTER 152.

### SCIRE FACIAS.

[Code—Chapter 124.]

**SECTION 3758.** (2176.) Where a *scire facias* is allowed by law, it shall be commenced by petition and notice filed and served as in other actions. Petition.

**SEC. 3759.** The petition must be sworn to by the plaintiff in the proceeding, his agent or attorney, and must state that the judgment has not been satisfied, to his knowledge, information or belief, and must specify the amount due thereon. Affidavit

**SEC. 3760.** (2178.) The answer of the defendant must also be under oath, and the issue joined, if any, shall be tried in the usual manner. Answer.

**PRIOR LAWS.** 1. An act relating to writs of *Scire facias*, upon judgments in the district court, passed July 24, took effect August 24, 1840; I. T., 2d session, extra, chap. 11, p. 10.

**DECISIONS.** In *scire facias*, no new judgment to be entered—form of entry, 6 Iowa, 39; 6 Iowa, 187; judgment of *nil dicit*, 1 G., 154; [no such judgment possible under the code of civil practice, see sections 3148, 3127, 3128;] an action may be brought on a judgment instead of *scire facias*, to revive it, 5 Iowa, 506; 2 *ibid.*, 559; the judgment is treated as absolute verity—defendant may plead subsequent matters, 6 Iowa, 39; and no execution can be had against one not party to the *scire facias*, even though a party to the judgment revived, 3 G., 330; the vendee of judgment defendant in case of *right* for land may be made co-defendant with his vendor on *scire facias* to revive such judgment of right, 6 Iowa, 187; administrator and heir may be united when the aim is to get execution against the land, 4 Iowa, 151; *scire facias* on judgment can only be brought in the county of the judgment, 5 Iowa, 506; 4 Iowa, 151.

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## CHAPTER 153.

### ACTION OF MANDAMUS.\*

[Code—Chapter 125.]

**SECTION 3761.** The writ of mandamus is an order of a court of

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\* The mandamus of common law is very technical. It did not proceed on the principles of pleading, as used in cases where one person made some legal demand

Mandamus may issue on behalf of a public or private person.	competent jurisdiction, and issues from the district court commanding an inferior tribunal, corporation, board or person, to do or not to do, an act, the performance or omission of which the law specially enjoins as a duty, resulting from an office, trust or station, and it is granted on the petition of any private party aggrieved, without the concurrence of the prosecutor for the state, or on the petition of the state by the district attorney, when the public interest is concerned, and is in the name of such private party, or of the state, as the case may be in fact brought.
Statements of petition.	SEC. 3762. The plaintiff in such action shall state his claim, and shall also state facts sufficient to constitute a cause for such claim, and shall also set forth that the plaintiff, if a private individual, is personally interested therein, and that he sustains and may sustain damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected, and shall pray a writ of mandamus commanding the defendant to fulfill such duty.
Discretion.	SEC. 3763. Where a discretion is left to an inferior tribunal, the writ of mandamus can only compel it to act. It can not control the discretion of the inferior tribunal.
Other cases.	SEC. 3764. The writ may also be issued by the supreme court to any district court, if necessary, and also in any other case where it is found necessary, to enable it to exercise its legitimate power.
When not.	SEC. 3765. It shall not be issued in any case where there is a plain, speedy and adequate remedy, in the ordinary course of the law, except as herein provided.
The pleadings same as in other cases.	SEC. 3766. The pleadings and other proceedings in any action in which a mandamus is claimed shall be the same in all respects as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages.
Legal specific performance.	SEC. 3767. The plaintiff, in any action except those of chapters 142, 143 and 144 hereof, may also in aid of such cause of action, pray, and have a writ of mandamus to compel the performance of a duty established in such action. But if such duty, the performance of which is sought to be compelled, is not one resulting from an office, trust, or station, it must be one for the breach of which a legal right to damages is already complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance.*

against another. It is submitted that there is no propriety in this departure. The applicant—the plaintiff—demands of the court by adjudication, an establishment of certain rights to which he claims to be entitled by reason of facts which he states. The defendant being notified of this, states his defense thereto by demurrer or answer, and on the hearing, the court makes such judgment as the case demands. The old reasons presiding over the form of the procedure do not now exist. On the question of the application of the rules of amendment to mandamus as to actions under the Code, our supreme court, 7 Iowa, 395, say, “it is true that this proceeding is regarded as criminal in part. \* \* \* But yet in its substance and real nature it is a *civil remedy*.” “In England, of late, the statutes have been framed upon this reasonable view, and extended the right (of amendment) to this proceeding.” We add that the English practice has now constituted this a civil action, the pleading in which is the same as in any other claim of remedy. Indeed, the same is substantially true of all those states, which have made any late change in their procedure. This no longer stands as a criminal proceeding, nor are the technicalities of information—inducement, writ, return, &c., longer preserved. This chapter is mainly Kentucky and English, and we hope will be found as efficient as the old mode, and less intricate. *Report on Civil Code*, p. 354.

\* The English Common Law Commissioners, in their second report, page 42, say, the proceedings on mandamus, simplified as they propose, may be applied in every case in which specific performance of a contract or duty is to be enforced, and ought to be so applied; and “that courts of law ought to have power to grant specific per-

SEC. 3768. In case judgment be given to the plaintiff that a mandamus do issue, it shall be lawful for the court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the damages and costs, also to issue a peremptory writ of mandamus to the defendant commanding him forthwith to perform the duty to be enforced. Command per-  
formance.

The Jefferson circuit court has jurisdiction to award a mandamus against the council of the city of Louisville, under proper circumstances, and while the judgment of the court is in force and unreversed, it should be obeyed. A refusal to obey the mandamus is a contempt of court, which justifies the imprisonment of the party, and no action is maintainable for such imprisonment. *Kaye v. Kean*, 18 B. M., 847.

formance, and to enforce the specific delivery of goods in every case in which that relief has hitherto been granted by courts of equity. This mode of procedure will be the same as in ordinary actions, with the exception that the plaintiff, by his declaration, will pray the specific relief, instead of merely a sum of money. There are cases in which a court of equity, upon peculiar considerations of doubtful justice, grants specific performance, though the legal right be not complete at the commencement of the suit. It may not be advisable to interfere with the jurisdiction of courts of equity in such cases, but only to give courts of law the power of enforcing specific performance in the same cases in which compensation in damages only can now be obtained in those courts." A well reputed late English work on practice—*Francis*, says: "The equitable effect of this power, so given to courts of law, seems to amount to this, that while hitherto it was in the option of any party to a contract to elect, so far as the control of courts of common law extended, whether he would perform his contract, or pay a sum of money as damages, it is now left to the party against whom the breach is committed to elect between enforcing the contract, or accepting as a substitute money damages; and, subject to the opinion of the court, that the latter was not a perfect compensation, specific performance may be enforced."

The commissioners, in their report upon the point, further say: "That when obligations are imposed by the law, or undertaken by the act of parties, the party on whose behalf they are created, has a right to insist on the specific performance of the acts which have been undertaken for his benefit, when such acts are capable of being performed, and when money would not be a perfect compensation for their non-performance; and in like manner where an injury is about to be committed, for which a mere money payment would not be a full and perfect redress, a power should exist of anticipating and prohibiting the wrongful act. These defects of the common law, it may be observed, did not in ancient times exist to the same extent as at present."

These "useful remedies," *quia timet*, which, in "ancient times" existed at common law, and which are not restored, nor have any substitute provided for them by the present act, are enumerated by Lord Coke, who wisely remarks that "preventing justice excelleth punishing justice." The writs at common law which might be maintained *quia timet* before any "molestation, distress, or impleading," are enumerated thus: 1. A man may have a writ of *mesne* before he be distrained; 2. A *warrantie chartæ* before he be impleaded; 3. A *monstraverunt*, before any distress or vexation; 4. An *audita querela*, before any execution sued; 5. A *curia claudenda*, before any default of inclosure; 6. A *ne injuste vexes* before any distress or molestation. And these be called *brevia anticipantia*, writs of prevention, (Co. Litt. 100 a).

The act did not go as far as the recommendation. We have substantially followed it in this, and the succeeding sections, departing only to avoid defects suggested by experience, and to remove doubt.

The following is extracted from a late English Practice Book on this subject—Finalson, and may show some of the workings of the English act, although it will not be an exact criterion of ours.

"Mandamus has been, since the courts of common law lost through disuse their ancient power of compelling the performance of duties, the only means of enforcing the doing of an act, other than the mere payment of money or delivery of property. Thus it lay to restore a party to a scholarship or mastership of a public school, which he held not by private contract, but public right.

It would never lie but when the right or duty was of a public nature. Thus it would not lie to compel the bank to transfer stock; for, though they are a public body, their relation to the holders of stock is of a private nature, founded on personal duty, *Rex v. Bank of England*, 2 Doug., 524; *Davis v. Bank of England*, in error, 7 B. & C., 185; and that is just the kind of case to which the present section will apply. In so far as regards one of the principles of the old law, as to mandamus, that the duty must

Form of the writ.

SEC. 3769. The writ shall simply command the performance of the duty, shall be directed to the party and not to the sheriff, and may be issued in term or vacation and returnable forthwith, and no return except that of compliance shall be allowed, but time to return it may, upon sufficient grounds be allowed by the court or judge, either with or without terms.

Plaintiff may do the act at defendant's cost.

SEC. 3770. The court may, upon application of the plaintiff, besides, or instead of proceeding against the defendant by attachment, direct that the act required to be done, may be done by the plaintiff, or some other person appointed by the court, at the expense of the defendant, and upon the act being done, the amount of such expense may be ascertained by the court, or by a reference appointed by the court, as the court or judge may order, and the court may render judgment for the amount of such expenses and costs, and enforce payment thereof by execution.

Temporary orders for the safety of property.

SEC. 3771. During the pendency of the action, the court or judge in vacation may make temporary orders for preventing damage or injury to the plaintiff until the cause is decided.

State a party.

SEC. 3772. When the state is a party, the attorney may appeal without security.

DECISIONS UNDER THE PRIOR PRACTICE. For the common law learning as to mandamus, see 4 Iowa, 179; 5 Iowa, 381; 1 *ibid.*, 188-473-538; 4 G., 78; 2 Iowa, 280; M., 31; 7 Iowa, 186-390; and *the State v. Smith Co. Judge*, 1859.

be one of a *public* nature, this section departs from it; but as regards the other, that it lay only where there was no other remedy either at law or equity, the clause is not inconsistent with it, so far, at least, as law is concerned; for, in truth, *there never was any other means at law since the writ of mandamus became known, to secure that which mandamus secured, viz.: the performance of the duty*; except, at all events, where the duty was nothing beyond the delivery of property or payment of money, the former of which is provided for by detinue, and replevin and ejectment; and as to the latter, mandamus was never required, except in very peculiar cases, to which the remedy by action was inapplicable. There will, however, be often a concurrent remedy with mandamus, in a suit in equity to compel specific performance of a contract, where the duty arises out of contract. Instances can easily be found in which a duty arises out of a contract to do some act other than a delivery of goods or payment of money, as on a covenant to procure a renewal of letters patent, *Simpson v. Clayton*, 6 Sc., 469; or to repair, *Wright v. Goddard*, 8 A. & E., 144. It has been held that any covenant to do an act not contrary to law, may be sued upon, (for damages for the non-performance,) although there be a doubt as to the possibility of performance, *Tufnell v. Constable*, 7 A. & E., 798. But as to mandamus in such a case, *query*.

\* \* \* There may be a duty on a contract to execute a contract, or cause it to be duly executed, where execution in a particular way, or by certain parties is necessary to its validity, *Thornton v. Jenyns*, 1 M. & G., 166; 1 Sc. N. R., 52; *Latch v. Wedlake*, 11 A. & E., 959; see as to contract to build a house, *Fisher v. Ford*, 4 Jur., 1034; as to printing a book, *Smith v. White*, 8 Sc. N. R., 483; to write a book, *Sweet v. Lee*, 3 M. & G., 452; 4 Sc. N. R., 77. There may be a duty on contract to enter the employ of another, for example as surgeon to a ship, *Richards v. Hayward*, 2 Sc. N. R., 670; 2 M. & G., 574. In some of such cases this section may apply, *aliter* as to others, where the *compulsory performance* would be *unsatisfactory*; and so also as to contracts to employ, as to which the old principle, that mandamus does not lie where there is really any other adequate remedy, might be applied; for instance, in a case such as *Pilkington v. Scott*, 15 Mec, and W., 657; as to furnishing rails or doing other work, *Macintosh v. Midland Counties Railway Co.*, 14 Mec, and W., 538; making steam engines, *Zuhetta v. Miller*, 15 Law, J., C. P., 267; delivering machinery or drawings for it, *Kingdom v. Cox*, *ibid.*, 95. In the case of an insurance or other broker, a duty arises on a mere retainer to effect an insurance or do any other act proper to be done for the benefit of his employer, within the scope of his business; for the breach of such duty an action lies, as for not effecting a policy as well as for effecting it carelessly, *Turpin v. Bolton*, 6 Sc. N. R., 447; 5 M. & G., 445; and *semble* that there would be a case within the present section for the purpose of compelling him to effect the policy. A recent case will illustrate the appli-

## CHAPTER 154.

## INJUNCTION.

[Code—Chapter 126.]

SECTION 3773. (2189.) An injunction may be granted as an independent means of relief or as auxiliary to other proceedings, in accordance with the rules heretofore observed, except as herein modified. Injunctions.

SEC. 3774. (2190.) When it is a mere auxiliary measure resorted to during the trial of the principal cause, the terms on which it is allowed as well as the kind of notice to be given to the opposite party, shall be such as the court prescribes. When auxiliary.

SEC. 3775. (2191.) When applied for as an independent means of relief, the petition must be sworn to and presented to the district court, if in session in the county, for an allowance of the injunction. If not in session, application for that purpose may be made to any judge of the supreme or district court, or to the judge of the county court of the proper county. When otherwise.

SEC. 3776. (2192.) If the order of allowance is made by the court in session, the clerk shall make an entry thereof in the court record and issue the writ accordingly. If made in vacation the judge must indorse the said order upon the petition. Allowance.

SEC. 3777. (2193.) In both the cases contemplated in the last section, the order of allowance must direct the writ of issue only after the filing of a bond in the office of the clerk of the district court, in a penalty to be therein fixed, with sureties to be approved by said clerk, (unless the court or judge granting the said order has previously approved said sureties,) and conditioned for the payment of all the damages which may be adjudged against the petitioner by reason of such injunction. Bond.

SEC. 3778. (2194.) When proceedings in a civil action are sought to be enjoined, the suit must be brought in the county wherein such proceedings are pending. The bond must also in that case be farther conditioned to pay any judgment that may be ultimately recovered against the party who seeks the injunction, for the cause of action on which the suit sought to be enjoined is founded. To enjoin civil action.

SEC. 3779. (2195.) The penalty of the bond must be fixed by the court or judge who makes the order, and must be doubly sufficient to cover any probable amount of liability to be thereby incurred. Penalty of bond.

SEC. 3780. (2196.) Upon the filing of the bond as required, the clerk must issue the writ of injunction as directed by the order of allowance. Writ.

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cation of the clause, where the covenant was to lay out building grounds with roads, &c., *Mason v. Cole*, 18 Law, J., Ex., 478; there the mere recovery of damage might be no adequate remedy. Perhaps, the principles upon which the courts of equity act on this point, either as to injunction against breach of covenant, or by decree for specific performance, may be useful, *vide Elliott v. Turner*, 13 Sin., 477; where it is laid down that equity will not relieve against a breach of covenant, unless the payment of money could not be an adequate compensation. The mandamus may be claimed under this section, for instance, to the bank directing it to pay plaintiff the dividends on certain stock, provided he could maintain an action for damage caused by the refusal or delay to transfer; as to which see *Partridge v. Bank of England* in error, 9 Q. B., 396; or it may be for performance of a covenant for further reference, *Ward v. Audland*, 16 Mee, and W., 863. *Report of Civil Code*, p. 354.

- Defendant may show cause.** SEC. 3781. (2197.) The court or judge before granting the writ may, if deemed advisable, allow the defendant an opportunity to show cause why such order should not be granted.
- Motion to vacate.** SEC. 3782. (2198.) If the writ is granted without allowing the defendant to show cause, he may at any time before the next term of the court apply to the judge who made the order to vacate or modify the same.
- Application.** SEC. 3783. (2199.) Such application must be with notice to the plaintiff and may rest upon the ground that the order was improperly granted, or it may be founded upon affidavits on the part of the defendant. In the latter case the plaintiff may fortify his application by counter affidavits and have reasonable time therefor.
- Consequence.** SEC. 3784. (2200.) The judge may thereupon decide the matter at once, unless some good cause for delay be shown. But the vacation of the order shall not prevent the cause from proceeding if any thing be left to proceed upon.
- Disobedience.** SEC. 3785. (2201.) Any judge of the supreme or district court, being furnished with an authenticated copy of the writ of injunction, and also with satisfactory proof that such injunction has been violated, shall issue his precept to the sheriff of the county where the violation of the injunction occurred, or to any other sheriff, (naming him,) more convenient to all parties concerned, directing him to attach said defendant and bring him forthwith before the same or some other judge, at a place to be stated in said precept.
- Contempt purged.** SEC. 3786. (2202.) If, when thus produced, he files his affidavit denying or sufficiently excusing the contempt charged, he shall be released and the affidavit shall be filed with the clerk of the court for preservation.
- Bond required.** SEC. 3787. (2203.) But if he failed to do so, the judge may require him to give bond, with surety, for his appearance at the next term of the court, and also for his future obedience to the injunction, which bond shall be filed with the clerk.
- Committed.** SEC. 3788. (2204.) If he fail to give such security, he may be committed to the jail of the county where the proceedings are pending, until the next term of the court.
- Contempt punished.** SEC. 3789. (2205.) If the security be given, the court at the next term shall act upon the case, and punish the contempt in the usual mode.
- Motion to dissolve.** SEC. 3790. (2206.) The defendant may move to dissolve the injunction, either before or after the filing of the answer.
- Issue on answer.** SEC. 3791. (2207.) Issue may be joined on the defendant's answer and a trial had as in other cases.
- Whole case tried.** SEC. 3792. (2208.) When practicable, the whole matter connected with the injunction shall be disposed of on such trial, and complete justice administered to all parties.
- Only one motion.** SEC. 2793. Only one motion to dissolve or modify an injunction upon the whole case, shall be allowed.
- Damages on the bond.** SEC. 3794. Upon the dissolution, in whole or in part, of an injunction to stay proceedings upon a judgment or final order, the damages shall be assessed by the court, which may hear the evidence and decide in a summary way, or may, on the request of either party, cause a jury to be empaneled to find the damages. Where money is enjoined, the damages may be any rate per cent. on the amount released by the dissolution, which, in the discretion of the court, may be proper, not exceeding ten per cent. And where the delivery of property has been delayed

by the injunction, the value of the use, hire, or rent thereof shall be assessed. Judgment shall be rendered against the party who obtained the injunction, for the damages assessed, and against the surety of such party.

Where an action is brought upon an injunction bond, the *subject* of the action being the *damage* sustained by the plaintiffs in consequence of the injunction, which prevented them from proceeding in their business, all the obligees may join as plaintiffs, notwithstanding the claim of one of them is different in its character and amount from that of the others. *Loomis v. Brown*, 16 Barb., 325.

SEC. 3795. (2210.) For good cause shown, a judge's order may issue in vacation, directing any of the officers of the court in relation to the discharge of their duties. Judge's order.

SEC. 3796. (2211.) Such order shall be in force only during the vacation in which it is granted, and for the first two days of the ensuing term. How long in force.

SEC. 3797. (2212.) The judge granting it may require the filing of a bond, as in case of an injunction, unless from the nature of the case, such requirement would be clearly unnecessary and improper. Bond may be required.

PRIOR LAWS. 1. An act on chancery practice, passed April 23, 1833; M. D., 1833, p. 365; repealed Aug. 30, 1840.

2. An act regulating injunction and *ne exeat*, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 350; also Reprint, 1843, p. 443; repealed Feb. 15, 1844; I. T., 6th sess., chap. 36, p. 57.

DECISIONS UNDER THE PRIOR PRACTICE. Injunction to restrain the opening of a road, 7 Iowa, 213, 416; an order dissolving the same may be reviewed on appeal, 7 Iowa, 213; an injunction may be dissolved on the answer alone, when, *Schricker v. Field*, Dec., 1859; enjoining the issuance of bonds, *Stokes et al. v. Scott Co.*, Dec., 1859; the judges of, and not the supreme court grant injunctions, 2 G., 568; contempt case, 2 Iowa, 69; suit on bond, 4 G., 425; bill for injunction to be sworn to, M., 108; 3 G., 245; who grant, 2 G., 568; there must be in the party asking it some interest, 7 Iowa, 33; with a bill to recover for trespass can there be united a claim of injunction to restrain further commission of trespass, 2 Iowa, 496; [see chapter 155]—plaintiff in injunction must tender the amount admitted due before he can restrain sale under mortgage, *Sloan v. Coolbaugh*, Dec., 1859; the interest needed to enable to enjoin county judge from illegally spending money or issuing bonds, *Rice v. Smith*, county judge, Dec., 1859.

## CHAPTER 155.

### PROHIBITION IN AN ACTION BY ORDINARY PROCEEDINGS.\*

SECTION 3798. In all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought an action by ordinary proceedings, he may, in the same cause, pray and

\*This is a much more limited injunction, than that of equity. The party who obtains it, must be entitled to maintain and have brought an action, and the injunction when brought will be only against the repetition, or continuance of the breach or injury of like kind. This was recommended by the English commissioners. They urged as a palpable defect in the administration of justice, that the ordinary scope of the remedy at law, extending only to give compensation or redress for injuries sustained, afforded, in general, no means for preventing their commission; while

have a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right, and he may also, in the same action, include a claim for damages or other redress.

SEC. 3799. In such action, judgment may be given for other relief, and also that the writ of injunction do or do not issue, as justice may require; and in case of disobedience, such writ of injunction may be enforced by attachment by the court, or when such court shall not be sitting, by a judge thereof.

SEC. 3800. It shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the court or a judge, for a writ of injunction to restrain

on the other hand, the practice of the courts of equity, by way of injunction, extended not only to the protection of equitable rights, but of those also for the violation of which an action lies at common law. It became law in the terms substantially here used as section 79 of the English act of 1854. The process of injunction had before that time been introduced into common law courts in certain cases.

The English commission propounded questions to leading lawyers on this subject, and in answer to such, the distinguished jurist, *Montague Smith*, says, page report 251, substantially as follows:

“The remedial jurisdiction of common law courts over legal rights should be extended. There are too many modes of indirect relief only, instead of direct relief. A *mandamus* to admit to an office is more efficacious than an action for damage—the first achieves the thing wanted, the last does not. An injunction is more efficacious than a suit for damages in case of destroying invaluable trees or such other property. There is no reason when rights are purely legal, that law should not protect them, instead of sending suitors elsewhere. This would not trench on the boundary of legal and equitable *rights*—only affect remedies—it only lets law courts guard law *rights*. Now parties to law rights are compelled to go to equity courts, for equitable remedies on them, and the absurdity follows that they are sent back to law courts to have the law *rights* determined—the equitable remedy being based on the legal right.

Let a law court guard by injunction legal *rights* as an equity court does. When legal rights only are concerned, let law courts prevent their invasion.

So, of discovery—let legal rights be discovered at law by such mode as in chancery or otherwise. Let the same be true of specific performance of contract, when only legal rights are involved; and the court which passes on the right will give the remedy.”

We have said that the acts based on these reports went very far towards making each court independent of the other.

From a late English book on practice, Finlason, we find that the English act is held to apply in the following cases: “The clause, as already shown, might apply in cases of factors improperly pledging goods with which they were intrusted, as in *Hatfield v. Phillips*, 14 Mee. and W., 665. In cases of contract the clause will apply chiefly where the defendant has covenanted to abstain from any act, as from practising within a particular district, *Nicholls v. Stretton*, 11 Jur., 1009, a class of cases in which the courts of equity have hitherto exercised their jurisdiction of injunction, *Dietrichsen v. Cabburn*, 2 Ph., 52, 10 Jur., 601; even though the contract contains stipulations they would not enforce, *Rolfe v. Rolfe*, 15 Sim., 88. The clause would not often apply to breaches of contract which were not also torts or breaches of duty apart from contract. The clause could apply in cases, where, though the same injury could not be again committed, there could be a continuance of the same injury, as in negligent warehousing, *Bourne v. Galliffe*, 8 Sc. N. R., 604; not for a false representation, which, from the very nature of the injury, could never be repeated, *Ormerod v. Huth*, 14 Mee. and W., 651; *Bailey v. Walsford*, 9 Q. B. 197; but in some instances negligence, if in a continued course of conduct, could be restrained, as if railway companies ran their engines without reasonable protection to prevent sparks from flying therefrom to the peril of contiguous cornstacks, as in *Pigott v. Eastern Counties Railway Company*, 3 M. and G., 515; and it would apply in cases of defamation, in which there was a renewed publication, though it would be a new cause of action, as in *Gathercole v. Miatt*, 15 Mee. and W., 319. A court of equity, indeed, has declined to interfere by injunction to prevent the publication of representations it deemed rather libellous than piratical, but that was on the ground that the legal right should be established, *Clark v. Freeman*, 11 Beav., 112. In cases of nuisance, the clause would have a clear application to prevent the continuance of



the defendant in such action from a repetition or continuance of the wrongful act, or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or judge, upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable and just, and in case of disobedience, such writ may be enforced by attachment by the court, or, when such court shall not be sitting, by the judge thereof: *provided always*, that any order for a writ of injunction, made by a judge, or any writ issued by virtue thereof, may be discharged or varied, or set aside by the court, on application thereto by any party dissatisfied with such order.

it, as where a cornice was erected by which the rain flowed on the plaintiff's garden, *Fay v. Prentice*, 1 C. B., 828; so where dirt was kept on a highway, *Goldthorpe v. Hardman*, 2 D. and L., 442; 13 Mec. and W., 337; so where timber was kept lying on a river at the entrance to a wharf, *Rose v. Groves*, 5 M. and G., 613; 6 Sc. N. R., 645; *Dobson v. Blackmore*, 9 Q. B., 99; *Brown v. Mallett*, 5 C. B., 594. So the clause might apply (supposing there was time) to prevent the continuance of the same injury, as undermining party walls, *Bradbee v. Christ's Hospital*, 4 M. and G., 714; or excavating land under houses or in mines, *Firmstone v. Water*, 2 D. and L., 203.

It may often be a question whether this clause or the section as to *mandamus* is to be resorted to in cases of continued non-feasance, nearly amounting to mis-feasance, such as in *Russell v. Shenton*, 3 Q. B., 449, where the complaint was for not cleaning sewers; but there will be no difficulty as the claim for *mandamus* and injunction can clearly be *joined*. See as to the jurisdiction of equity to grant injunction in such cases, *Hawes v. Taylor*, 2 Ph., 209; 11 Jur., 73. A class of cases in which the clause will have a clear application is the actions for imitating trade marks. *Crawshaf v. Thompson*, 4 M. & G., 357; 5 Sc. N. R., 562; *Rodgers v. Nowell*, 5 C. B., 109; or in cases of infringement of copy right, *Wright v. Tallis*, 1 C. B., 898; or piracy of designs, *Millengen v. Pickens*, 1 C. B., 799; or patents, *Allen v. Rawson*, 1 C. B., 551; *Stead v. Williams*, 7 M. & G., 818; *Russell v. Leadson*, 14 Mec. & W., 574. Cases in which the courts of equity of course can exercise a concurrent jurisdiction by injunction, *Geary v. Norton*, 1 De G. & S., 9; *Heath v. Unwin*, 6 Law J., Ch. 283. The clause would clearly apply again in cases of continuance of trespass, as keeping stakes in the lands of plaintiff, *Bowyer v. Cook*, 16 Law J., C. P., 322. In regard to acts of trespass, where the title is in dispute, the courts of equity have not been accustomed to grant injunction except to prevent *irreparable* injury, *Attorney General v. Mallett*, 16 Law J., Ex., 131. See as to jurisdiction in cases of waste, *Morris v. Morris*, 16 Law J., Ch. 201; as to the common law action, *Matthews v. Matthews*, 7 C. B., 1018. This section would be applicable peculiarly in cases of a covenant to insure, which has been held a *continuing* covenant, *Doe dl. Maston v. Gladwin*, 6 Q. B., 953. So covenants to renew leases, *Worley v. Frampton*, 16 Law J., Ch. 102; or to make an assignment, *Lovelock v. Franklyn*, S. Q. B., 371; or to erect buildings, *Cunnoch v. Jones*, 18 Law J., Ex., 204; or to keep a policy on foot, *Dormay v. Boradaile*, 5 C. B., 380. The clause would apply to compel a party to abate a nuisance, as to pull down a building erected wrongfully on a common, *Davis v. Williams*, 20 Law J., Q. B., 330; see *Feret v. Hill*, 2 C. L. Rep., 1371."

This chapter would not be needed, if we had as have most of the progressive states, successfully removed in full the dissimilarity between law and equity procedure. But as we have not, perhaps, our conservative friends will be less timid in allowing this advance, when they know they are treading on ground deemed even safe by the profession and tribunals of England, which have been, we believe, by our aforesaid friends, esteemed quite sufficiently slow. *Report on Civil Code*, p. 338.

## CHAPTER 156.

## HABEAS CORPUS.

[Code—Chapter 127.]

- Substance of petition.** SECTION 3801. (2213.) The petition for the writ of habeas corpus must be sworn to, and must state:
1. That the person in whose behalf it is sought is restrained of his liberty, and the person by whom and the place where he is so restrained, mentioning the names of the parties if known, and if unknown describing them with as much particularity as practicable;
  2. The cause or pretense of such restraint according to the best information of the applicant; and if it be by virtue of any legal process, a copy thereof must be annexed or a satisfactory reason given for its absence;
  3. It must state that the restraint is illegal and wherein;
  4. That the legality of the imprisonment has not already been adjudged upon a prior proceeding of the same character, to the best knowledge and belief of the applicant;
  5. It must also state whether application for the writ has been before made to, and refused by, any court or judge, and if such application has been made, a copy of the petition in that case with the reasons for the refusal thereto appended must be produced or satisfactory reasons given for the failure to do so.
- Sworn to, &c.** SEC. 3802. (2214.) This petition must be sworn to by the person confined or by some one in his behalf, and presented to some court or officer authorized to allow the writ.
- By whom allowed** SEC. 3803. (2215.) The writ of habeas corpus may be allowed by the supreme or district court, or by any judge of either of those courts. In such cases it may be served in any part of the state.
- Same.** SEC. 3804. (2216.) It may also be allowed by any county court except when the commitment was made by order of one of the courts or officers mentioned in the last section, but when allowed by the county court it is valid only within the limits of the county where issued.
- Application where.** SEC. 3805. (2217.) Application for this writ, when made to the supreme or district courts or judges thereof, must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to for the writ, may refuse the same unless a sufficient reason be stated in the petition for not making the application to the more convenient supreme or district court, or a judge thereof.
- When refused.** SEC. 3806. (2218.) If, from the showing of the petitioner, the plaintiff would not be entitled to any relief, the court or judge may refuse to allow the writ.
- When not.** SEC. 3807. (2219.) But if the petition show a sufficient ground for relief, and is in accordance with the foregoing requirements, the writ shall be allowed and may be substantially as follows:

## THE STATE OF IOWA,

To the sheriff of, &amp;c., [or to A. B., as the case may be.]

You are hereby commanded to have the body of C. D., by you unlawfully detained as is alleged, before the court [or before me, or before

E. F., judge, &c., as the case may be] at \_\_\_\_\_, on \_\_\_\_\_, [or immediately after being served with this writ,] to be dealt with according to law, and have you then and there this writ with a return thereon of your doings in the premises.

SEC. 3808. (2220.) When the writ is allowed by a court it is to be issued by the clerk, but when allowed by a judge he must issue the writ himself, sub-cribing his name thereto without any seal. By whom issued

SEC. 3809. (2221.) If the writ is disallowed, the court or judge shall cause the reasons of said disallowance to be appended to the petition and returned to the person applying for the writ. Disallowed.

SEC. 3810. (2222.) Any judge, whether acting individually or as a member of a court, who wrongfully and willfully refuses such allowance of the writ when properly applied for, shall forfeit to the party aggrieved the sum of one thousand dollars. Penalty for refusing.

SEC. 3811. (2223.) Whenever any court or judge authorized to grant this writ has evidence, from a judicial proceeding before them, that any person within the jurisdiction of such court or officer is illegally imprisoned or restrained of his liberty, it is the duty of such court or judge to issue or cause to be issued the writ as aforesaid, though no application be made therefor. Issued without application

SEC. 3812. (2224.) The writ may be served by the sheriff or by any other person appointed for that purpose by the court or judge by whom it is issued or allowed. If served by any other than the sheriff, he possesses the same power and is liable to the same penalty for a non-performance of his duty as though he were the sheriff. By who

SEC. 3813. (2225.) The proper mode of service is by leaving the original writ with the defendant and preserving a copy thereof on which to make the return of service. How.

SEC. 3814. (2226.) If the defendant can not be found, or if he have not the plaintiff in custody, the service may be made upon any person having the plaintiff in his custody, in the same manner and with the same effect as though he had been made defendant therein. Defendant not found.

SEC. 3815. (2227.) If the defendant conceal him-self or refuse admittance to the person attempting to serve the writ, or if he attempt wrongfully to carry the plaintiff out of the county or the state after the service of the writ as aforesaid, the sheriff or the person who is attempting to serve or who has served the writ as above contemplated, is authorized to arrest the defendant and bring him together with the plaintiff forthwith before the officer or court before whom the writ is made returnable. Power of officer

SEC. 3816. (2228.) In order to make such arrest, the sheriff or other person having the writ, possesses the same power as is given to a sheriff for the arrest of a person charged with a felony. Same

SEC. 3817. (2229.) If the plaintiff can be found, and if no one appear to have the charge or custody of him, the person having the writ may take him into custody and make return accordingly. And to get possession of the plaintiff's person in such cases, he possesses the same power as is given by the last section for the arrest of the defendant. Same.

SEC. 3818. (2230.) The court or judge to whom the application for the writ is made, if satisfied that the plaintiff would suffer any irreparable injury before he could be relieved by the proceedings as above authorized, may issue a precept to the sheriff or any other person selected instead, commanding him to bring the plaintiff forthwith before such court or judge. When warrant to issue.

- Defendant arrested.** SEC. 3819. (2231.) When the evidence aforesaid is farther sufficient to justify the arrest of the defendant for a criminal offense committed in connection with the illegal detention of the plaintiff, the precept must also contain an order for the arrest of the defendant.
- Precept, how served.** SEC. 3820. (2232.) The officer or person to whom the precept is directed must execute the same by bringing the defendant, and also the plaintiff if required, before the court or judge issuing it, and thereupon the defendant must make return to the writ of habeas corpus in the same manner as if the ordinary course had been pursued.
- Want of form.** SEC. 3821. (2233.) The defendant may also be examined and committed, or bailed, or discharged, according to the nature of the case.
- Presumption.** SEC. 3822. (2234.) The writ of habeas corpus must not be disobeyed for any defects of form or misdescription of the plaintiff or defendant, provided enough is stated to show the meaning and intent of the writ.
- Appearance.** SEC. 3823. (2235.) Any person served with the writ is to be presumed to be the person to whom it is directed, although it may be directed to him by a wrong name or description or to another person.
- Plaintiff brought.** SEC. 3824. (2236.) Service being made in any of the modes hereinafore provided, the defendant must appear at the proper time and answer the said petition.
- Disobedience.** SEC. 3825. (2237.) He must also bring up the body of the plaintiff, or show good cause for not doing so.
- Attachment served.** SEC. 3826. (2238.) A willful failure to comply with the above requisitions renders the defendant liable to be attached for a contempt, and to be imprisoned till a compliance is obtained, and also subjects him to the forfeiture of one thousand dollars to the party thereby aggrieved.
- Attorney notified.** SEC. 3827. (2239.) Such attachment may be served by the sheriff or any other person thereto authorized by the judge, who shall also be empowered to bring up the body of the plaintiff forthwith, and has for this purpose the same powers as are above conferred in similar cases.
- Answer.** SEC. 3828. (2240.) The court or officer allowing the writ must cause the prosecuting attorney of the proper county to be informed of the issuing of the writ and of the time and place when and where it is made returnable.
- Same.** SEC. 3829. (2241.) The defendant in his answer must state plainly and unequivocally whether he then has, or at any time has had, the plaintiff under his control and restraint, and if so the cause thereof.
- Same.** SEC. 3830. (2242.) If he has transferred him to another person he must state that fact, and to whom, and the time thereof as well as the reason or authority therefor.
- Reply.** SEC. 3831. (2243.) If he holds him by virtue of a legal process or written authority, a copy thereof must be annexed.
- Same.** SEC. 3832. (2244.) The plaintiff may demur or reply to the defendant's answer, and all issues joined thereon shall be tried by the judge or court.\*
- Same.** SEC. 3833. (2245.) Such replication, except when the hearing is before the judge of the county court may deny the sufficiency of the testimony to justify the action of the committing magistrate, on the trial of which issue all written testimony before such magistrate may be given in evidence before the court or judge in connection with any other testimony which may then be produced.

\* Is this section 2244, of present Code, affected by the provision as to jury trial of act 1, sec. 10, of new constitution? *Report on Civil Code*, p. 341.

SEC. 3834. (2246.) But it is not permissible to question the correctness of the action of a grand jury in finding a bill of indictment, or of the petit jury in the trial of a cause, nor of a court or judge when acting within their legitimate province and in a lawful manner. Restriction.

SEC. 3835. (2247.) If no sufficient legal cause of detention is shown the plaintiff must be discharged. Plaintiff.

SEC. 3836. (2248.) Although the commitment of the plaintiff may have been irregular, still if the court or judge is satisfied from the evidence before them that he ought to be held to bail or committed either for the offense charged or any other, the order may be made accordingly. Irregularity.

SEC. 3837. (2249.) The plaintiff may also in any case be committed, let to bail, or his bail be mitigated or increased, as justice may require. Power of judge.

SEC. 3838. (2250.) Until the sufficiency of the cause of restraint is determined the defendant may retain the plaintiff in his custody and may use all necessary and proper means for that purpose. Plaintiff detained.

SEC. 3839. (2251.) The plaintiff in writing, or his attorney, may waive his right to be present at the trial in which case the proceedings may be had in his absence. The writ will in such cases be modified accordingly. Plaintiff's presence.

SEC. 3840. (2252.) Disobedience to any order of discharge subjects the defendant to attachment for a contempt, and also to the forfeiture of one thousand dollars to the party aggrieved, besides all damages sustained by him in consequence of such disobedience. Disobedience

SEC. 3841. (2253.) If the defendant attempt to elude the service of the writ of habeas corpus, or to avoid the effect thereof by transferring the plaintiff to another, or by concealing him, he shall on conviction be imprisoned in the penitentiary or county jail not more than one year and fined not exceeding one thousand dollars. And any person knowingly aiding or abetting in any such act shall be subject to the like punishment. Penalty on defendant.

SEC. 3842. (2254.) An officer refusing to deliver a copy of any legal process, by which he detains the plaintiff in custody, to any person who demands such copy and tenders the fees therefor, shall forfeit two hundred dollars to the person so detained. On officer.

SEC. 3843. (2255.) When the proceedings are before a judge (except when the writ is refused) all the papers in the case, including his final order, shall be filed with the clerk of the district court of the county wherein the final proceedings were had, and a brief memorandum thereof shall be entered by the clerk upon his judgment docket. Papers to be filed.

PRIOR LAWS. 1 Habeas corpus, passed April 12, 1827; M. D., 1833, p. 397; repealed Aug. 30, 1840.

2. An Act concerning habeas corpus, passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 70, p. 92; Reprint, 1843, p. 277. (Repeals common law as to same.)

DECISION. Not entitled to the writ after conviction by court, having jurisdiction, 6 Iowa, 79.

## CHAPTER 157.

## CHANGING NAMES.

[Code—Chapter 128.]

- Power given.** SECTION 3844. (2256.) The district court has power to change the names of persons in the following manner:
- Petition.** SEC. 3845. (2257.) The applicant for such change must file his petition verified by his oath, stating that he is a resident of the county and has for one year then last past been a bona fide resident of the state. It must also in a general way give a description of his person, stating his age, height, the color of his hair and eyes, the place of his birth, and who were his parents.
- Order.** SEC. 3846. (2258.) An order of the court shall thereupon be made and entered of record giving a description of the applicant as set forth in the petition, the new name given, the time at which the change shall take effect (which shall not be less than thirty days thereafter,) and directing in what newspaper of general circulation in the county, notice of such change shall be published.
- Publication.** SEC. 3847. (2259.) Previous to the time thus prescribed for the taking effect of such change, the applicant shall cause notice thereof to be published for four successive weeks in the newspaper directed by the court.
- Proof filed.** SEC. 3848. (2260.) The ordinary proof of such publication being filed in the office of the clerk of the court shall be by him filed for preservation, and on the day fixed by the court as aforesaid the change shall be complete.

PRIOR LAW. An Act to confer the power of changing names of persons, towns and villages on district court, passed Feb. 8, 1847 ? 1st sess., chap. 36, p. 46.

## CHAPTER 158.

## OF JUSTICES OF THE PEACE AND THEIR COURTS.

[Code—Chapter 129]

- Jurisdiction local.** SECTION 3849. (2261.) The jurisdiction of justices of the peace when not specially restricted, is geographically coextensive with their respective counties.
- Amount, &c.** SEC. 3850. Within the prescribed limit, it extends to all civil cases (except cases by equitable proceedings, and cases where the question of title to any real estate may arise,) where the amount in controversy does not exceed one hundred dollars; and by consent of parties, it may be extended to any amount not exceeding three hundred dollars.

*Where Suit may be brought.*

- Where brought.** SEC. 3851. (2263.) Suits may in all cases be brought in the township where the defendant, or one of several defendants, resides.

SEC. 3852. (2264.) They may also be brought in any other town-<sup>Same.</sup>ship of the same county, if actual service on one or more of the defendants is made in such township.

SEC. 3853. Actions of replevin and suits commenced by attach-<sup>If replevin or attachment.</sup>ment may be commenced in any county and township wherein any portion of the property is found, and justices shall have jurisdiction therein, within the county.

SEC. 3854. (2266.) If none of the defendants reside in the state,<sup>If non-resident.</sup> suit may be commenced in any county and township wherein either of the defendants may be found.

SEC. 3855. (2267.) On written contracts stipulating for payment at a particular place suit may be brought in the township where the pay-<sup>On written contracts.</sup>ment was agreed to be made.

SEC. 3856. (2268.) If there is no justice in the proper township qualified or able to try the suit, it may be commenced in any adjoining<sup>In adjoining township.</sup> township in the same county.

*The Justice's Docket.*

SEC. 3857. (2269.) Every justice of the peace shall keep a docket in which shall be entered in continuous order, with the proper date to each act done: <sup>Justice's docket and its contents.</sup>

1. The title to each cause.
2. A brief statement of the nature and amount of the plaintiff's demand and defendant's set-off (if any,) giving date to each where dates exist.
3. The issuing of the process and return thereof.
4. The appearance of the respective parties.
5. Every adjournment, stating at whose instance and for what time.
6. The trial, and whether by the justice or by a jury.
7. The verdict and judgment.
8. The execution, to whom delivered, the renewals, if any, and the amount of debt, damages, and costs indorsed thereon.
9. The taking and allowance of an appeal, if any.
10. The giving a transcript for filing in the clerk's office or for set-off, if one is given.
11. A note of all motions made and whether refused or granted.

*Suits, how brought.*

SEC. 3858. (2270.) The parties to the action may be the same as <sup>Practice.</sup>in the district court, and all the proceedings prescribed for that court so far as the same are applicable and not herein changed shall be pursued in justice's courts. The powers of the court are only as herein enumerated.

SEC. 3859. (2271.) Ordinary actions in justice's courts are com-<sup>Same.</sup>menced by voluntary appearance or by notice.

SEC. 3860. (2272.) When by notice, no petition need be filed as is required in the district court except where the petition must be sworn to, but the notice must state the cause of action in general terms sufficient to apprise the defendant of the nature of the claim against him. <sup>Petition not necessary.</sup>

SEC. 3861. (2273.) It must be addressed to the defendant by name, <sup>Notice to whom.</sup>but if his name is unknown, a description of him will be sufficient. It must be subscribed by the plaintiff or the justice before whom it is returnable.

State amount.	SEC. 3862. (2274.) It must state the amount for which the plaintiff will take judgment if the defendant fail to appear and answer at the time and place therein fixed.
Limit of time.	SEC. 3863. (2275.) The time thus fixed in the notice must not be more than fifteen days from the date, and the notice must be served not less than five days previous to the trial.
Service and return.	SEC. 3864. (2276.) The service and return thereto must be made in the same manner as in the district court except that no service shall be made by publication other than is herein provided, nor shall any return made by another than the sheriff or a constable of the county be valid unless sworn to.
Defendant may pay to the officer.	SEC. 3865. (2277.) The defendant may at any time pay to the officer having the process, or to the justice of the peace, the amount of the claim together with the costs which have then accrued, and thereupon the proceedings shall cease.

*The Appearance of Parties.*

Agent's authority.	SEC. 3866. (2278.) An agent appearing for another may be required by the justice to show his authority if written, or prove it by his own oath or otherwise if verbal.
One hour given.	SEC. 3867. (2279.) The parties in all cases are entitled to one hour in which to appear after the time fixed for appearance and neither party is bound to wait longer for the other.
Postponement.	SEC. 3868. (2280.) Upon the return day, if the justice be actually engaged in other official business he may postpone proceedings in the case until such business is finished.
Adjournment.	SEC. 3869. (2281.) If from any cause the justice is unable to attend to the trial at the time fixed, or if a jury be demanded, he may adjourn the cause for a period not exceeding three days, nor shall he make more than two such adjournments.
Same.	SEC. 3870. (2282.) In case of the absence of witnesses, either party, at his own cost, may obtain an adjournment not exceeding sixty days, by filing an affidavit like that required to obtain a continuance in the district court for the like cause.
Condition.	SEC. 3871. (2283.) Either party applying for an adjournment must, if required by the adverse party, consent that the testimony of any witness of the adverse party who is in attendance be then taken to be used on the trial of the cause.
Pleadings.	SEC. 3872. (2284.) The pleadings must be substantially the same as in the district court. They may be written or oral. If oral, they must in substance be written down by the justice in his docket, and sworn to when such verification is necessary.
Set-offs.	SEC. 3873. (2285.) Cross-demands or set-offs must be made, if at all, at the time the answer is put in.
Copies.	SEC. 3874. (2286.) The original or a copy of all written instruments upon which a cause of action or set-off is founded, must be filed with the claim founded thereon, or a sufficient reason given for not doing so.
Either may have change of venue.	SEC. 3875. Either party, before the trial is commenced, may have a change of venue, upon filing an affidavit that the justice is prejudiced against him, or is of near relation to the other party, is a material witness for the affiant, or that the affiant can not obtain justice before him.
Transmission of case and trial or notice thereof.	SEC. 3876. When said change of venue is allowed, said justice shall transmit all the original papers in said case, and a transcript of his proceedings, to the next nearest justice in the township, if there be any, if



not, to the next nearest justice in his county, which said justice shall proceed to try said case, and if he can not try the same immediately, he shall then fix a time therefor, of which all parties shall take notice.

SEC. 3877. (2287.) If in a suit for trespass on real property the defendant justifies by pleading title, it must be in writing. The justice shall thereupon make an entry thereof in his docket, and return the original papers and a transcript of all the entries in his docket to the district court in the same manner and within the same time as is required in cases of appeals. Plea of title.

SEC. 3878. (2288.) When, from the plaintiff's own showing on the trial, it appears that the determination of the action will necessarily involve the decision of a question of title to real property, the justice must dismiss the action, stating in his docket the reason therefor. Dismissed.

SEC. 3879. (2289.) But when a case is thus transferred or dismissed on account of the title to lands being involved, if there are other causes of action not necessarily connected they may be severed and the latter tried before the justice. Actions severed.

DECISIONS UNDER THE PRIOR PRACTICE. Every presumption is in favor of the proceedings and jurisdiction of courts of general jurisdiction. There is no presumption in favor of the jurisdiction of a limited court, but that being shown then every presumption is in favor of its proceedings. The jurisdictional averments of the record of a limited court are presumed true. Jurisdiction existing, error is irremediable save by appeal. Where the court has adjudicated on the fact conferring jurisdiction such adjudication shall not be assailed collaterally, unless there was a total, and not merely partial, want of such fact, 4 Iowa, 77; what the notice should contain, 4 G., 346; *ibid.*, 345; if plaintiff file the note and its signature is not denied on oath he need not appear, 3 G., 568; variance between note and transcript amendable, 3 G., 284; if the statute allow a nonsuit for non-appearance of plaintiff as did Reprint, chapter 86, an appearance before the allowance of the motion for such nonsuit will avert it, 2 G., 191; change of venue, *Berner v. Frasier*, June, 1859; under chapter 58, of the laws of 4th session, a defendant may have more than one change of venue, 7 Iowa, 336; no jurisdiction in real estate, 3 Iowa, 347; transfer of case to district court because of question of real estate, *ibid.*; does jurisdiction over the maker confer it over the indorser, 8 Iowa 425; sum claimed is the criterion of jurisdiction, 2 Iowa, 35; townships of jurisdiction determined, *ex officio*, 2 G., 191; liability of acting officer, 3 G., 584; see *ibid.*, 374; proper entries, 4 Iowa, 343; enter pleadings, 2 Iowa, 36; directory only, 1 Iowa, 86; contents of docket aided by petition, 4 G., 304; general denial, when presumed, *ibid.*, 309; see 4 G., 409; "*that he had paid*" held to be not affirmative matter, 4 G., 379.

Appearance waives notice, 2 G., 9; 4 G., 297; same, *ibid.*, 363, 464; when appearance will not confer jurisdiction, *ibid.*, 374; special appearance, 4 G., 346; pleading written or not, 4 G., 409; 2 Iowa, 37; 3 G., 299; no technical nicety, 1 Iowa, 554; case of petition lost, 4 G., 304; "11 o'clock, M." bad notice, 4 G., 345; exactness not required in pleadings before justice, 1 Iowa, 554; M., 91; 4 G., 310; 4 G., 379; 3 G., 111; 2 G., 191, 350; 2 Iowa, 35; 4 G., 409, 304; no petition, 2 Iowa, 35; 4 G., 409, 304; *Cain v. Devit*, June, 1859; an instrument left with the justice should be filed, 2 Iowa, 35; what the record should show, 4 G., 409; account may be given in proof, though no copy have been filed, 3 Iowa, 324; section 2556, construed, 1 Iowa, 421; when the justice's record states that the defendant's set-off was not objected to, it will not be presumed untrue from the mere fact of a trial as it would be in a case where the record was silent, and there was only one action, 5 Iowa, 270; copy or original, 4 G., 409; legal conclusion, held to be fact conclusion, 1 Iowa, 93; matter taken as true, 1 Iowa, 600; denial presumed, 4 G., 310; notice having got the defendant into court, has discharged its function, 3 Iowa, 324; pleading legal conclusion held good, 4 G., 379; no technicality in pleading, 3 G., 111; see 2 G., 350; no petition used in suit on penal bond, 2 Iowa, 35; 6 *ibid.*, 164; 5 *ibid.*, 62.

### The Trial.

SEC. 3880. (2290.) Unless one of the parties demand a trial by jury at or before the time for joining issue, the trial shall be by the justice. Trial by justice.

- Nonsuit.** SEC. 3881. (2291.) If the plaintiff fails to appear by himself, his agent or attorney, on the return day, or at any other time fixed for the trial, the justice shall render a judgment of nonsuit against him with costs, except in the case provided in the next section.
- Exception.** SEC. 3882. (2292.) When the suit is founded on an instrument of writing purporting to have been executed by the defendant, in which the demand of the plaintiff is liquidated, if the signature of the defendant is not denied under oath, and if the instrument has been filed with the justice previous to the day for appearance, he may proceed with the cause whether the plaintiff appear or not.
- Default.** SEC. 3883. (2293.) In the case provided for in the last section, if the defendant does not appear, judgment shall be rendered against him for the amount of the plaintiff's claim.
- Same.** SEC. 3884. (2294.) But if, where the plaintiff's claim is not founded on such written instrument, the defendant does not appear, the justice shall proceed to hear the allegations and proofs of the plaintiff, and shall render judgment thereon for the amount to which he shows himself entitled, not exceeding the amount stated in the notice hereinbefore required.
- Same.** SEC. 3885. (2295.) In the cases contemplated in the last two sections, if the defendant has previously filed a set-off, founded on a written instrument purporting to have been signed by the plaintiff, calling for a sum certain, the justice shall allow such set-off in the same manner as though the defendant had appeared and shall render judgment accordingly.
- Judgment set aside.** SEC. 3886. (2296.) Judgment of nonsuit or by default may be set aside by the justice, at any time within six days after being rendered, if the party applying therefor can show a satisfactory excuse for his default.
- New trial.** SEC. 3887. (2297.) In such a case a new day shall be fixed for trial, and notice thereof given to the other party or his agent.
- Costs.** SEC. 3888. (2298.) Such orders shall be made in relation to the additional costs thereby created as the justice shall think equitable.
- Execution recalled.** SEC. 3889. (2299.) Any execution which may in the meantime have been issued shall be recalled in the same manner as in cases of appeals.
- Venire.** SEC. 3890. (2301.) The justice shall thereupon issue his precept to some constable of the township directing him to summon the requisite number of jurors possessing the same qualifications as are required in the district court.
- Number of jurors.** SEC. 3891. (2302.) The jury shall consist of six jurors unless a smaller number be agreed upon between the parties. Each party is entitled to three peremptory challenges. Any deficiency in their number arising from any cause may be supplied by summoning others in the manner above directed.
- When jury discharged.** SEC. 3892. (2303.) The justice may discharge the jury when satisfied that they can not agree, and shall immediately issue a new precept for summoning another to appear at a time therein fixed, not more than three days distant, unless the parties otherwise agree.
- Motion in arrest.** SEC. 3893. (2304.) No motion in arrest of judgment or to set aside a verdict can be entertained by a justice of the peace.
- Verdict.** SEC. 3894. (2305.) The verdict of the jury must be general. But where there are several plaintiffs or defendants the verdict may be for or against one or more of them.

*Judgment, and Proceedings incident thereto.*

SEC. 3895. (2306.) In cases of nonsuit, confession, or on the verdict of a jury, the judgment shall be rendered and entered upon the docket forthwith. In all other cases the same shall be done within three days after the cause is submitted to the justice for final action. Judgment.

SEC. 3896. (2307.) If the sum found for either party, exceed the jurisdiction of the justice, such party may remit the excess and take judgment for the residue, but he can never afterward sue for the amount so remitted. Excess.

SEC. 3897. (2308.) Instead of so remitting the excess the party obtaining such verdict may elect to have judgment of nonsuit entered against the plaintiff, in which case the plaintiff shall pay the costs. Same.  
Nonsuit.

SEC. 3898. (2309.) Mutual judgments between the same parties, rendered by the same or different justices, may be set off against each other. Mutual judgments.

SEC. 3899. (2310.) When rendered by the same court, the same course shall be pursued as is prescribed in the district court.

SEC. 3900. (2311.) If the judgment proposed to be set off was rendered by another justice, the party offering it must obtain a transcript thereof with a certificate of the justice who rendered it, indorsed thereon, stating that no appeal has been taken and that the transcript was obtained for the purpose of being used as a set-off in that case. By different justices

SEC. 3901. (2212.) Such transcript shall not be given until the time for taking an appeal has elapsed. Time.

SEC. 3902. (2313.) The justice so giving a transcript shall make an entry of the fact in his docket, and all other proceedings in his court shall thenceforth be stayed. Entry.

SEC. 3903. (2314.) Such transcript being presented to the justice who has rendered a judgment between the same parties as aforesaid, if execution has not been issued on the judgment rendered by him, he shall strike a balance between the judgments and issue execution for such balance. Execution for balance.

SEC. 3904. (2315.) If execution has already issued, the justice shall also issue execution on the transcript filed with him and deliver it to the same officer who has the other execution. Execution.

SEC. 3905. (2316.) Such officer shall treat the lesser execution as so much cash collected on the larger, and proceed to collect the balance accordingly. Set-off.

SEC. 3906. (2317.) The above rules as to set-off are subject to the same prohibition as to setting off costs, when the effect will be to leave an insufficient amount of money actually collected to satisfy the costs of both judgments, as is contained in the rules of proceeding in the district court. Qualification.

SEC. 3907. (2318.) When the judgment of another justice is thus allowed to be set off, the transcript thereof shall be filed among the papers of the case in which it is so used and the proper entry made in the justice's docket. Transcript filed.

SEC. 3908. (2319.) If the justice refuses the judgment as a set-off he shall so certify on the transcript and return it to the party who offered it. When filed in the office of the justice who gave it, proceedings may be held by him in the same manner as though no such transcript had been certified by him. If set-off refused.

*Filing Transcripts in the Clerk's Office.*

- When permissible. SEC. 3909. (2320.) The party obtaining a judgment in a justice's court for more than ten dollars may cause a transcript thereof to be certified to the office of the clerk of the district court in the county.
- Manner and effect. SEC. 3910. (2321.) The clerk shall forthwith file such transcript and enter a memorandum thereof in his judgment docket, noting the time of filing the same, and from the time of such filing it shall be treated in all respects as to its effect and mode of enforcement, as a judgment rendered in the district court as of that date.

*Executions and Proceedings thereon.*

- By whom and when issued. SEC. 3911. (2322.) Executions for the enforcement of judgments in a justice's court, except when docketed in the office of the clerk of the district court, may be issued by the justice before whom the judgment was rendered, on the application of the party entitled thereto, at any time within five years from the entry of the judgment but not afterwards.
- Substance of. SEC. 3912. (2323.) Such execution shall be against the goods and chattels of the defendant therein and shall be directed to any constable of the county.
- Date and return. SEC. 3913. (2324.) It must be dated as on the day on which it is issued, and made returnable within thirty days thereafter.
- Renewable. SEC. 3914. (2325.) If not satisfied when returned it may be renewed from time to time by an indorsement thereon to that effect signed by the justice and dated of the date of such renewal.
- For thirty days. SEC. 3915. (2326.) Such indorsement must state the amount paid on such execution (if any) and shall continue the execution in full force for thirty days from the date of renewal.
- Property. SEC. 3916. (2327.) Property levied on before such renewal may be retained by the officer and sold after renewal.

DECISIONS UNDER THE PRIOR PRACTICE. Plaintiff dismissing his suit is liable for all the costs legally made, or being made in the cause, whether then taxed or not, 4 Iowa, 569; the judgment may be for less than \$3, and yet the attachment good, 2 G., 214; 4 Iowa, 416; appeal lies, 3 Iowa, 261; 4 *ibid.*, 340, 463; from judgment by confession, *Troest v. Clark*, June term, 1859; 1 Iowa, 444; nonsuit, 4 Iowa, 463; the default herein means want of appearance, 5 Iowa, 265; Qu., see section 1824, Code, a judgment rendered against a defendant appearing but not answering can not be set aside by the justice, 5 Iowa, 265; notice of new trial, 2 G., 9; see 5 Iowa, 265; no power to set aside verdict, 6 Iowa, 175; a judgment rendered against a defendant appearing but not answering can not be set aside by the justice, 5 Iowa, 265; no judgment after the time, 7 Iowa, 25; appellant can not dismiss for informality, 1 Iowa, 150; what is a judgment, and what not, 2 G., 454.

*Appeals.*

- When allowed. SEC. 3917. (2328.) Any person aggrieved by the final judgment of a justice, may appeal therefrom to the district court in the county.
- Time. SEC. 3918. (2329.) The appeal must be taken and perfected within twenty days after the rendition of the judgment.
- By clerk. SEC. 3919. (2330.) If within the twenty days the appellant is prepared to take his appeal and is prevented only by the absence or death of the justice, or his inability to act, he may apply to the clerk of the district court of the county for the allowance of his appeal.
- And how. SEC. 3920. (2331.) Such application shall be founded on an affidavit stating the amount and nature of the judgment, and the time of the

rendition thereof, as nearly as practicable, and the reason why he thus applies.

SEC. 3921. (2332.) The clerk has thereupon the same power to act in the premises as the justice would have had. He may require the books and papers of the justice to be delivered to him, for which purpose he may issue a precept to the sheriff to that effect, if necessary, and may make out and file the transcript. After this he shall return to the office of the justice of the peace all the papers proper to be kept by the justice. Same.

SEC. 3922. (2333.) The appeal shall in no case be allowed until a recognizance of the following form or its equivalent is taken and filed in the office of the justice, the sureties being approved by him, or by the clerk acting for him as above authorized, and the sum therein inserted being sufficient to secure the judgment as well as the costs of the appeal. Recognizances.

We, the undersigned, acknowledge ourselves indebted to \_\_\_\_\_ in the sum of \_\_\_\_\_ dollars, upon the following condition. Whereas \_\_\_\_\_ has appealed from the judgment of \_\_\_\_\_, a justice of the peace, in an action between \_\_\_\_\_ as plaintiff and \_\_\_\_\_ defendant, Form.

Now if the said appellant pays whatever amount is legally adjudged against him in the farther progress of this cause, then this recognizance is to be void, and otherwise in force.

Attest, E. F., justice.

A. B., principal.  
C. D., surety.

SEC. 3923. (2334.) Upon the appeal being taken in accordance with the foregoing provisions, all farther proceedings in the cause by him shall be suspended. Proceedings cease.

SEC. 3924. (2335.) If, in the mean time, an execution has been issued, the justice shall give the appellant a certificate that the appeal has been allowed. Upon that certificate being presented to the constable, he shall cease farther action and release any property that may have been taken in execution. If execution issued.

SEC. 3925. (2336.) Upon the taking of any appeal, the justice shall file in the office of the clerk of the district court all the original papers relating to the suit, with a transcript of all the entries in his docket. Papers filed.

SEC. 3926. (2337.) Upon the return of the justice being filed in the office of the clerk, the cause will be deemed in the district court. Same.

SEC. 3927. (2338.) The district court may by rule compel the justice to allow an appeal, or to make or amend his return according to law. District court.

SEC. 3928. (2339.) Where an omission or mistake has been made by the justice in his docket entries, and that fact is made unquestionable, the district court may correct the mistake or supply the omission, or direct the justice to do so. Mistakes.

SEC. 3929. (2340.) If an appeal is allowed ten days before the next term of the district court, the justice's return must be made at least five days before that term. All such cases must be tried when reached, unless continued for cause. Return when made.

SEC. 3930. (2341.) If the appeal is not allowed on the day on which judgment is rendered, written notice thereof must be served upon the appellee or his agent at least ten days before the term of the court to which the cause is returnable, (provided there be ten days intervening,) or the suit, on motion of the appellee, shall be continued at the cost of the appellant. When notice required.

How served.	SEC. 3931. (2342.) Such notice may be served like the original notice, and if the appellee or his agent have no place of residence in the county, it may be served by being left with the justice.
Effect of appeal.	SEC. 3932. (2343.) An appeal brings up a cause for trial on the merits, and for no other purpose. All errors, irregularities, and illegalities are therefore to be disregarded under such circumstances, if the cause might have been prosecuted in the district court.
New demand.	SEC. 3933. (2344.) No new demand or set-off can be introduced into a case after it comes into the district court, unless by mutual consent.
Appellant pay costs.	SEC. 3934. (2345.) The appellant must pay the costs of the appeal unless he obtains a more favorable judgment than that from which he appealed.
When appellee.	SEC. 3935. (2346.) If the judgment below is against the appellant, he may proffer to pay a certain amount with costs, and if the final amount recovered be less favorable to the appellee than such proffer, he shall pay the costs of appeal.
Sureties.	SEC. 3936. (2347.) Any judgment in the district court against the appellant shall be entered up against him and his sureties jointly.
Damages.	SEC. 3937. (2348.) If an appeal is taken for delay, the district court shall award such damages, not exceeding ten per cent. on the amount of the judgment below, as may seem right.

*Writs of Error.*

When allowed.	SEC. 3938. (2349.) Any person aggrieved by an erroneous decision in a matter of law, or other illegality in the proceedings of a justice of the peace, may remove the same or so much thereof as is necessary into the district court for correction by writ of error.
Affidavit.	SEC. 3939. The basis of the proceeding is an affidavit filed in the office of the clerk, setting forth the errors complained of. Writ of error must be taken in the same time, and the notice must be the same as in case of appeal.
Writ	SEC. 3940. (2351.) The clerk shall thereupon issue the writ commanding the justice to certify the record and proceedings so far as they relate to the facts stated in the affidavit.
Copy.	SEC. 3941. (2352.) A copy of the affidavit shall accompany the writ and be served upon the justice, who shall, with the least practicable delay, make the return required.
Proceedings stayed.	SEC. 3942. (2353.) All proceedings in the justice's court, subsequent to judgment, may be stayed by a recognizance, entered into like that required in cases of appeals, and on which recognizance judgment shall be entered against the principal and surety in like manner and under like circumstances.
Amended return.	SEC. 3943. (2354.) The district court may compel an amended return when the first is not full and complete.
Judgment.	SEC. 3944. (2355.) The district court may render final judgment, or it may remand the cause to the justice for a new trial or such farther proceedings as shall be deemed proper, and may prescribe the notice necessary to bring the parties again before the justice.
Restitution.	SEC. 3945. (2356.) If the district court render a final judgment reversing the judgment of the justice of the peace, after such judgment has been collected in whole or in part, it may award restitution with interest, and issue execution accordingly, or it may remand the cause to the justice for this purpose.

DECISIONS UNDER THE PRIOR PRACTICE. An appeal lies from a judgment for costs against an intervenor, 4 Iowa, 340, error of law can be brought into district court by appeal, 3 Iowa 261, no motion in arrest allowed before a justice, 5 Iowa, 260, justice can not set aside verdict of jury in criminal case, 6 Iowa, 172; defendant has right to jury trial, 6 Iowa, 192, verity of judgment of a justice, 1 G, 78, if the justice does not make the proper entries, proceed against him to make him do so, 1 Iowa, 86, only official entries entitled to any credit. In the absence of written pleading the entries on the justice docket, rather than the original notice, define the claim on appeal, 2 G, 350, 4 *ibid*, 409, 3 Iowa, 324, case should be tried on appeal, on its merits, and on the issue made below, 3 Iowa, 189, appeal in default, 2 G, 466, from all final judgments, 3 Iowa, 262, from judgment of nonsuit, 4 Iowa, 464, under the Iowa city charter, 2 Iowa, 90, under Dubuque charter, 1 Iowa, 444, right may be waived, 3 G, 332, no judgment *in garnishee* before his debt be due, 2 G, 125, intention, no judgment, entry, 2 G, 454, see 2 G, 466; identity of instrument sued on, 2 G, 570, from judgment of mayor of city, 2 Iowa, 90, *Muscature v. Steek*, June term, 1859, there must be a judgment to appeal from, 7 Iowa, 23, 2 G, 245 and 454, appeal waived, 3 G, 332, M, 328, section 2329 applies to civil cases only, 5 Iowa, 413, 4 *ibid*, 338, twenty days, 6 Iowa, 528, notice of appearance, 6 Iowa, 369, 3 G, 99, 4 G, 344, see 5 Iowa, 517, bond amendable, 1 Iowa, 108, case dismissed for want of recognition, 3 G, 124, not reversed, unless for prejudice, 3 G, 203, appeal under special statute, 3 G, 91, limit of amendment, 2 G, 148, substantial compliance with section 2333 enough, *Moore v. Mause*, June term, 1859, justice may send up amended transcript, 4 G, 282, description of note sued on, 2 G, 129, impeachment of transcript, 2 G, 266, amended transcript is put of record and may be read, 3 Iowa 190, application to perfect record, 4 G, 432, erroneous description in record amended, 3 G, 284, instrument may be identified outside of record, 2 G, 129, not a judgment unless entered, *ibid*, 454, rule for amended transcript, 4 Iowa, 338, 7 *ibid*, 6, 4 G, 431; appeal dismissed, 3 G, 124, 1 Iowa, 150, 1 Iowa, 554, 128, 2 G, 91, failure of justice to send up transcript, 6 Iowa, 52, 4 G, 311, need of notice of appeal, 4 G, 344, same, 3 G, 99, tried on merits, 4 G, 383, can defaulters file answer after appeal? 7 Iowa, 45, amending transcript, 3 Iowa, 189, allowed on fact or law, 3 Iowa, 261, see *ibid*, 324, see *ibid*, 555, tried on merits, 4 G, 382, default by appellant, 2 G, 86, judgment affirmed, if appellant in default, 2 G, 350, variance, *ibid*, 466, an appeal lies from a judgment of nonsuit, and is heard on merits, 4 Iowa, 464, how instruments offered below to be evidenced 2 G, 570, 1 Iowa, 128, 2 Iowa, 35, 2 G, 466, default before justice admits in district court all but extent of damages, *Wiley v. Douge*, Dec term, 1859, not paying fee, 6 Iowa, 159, appellant in default, 2 G, 350, 86, effect of appeal, 1 Iowa, 554, 4 *ibid*, 463, 3 *ibid*, 261, 324, 4 G, 382, *Athens v. McCready*, June term, 1859, as to the right to file an answer in district court after the default below, 7 Iowa, 44, see 4 Iowa, 566, presumption as to pleadings below, 6 Iowa, 534, 7 Iowa, 6, 5 Iowa, 270, 4 G, 309, 5 Iowa, 490, when the justice's record states that the defendant's set off was not objected to it will not be presumed untrue from the mere fact of a trial, as it would be in a case where the record was silent, and there was only one actor, 5 Iowa, 270, time of return of transcript, 4 G, 311, on an appeal to the district court the demand of the plaintiff is not to be taken as admitted because the transcript shows no denial by the defendant, if it does show the case to have been contested, 5 Iowa, 491, contestation in the justice court shown by record, implies issue, 5 Iowa, 491, on appeal the pleadings of justice's courts will be reviewed kindly, and on no objections save such as were made at the earliest moment thereon, and a trial will be held to have cured a bad answer when the objection is first made in a higher court, 4 Iowa, 154, tender abandoned, if not claimed before justice, 4 G, 98, tender with costs, 2 Iowa, 50, bond irregular, R S, p 336, see 16, 3 G, 126, insufficient bond for judgment against justice, 3 G, 126, how judgment issued in *caution* cases, 2 G, 380, docket fee in advance, 4 G, 351, writs of error not allowed in case under section 932, 1 Iowa, 507, see 3 Iowa, 263, time of taking writ of error unlimited under Code, 2 Iowa, 87, same, 287, see 1 Iowa, 86, what to be done on reversal, 8 Iowa, 286 and 2 Iowa, 575, writ of error does not bring up facts, *O'Neal v. Millic*, Dec term, 1859, what to be tried on error, 3 Iowa, 203, see 2 Iowa, 203, if the proceedings are certified up to the district court, and a writ has been issued, the court has jurisdiction notwithstanding clerical neglects, if the appellant has discharged all his duty, 5 Iowa, 263

### Replevin.

SEC. 3946. (2357) The proceedings to gain possession of personal property wrongfully withheld will be the same as are prescribed in such cases, in the district court, except as modified in this chapter. As in district court

*Attachment.*

When allowed.	SEC. 3947. (2358.) Attachments are not allowable in justices' courts if the sum claimed is less than five dollars. And if more is claimed and less recovered, the plaintiff shall pay all the costs of the proceedings so far as they relate to the attachment.
Garnishee.	SEC. 3948. (2360.) The constable has the same power to administer an oath to the garnishee and to take his answer as is given to the sheriff in cases of attachment in the district court.
Appearance	SEC. 3949. (2361.) Garnishees may be required to appear and answer at the time fixed for the appearance of the parties to the action.
Attachment against non-resident.	SEC. 3950. When a writ of attachment, or of replevin, has been issued by any justice of the peace, in any action, and it shall be found that the defendant is absent, so that personal notice of service of process can not be had, it shall be the duty of the justice, upon the return day, unless the defendant appear, to make an order fixing the day for the trial, not less than sixty days thereafter, and requiring notice to be given by any constable, as provided in the next section.
The notice to be given.	SEC. 3951. Upon such order being made, at least sixty days' notice of the pendency of such action, shall be given by posting up written or printed notices in three public places in the township where the action was commenced, and such notices shall have the effect of a service, by publication in the district court, and the justice shall proceed to hear the cause upon the day specified for that purpose, but no bond shall be required of the plaintiff after judgment, as may be in the district court.
No bond as in district court.	

*Summary Remedy for Forcible Entry or Detention of Real Property.*

When allowed.	SEC. 3952. (2362.) This proceeding is allowable : <ol style="list-style-type: none"> <li>1. Where the defendant has by force or intimidation or fraud or stealth entered upon the prior actual possession of another in regard to real property and detains the same ;</li> <li>2. Where a lessee holds over after the termination, or contrary to the terms of his lease ;</li> <li>3. Where the defendant continues in possession after a sale by foreclosure of a mortgage or on execution, unless he claims by a title paramount to the lien by virtue of which the sale was made, or by title derived from the purchaser at the sale.</li> </ol>
Rent arrear.	SEC. 3953. (2363.) The mere non-payment of rent by the time stipulated in the lease does not enable a plaintiff to resort to this action unless expressly so stipulated in the lease.
Who may bring.	SEC. 3954. (2364.) The legal representative of a person who might have been plaintiff if alive, may bring this suit after his death.
Notice to quit.	SEC. 3955. (2365.) Before suit can be brought in any except the first of the above classes, three days' notice to quit must be given to the defendant in writing.
Petition.	SEC. 3956. (2366.) The petition must be in writing and sworn to.
Before whom.	SEC. 3957. (2367.) The proceedings may be had before a justice of the peace of the township where the premises are situated, or if there is no justice therein able or qualified to act, they may be brought before some justice in any adjoining township. They shall be governed by the same rules as other cases before justices of the peace except as herein modified.
Time for appearance.	SEC. 3958. (2368.) The time for appearance and pleading must not



be less than two nor more than six days from the time the notice is served on the defendant.

SEC. 3959. (2369.) No adjournment shall be made for more than **Adjournments.** ten days, nor to any other place except by consent of parties.

SEC. 3960. (2370.) If the defendant is found guilty, judgment shall **Judgment.** be entered that he be removed from the premises, and that the plaintiff be put in possession thereof, and a warrant of removal shall issue accordingly, to which shall be added a clause commanding the officer to levy the costs as in ordinary cases.

SEC. 3961. (2371.) The question of title can not be investigated in **Title not investi-** this action. And nothing herein contained prevents a party from suing **gated.** for a trespass, or from testing the right of property in any other manner.

SEC. 3962. (2372.) Thirty days' peaceable and uninterrupted pos- **Bar.** session with the knowledge of the plaintiff after the cause of action accrued, is a bar to this proceeding.

SEC. 3963. (2373.) An action of this kind can not be brought in **No joinder.** connection with any other, nor can it be made the subject of set-off.

SEC. 3964. (2374.) The warrant for removal can be executed only in the day-time.

SEC. 3965. An appeal or *writ of error*, taken in the usual way, if **Appeal.** the proper security is given, suspends the execution for costs, and may, with the consent of the plaintiff, prevent the warrant of removal from being executed, but not otherwise.

SEC. 3966. (2376.) The district court on the trial of the appeal **Restitution.** may issue a warrant of removal or re-titution, as the case may require.

*DECISIONS.* The office of the proceeding of forcible entry and detainer, 2 G., 201; M., 111, 253; the kind of possession necessary to base it, 4 Iowa, 18; the force, 2 G., 201; stealth, 4 Iowa, 18; plea of title when plaintiff relies upon the third clause of section 3952, is good, and will support a dismissal of the cause, 4 G., 440. This remedy is to protect the actual possession. There may be possession *in fact* of unimproved and uninclosed land, and an entry on such land is a possession in extent, measured by the intention, and actual possession may be found from an entry with the intention of improving, 4 Iowa, 18; see 4 Iowa, 38; title not questioned, 4 G., 440; see 3 G., 119; statement, 3 G., 502; proof in, 2 G., 201; how notice proved, 2 Iowa, 435; statements of petition, 3 G., 502; same, 2 G., 376; not the mode of trying titles, M., 111; title not questioned, 4 G., 440; with knowledge, 3 Iowa, 569; bond, 2 G., 148; complaint, *ibid.*, 376.

*General Provisions.*

SEC. 3967. (2377.) Every justice of the peace upon the expiration **Official papers to** of his term of office, must deposit with his successor his official dockets **successor.** as well as those of his predecessors which may be in his custody, there to be kept as public records. All his official papers shall also be turned over to his successor.

SEC. 3968. (2378.) If his office become vacant by death, removal **Or clerk.** from the township or otherwise, before his successor is elected, the said docket and papers shall be placed in the hands of the clerk of the district court, to be by him turned over to the successor of the justice when elected and qualified.

SEC. 3969. (2379.) The justice with whom the docket of his predecessor is thus deposited, may issue execution on, or give a transcript of, any judgment there entered in the same manner and with like effect as the justice who rendered judgment might have done. **Successor may issue execution.**

SEC. 3970. (2380.) When two or more justices are equally entitled **Successor, how determined.** to be deemed the successor in office of any justice as aforesaid, the judge

- of the county court shall determine by lot which is the successor, and shall certify accordingly.
- Certificate.** SEC. 3971. (2381.) Such certificate shall be in duplicate, one copy of which shall be filed in the county office, and the other given to the said successor.
- Interchange.** SEC. 3972. (2382.) In case of the sickness, other disability, or necessary absence of a justice at the time fixed for a trial of a cause or other proceeding, any other justice of the township may at his request attend and transact the business for him without any transfer of the business to another office. The entries shall be made in the docket of the justice at whose office the business is transacted, and the same effect shall be given to the proceedings as though no such interchanging of official service had taken place.
- Special constables.** SEC. 3973. A justice may, in writing, specially depute any discreet person of suitable age, to perform any particular duty properly devolving upon a constable. Such person has the powers of a constable for that particular purpose, and is subject to the same obligations, and shall receive the same fees.
- Process limited.** SEC. 3974. (2384.) No process can issue from a justice's court into another county, except when specially authorized.
- Sheriff and constable.** SEC. 3975. (2385.) The constable is the proper executive officer of a justice's court, but the sheriff may perform any of the duties required of him. The powers and duties of the sheriff in relation to the business of the district court, so far as the same are applicable and not modified by statute, devolve upon the constable in relation to the justice's court.
- Justice—clerk.** SEC. 3976. (2386.) The justice may be regarded as his own clerk, and performs the duty of both judge and clerk.
- Successor to renew execution.** SEC. 3977. (2387.) When the term of office of a justice of the peace for any cause expires, his successor may issue execution, or renew an execution in the same manner and under the same circumstances as the former justice might have done, if his term of office had not expired.

**PRIOR LAWS.** 1. An act to regulate and define the powers of justices of the peace and constables in civil cases, passed April 20, 1833; M. D., 1833, p. 193.

2. An act to prevent forcible entry and detainer, passed June 3, 1828; M. D., 1833, p. 374.

3. An act amending same, passed July 28, 1830; M. D., 1833, p. 379.

4. An act to prevent forcible entry and detainer, passed Dec. 26, 1837; Wis., 2d sess., No. 11, p. 23; (this act resembles nearly those of Michigan, and does not expressly repeal).

5. An act on jurisdiction and formula of justices of the peace, passed Jan. 17, 1838, in force April 1, 1838; Wis., 2d sess., No. 58, p. 127, (very full.)

6. An act to cure cases where justices did not give bond, as by sec. 39 of Michigan laws of April 30, 1833, passed June 23, 1838; Wis., special sess., No. 30, p. 356. All the above repealed Aug. 30, 1840.

7. An act to prevent forcible entry and detainer, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 217; repealed by Reprint, 1843, chap. 86, p. 302, sec. last.

8. An act on jurisdiction and formula of justices of peace, passed Jan. 21; took effect Feb. 21, 1839; I. T., 1st sess., p. 282, (similar to this;) repealed by Reprint, 1843, chap. 86, p. 302.

9. An act amending the above, passed Jan. 14, took effect Feb. 14, 1840; I. T., 2d sess., chap. 45, p. 59.

10. An act on laws of other states, passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 64, p. 87.

11. An act for the amending of the act of Jan. 14, 1840, as to justices, passed Aug. 1, 1840; I. T., 2d sess., extra, chap. 39, p. 51; also, Reprint, 1843, p. 370.

12. An act to provide for the election of justices of the peace, to prescribe their powers and duties, and regulate their proceedings, passed Feb. 9, took effect March 9, 1843; Reprint, chap. 86, p. 302, (very full—new.)

13. An act to legalize the acts of justices of the peace and constables, in certain cases, passed Feb. 12, 1844; I. T., 6th sess., chap. 11, p. 18.

14. An act amending the justice act of Feb. 9, 1843, passed Feb. 15, 1844; I. T., 6th sess., chap. 15, p. 20.

15. An act amending the justice act of Feb. 9, 1843, passed Feb. 14, took effect March 20, 1844; I. T., 6th sess., chap. 22, p. 40.

16. An act amendatory of an act, subjecting real and personal property to execution, passed Feb. 15, took effect March 15, 1844; I. T., 6th sess., chap. 23, p. 43.

17. An act concerning justices of the peace, passed Feb. 22; took effect 24th, 1847; 1st sess., chap. 74, p. 89.

CHAPTER 159.

EVIDENCE.

[Code—Chapter 130.]

SECTION 3978. Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, both civil and criminal, except as herein otherwise declared. Who competent.

SEC. 3979. (2389.) Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility. Credibility.

SEC. 3980. On the trial of any issue joined, or of any matter, or of any inquiry arising in any action or other proceeding in any court of justice, or before any person, having by law or by consent of parties, authority to hear, receive and examine evidence, no person shall be disqualified, by reason of his interest in the same, or in the event of the same whether such interest be as a party thereto or otherwise. But the party or parties thereto, and the person in whose behalf such action or other proceeding may be brought or defended shall, except as hereinafter excepted, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, on behalf of himself or either or any of the parties to the issue, action or proceeding.\* Interest not a disqualification.

SEC. 3981. But nothing herein contained shall render any person, who, in any criminal proceeding is charged with the commission of any public offense competent or compellable to give evidence therein, for or against himself. Party competent.

SEC. 3982. No person shall be allowed to testify under the provision of section 3980, where the adverse party is the executor of a deceased person, when the facts to be proved transpired before the death of such deceased person, and nothing in such section contained shall in any manner affect the laws now existing in relation to the settlement of estates of deceased persons, infants, or persons of unsound mind; or the attestation of any instrument required to be attested. But not in a criminal case.

SEC. 3983. The husband or wife shall in no case be a witness for or against the other, except in a criminal proceeding for a crime committed by one against the other, or in a civil action or proceeding one against the other, but they may in all criminal prosecutions be witnesses for each other. Not in case of executor, &c.

\* This and the next section are copied from the English act, for the reasons and authorities in its support, see page 260, of this report. *Report of Civil Code*, p. 342.

- Husband and wife.** SEC. 3984. (2392.) Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.
- Professional confidence.** SEC. 3985. (2393.) No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication properly intrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline.
- Unless waived.** SEC. 3986. (2394.) The prohibitions in the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted, waives the rights thereby conferred.
- Public officers.** SEC. 3987. (2395.) A public officer can not be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.
- Civil liability.** SEC. 3988. (2396.) No witness is excused from answering a question upon the mere ground that he would be thereby subjected to a civil liability.
- Ignominy.** SEC. 3989. (2397.) But when the matter sought to be elicited would tend to render him criminally liable or to expose him to public ignominy, he is not compelled to answer except as provided in the next section.
- Previous conviction.** SEC. 3990. (2398.) A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof.
- Moral character.** SEC. 3991. The general moral character of a witness may be proved for the purposes of testing his credibility.
- Whole of a subject may be given.** SEC. 3992. (2399.) What part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; thus when a letter is read, all other letters on the same subject between the same parties may be given. And when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood or to explain the same may also be given in evidence.
- Writing and printing.** SEC. 3993. (2400.) When an instrument consists partly of written and partly of printed form, the former controls the latter when the two are inconsistent.
- Understanding of parties.** SEC. 3994. (2401.) When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.
- Historical works, &c.** SEC. 3995. (2402.) Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest.
- Subscribing witnesses.** SEC. 3996. (2403.) When a subscribing witness denies or does not recollect the execution of the instrument to which his name is subscribed as such witness, its execution may be proved by other evidence.
- Hand-writing.** SEC. 3997. (2404.) Evidence respecting hand-writing may be given by comparison made by experts or by the jury with writings of the same person which are proved to be genuine.
- Entries, &c, when evidence.** SEC. 3998. (2405.) The entries and other writings of a person de-

ceased made at or near the time of the transaction and in a position to know the facts therein stated, are presumptive evidence of such facts when the entry was made against the interest of the person so making it, or when made in a professional capacity or in the ordinary course of professional conduct, or when made in the performance of a duty specially enjoined by law.

SEC. 3999. (2406.) Books of account containing charges by one party against the other made in the ordinary course of business, are receivable in evidence, only under the following circumstances, subject to all just exceptions as to their credibility :

1. The books must show a continuous dealing with persons generally, or several items of charge at different times against the other party in the same book or set of books.

2. It must be shown by the party's oath or otherwise that they are his books of original entries.

3. It must be shown in like manner that the charges were made at or near the time of the transactions therein entered, unless satisfactory reasons appear for not making such proof.

4. The charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why such verification is not made.

SEC. 4000. (2407.) Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgment of conveyances of real property, may be read in evidence without farther proof.

SEC. 4001. (1227.) Every instrument in writing affecting real estate, which is acknowledged or proved and certified as hereinbefore directed, may be read in evidence without farther proof.

SEC. 4002. (1228.) The record of such instrument or a duly authenticated copy thereof, is competent evidence whenever by the party's own oath or otherwise the original is shown to be lost, or not belonging to the party wishing to use the same, nor within his control. And in such case it is no objection to the record that no official seal is appended to the recorded acknowledgment thereof, if, when the acknowledgment purports to have been taken by an officer having an official seal, there be a statement in the certificate of acknowledgment that the same is made under his hand and seal of office and the record show by a scroll or otherwise that there was such a seal, which will be presumptive evidence that the official seal was attached to the original certificate.

SEC. 4003. (1229.) The provisions of the preceding section are intended to apply to all instruments heretofore recorded, as well as those hereafter to be recorded.

SEC. 4004. (1230.) Neither the certificate, nor the record nor the transcript thereof, is conclusive evidence of the facts therein stated.

SEC. 4005. (2408.) The judge of the court is a competent witness for either party and may be sworn upon the trial. But in such a case it is in his discretion to order the trial to be postponed or suspended and to take place before another judge.

SEC. 4006. (2409.) Except when otherwise specially provided, no evidence of any of the contracts enumerated in the next succeeding section is competent unless it be in writing and signed by the party charged or by his lawfully authorized agent.

SEC. 4007. (2410.) Such contracts embrace :

1. Those in relation to the sale of personal property when no part of the property is delivered and no part of the price is paid.

Books of account.

Private writing.

Instrument when evidence.

Record, when.

Retrospective.

Certificate.

Judge a competent witness.

Written evidence only admissible.

2. Those made in consideration of marriage, but not including promises to marry.

3. Those wherein one person promises to answer for the debt, default, or miscarriage of another, including promises by executors to pay the debt of their principal from their own estate.

4. Those for the creation or transfer of any interest in lands except leases for a term not exceeding one year.

5. Those that are not to be performed within one year from the making thereof.

**Exceptions.** SEC. 4008. (2411.) The provision of the first sub-division of the preceding section does not apply when the article of personal property sold is not at the time of the contract owned by the vendor and ready for delivery, but labor, skill, or money are necessarily to be expended in producing or procuring the same: nor do those of the fourth sub-division of said section apply where the purchase money or any portion thereof has been received by the vendor, or when the vendee with the actual or implied consent of the vendor has taken and held possession thereof, under and by virtue of the contract, or when there is any other circumstance which by the law heretofore in force, would have taken a case out of the statute of frauds.

**The above regulations.** SEC. 4009. (2412.) The above regulations, relating merely to the proof of contracts, do not prevent the enforcement of those which are not denied in the pleadings, unless in cases where the contract is sought to be enforced or damages to be recovered for the breach thereof against some person other than him who made it.

**Another exception.** SEC. 4010. (2413.) Nothing in the above provisions shall prevent the party himself against whom the unwritten contract is sought to be enforced, from being called as a witness by the opposite party nor his oral testimony from being evidence.

**Notarial protest.** SEC. 4011. The usual protest of a notary public without proof of his signature, or notarial seal, is *prima facie* evidence of what it recites concerning the dishonor and notice of a bill of exchange or promissory note.

#### *How Testimony is to be Procured.*

**Subpœna.** SEC. 4012. The clerks of the several courts shall, on application of any person having a cause, or any matter pending in court, issue a subpœna for witnesses under the seal of the court, inserting all the names required by the applicant in one subpœna, which may be served by the sheriff, coroner, or any constable of the county, or by the party or any other person. When a subpœna is not served by the sheriff, coroner, or constable, proof of service shall be shown by affidavit; but no costs of serving the same shall be allowed.

**Same.** SEC. 4013. The subpœna shall be directed to the person therein named, requiring him to attend at a particular time or place, to testify as a witness, and it may contain a clause, directing the witness to bring with him any book, writing, or other thing under his control, which he is bound by law to produce as evidence.

**How far sent in civil cases.** SEC. 4014. (2416.) Witnesses in civil cases can not be compelled to attend the district court out of the state where they are served, nor at a distance of more than seventy miles from the place of their residence or from that where they are served with a subpœna, unless within the same county. No other subpœna but that from the district court can compel his attendance at a greater distance than thirty miles from his place of residence or of service if not in the same county.

**Demand of fees.** SEC. 4015. (2417.) Witnesses are entitled to receive (in advance if

demande) their traveling fees to and from the court, together with their fees for one day's attendance. At the commencement of each day after the first they are farther entitled on demand to receive the legal fees for that day in advance. If not thus paid they are not compelled to attend or remain as witnesses.

SEC. 4016. (2418.) For a failure to obey a valid subpoena without a sufficient cause or excuse, or for a refusal to testify after appearance, the delinquent is guilty of a contempt of court. He is also liable to the party by whom he was subpoenaed for all consequences of such delinquency, together with fifty dollars additional damages. Disobeying subpoenas.

SEC. 4017. (2419.) Before a witness is thus liable for a contempt for not appearing, he must be served personally with the process by reading it to him, and by leaving a copy thereof with him if demanded, and it must be shown that the fees and traveling expenses allowed by law were tendered to him if required; or it must appear that a copy of the subpoena, if left at his usual place of residence, came into his hands together with the said fees and traveling expenses above mentioned. When enforced.

SEC. 4018. (2420.) If a witness conceal himself or in any other manner attempt to avoid being personally served with a subpoena, any sheriff or constable having the subpoena may use all necessary and proper means to serve the same, and for that purpose may break into any building or other place where the witness is to be found, having first made known his business and demanded admittance. Powers of officer.

SEC. 4019. A person confined in any prison in this state, may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned, and in a criminal case in any county in the state; but in all other cases his examination must be by a deposition. Prisoner examined.

SEC. 4020. While a prisoner's deposition is being taken, he shall remain in the custody of the officer having him in charge, who shall afford reasonable facilities for the taking of the depositions.

SEC. 4021. (2477.) When by the laws of any other state or country, testimony may be taken in this state to be used in the courts of such state or country, and also in all cases herein provided for taking depositions, the persons authorized to take such depositions have power to issue subpoenas and compel obedience thereto, to administer oaths, and do any other act of a court which is necessary for the accomplishment of the purpose for which they are acting. Persons authorized by other states.

SEC. 4022. (2478.) Subpoenas issued by them are valid to the same geographical extent as those emanating from a justice's court, and may be served and returned in the same manner. Subpoenas by them valid.

SEC. 4023. (2479.) Any sheriff or constable, when called upon for that purpose, shall serve such subpoenas and make return thereto. Officers must serve.

SEC. 4024. (2421.) In addition to the above remedies, if a party to a suit in his own right, on being duly subpoenaed, fail to appear and give testimony, the other party may, at his option, have a continuance of the cause as in cases of other witnesses, and at the cost of the delinquent. Parties to appear.

SEC. 4025. (2422.) Or the party so calling his opponent may, in such a case, himself become a witness, or, if he shows by his own testimony or otherwise that he could not have a full personal knowledge of the transaction, the court may order his pleading to be taken as true; such order however is subject to be reconsidered during the term of the court, upon satisfactory reasons being shown for such delinquency. Or pleading taken as true.

SEC. 4026. (2423.) The district court may by rule require the production of any papers or books which are material to the just determi- Books and papers to be produced.

nation of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them.

Petition therefor. SEC. 4027. (2424.) The petition for that purpose must state the facts expected to be proved by such books or papers, and that, as the petitioner believes, such books and papers are under the control of the party against whom the rule is sought, and must show wherein they are material. The rule shall thereupon be granted, to produce the books and papers or show cause to the contrary, if the court deems such rule expedient and proper.

Failure to obey. SEC. 4028. (2425.) On failure to obey the rule, or show sufficient cause for such failure, the same consequences shall ensue as if the party had failed to appear and testify when subpoenaed by the party now calling for the books and papers.

Writings. SEC. 4029. (2426.) Though a writing called for by one party is by the other produced, the party thus calling for it is not obliged to use it as evidence in the case.

DECISIONS UNDER THE PRIOR PRACTICE. The person contracting for illegal interest may be witness thereto, 4 Iowa, 492; where a party treats a contract as binding, although unsigned by him, he may enforce it, 5 Iowa, 341; the consideration of a contract (that passed, or needed not to have been in writing,) need not appear on the face of the contract—it may be inferred from its terms or proved by parol, 5 Iowa, 341; assignor of claim competent witness, 8 Iowa, 386, 392; competency of books of account and credibility, *Eyre v. Cook*, June, 1859; M., 281; not competent in 1 Iowa, 53; book must be produced, *Churchill, Walkley & Johnson v. Fulliam*, June term, 1859; must be made at or near transaction, 6 Iowa, 487; in the ordinary course of business, 8 Iowa, 219, 163, 229; money paid to a third person can not be so proved, *Mell & Buckworth v. Eckerson*, June, 1859; the whole account must come in, 8 Iowa, 163; the books of a third person may be admissible, *White v. Tucker*; books may be referred to to refresh memory when not admissible, *ibid.*; proof of heirship, 6 Iowa, 150; letters of administration *prima facie* evidence of intestate's death, 6 Iowa, 150; presumptive value of letters of administration as to next of kin, 6 Iowa, 150; sec. 2434, certificate of judge, 2 G., 186; 1 G., 196, 78; and of clerk, *Greason v. Davis*, Dec. term, 1859; 1 Iowa, 1; 4 G., 294; 1 G., 196; sec. 2439, certifying justice's judgments, 1 G., 78; securing evidence of note detained by adverse party, 4 Iowa, 534; parol evidence admissible to show mistake or fraud in bill of lading, 3 G., 268; 3 Iowa, 532; note is sufficient evidence to sustain a count for an account stated, M., 385, 305; note lost after suit brought, 6 Iowa, 191; parol to vary contract inadmissible, 4 G., 567; 1 Iowa, 263; permissible to explain, *Robertson & Co. v. Walters*, Dec. term, 1859; not to construe, *Campbell v. Busch*, Dec. term, 1859; denial under oath of signature, 6 Iowa, 514; 2 G., 366, 320; 1 Iowa, 263, 143; 6 Iowa, 48; 6 *ibid.*, 390, 514; if denied by one partner, *Byington v. Woodward*, Dec. term, 1859; competency of indorser, M., 84; 7 Iowa, 150, 17; 2 Iowa, 64; signing firm name admits firm, M., 182, 105; the answer to a collateral question is binding and can not be contradicted, 4 Iowa, 481; a party may lose his right to the effect of a sworn answer by filing an unsworn one, and long delay, 4 Iowa, 527; a levy on property exempt is no justification for an assault on the officer, and such proof should be excluded, 4 Iowa, 480; what is leading question, *Pelamourges v. Clark*, June, 1859; cumulative evidence, 3 G., 196; facts, not opinions, to be stated by witnesses, 4 G., 148; 1 G., 470, 474; 4 G., 148; 3 G., 555; as to right to question witness as to meaning of words not technical, see *Campbell v. Rusch*, Dec., 1859; questions in case of insanity, *Pelamourges v. Clark*, June, 1859; when loss of credit may be proved, 1 G., 470; superior weight of what is stated on oath to what is said by same witness unsworn, 1 G., 48; experts, 6 Iowa, 380; 1 Iowa, 159; 2 Iowa, 30; declaration while in possession of property, *Taylor v. Lusk*; case of conspiracy distinction between the evidence which shows combination and that which thereupon becomes competent, *Wiggins v. Leonard*, June, 1859; reproduction of testimony, 1 Iowa, 530.

On cross-examination you can only ask a witness as to facts and circumstances connected with the matter stated in his direct examination, 4 Iowa, 480; the defendant's wrongful conduct on trial with regard to an instrument sued on, may render secondary evidence thereof proper, 4 Iowa, 535; if the defendant by taking it, prevent the plaintiff from offering the note sued on in evidence, then a copy of it may be used, 4 Iowa, 535; in creditor's bill against vendee charged as fraudulent, neither the declarations of the grantor, nor his answer in chancery, nor his letters are admi-



sible to defeat grantee's title without proof of collusion between such vendee and grantor, nor to prove such collusion, 4 Iowa, 524; if the district court decline to allow a question which is put on cross-examination in order to evolve the feeling of the witness, such discretion will be presumed to be well exercised unless the contrary is made to appear, 4 Iowa, 447; hearsay inadmissible, 5 Iowa, 533; a defendant can not defend himself against a charge by showing that another had threatened to do the thing, but must go on and prove some further fact tending to show that he also did it, as well as threatened, else such threats should be ruled out, 5 Iowa, 533; evidence, however slight, which tends to prove the issue, should go to the jury, 5 Iowa, 538; 6 Iowa, 380; on presumptions, see 4 G., 468; 1 G., 134; 2 G., 2, 158; 4 G., 500, 416; 2 G., 165; 1 Iowa, 413; presumption of assent to alteration of note, 4 Iowa, 559 and 63; 7 Iowa, 143; 4 G., 212; declarations of one not party, 5 Iowa, 532; admission by agreement, 2 G., 444; 3 G., 332; M., 328; *Yost v. Devault*, June term, 1859; if record evidence has been introduced it should not be disregarded by the jury for the sole reason that it was not handed to them, 5 Iowa, 459; facts of conduct may constitute as conclusive an estoppel as those in deed or record, 5 Iowa, 422; in damages from breach of warranty, or in defenses on notes for land, the burden of showing good outstanding title, and of showing that what was paid therefor was reasonable, is on the party so asserting, 5 Iowa, 408; an implied or resulting trust may be proved by parol, 5 Iowa, 259; one who testifies to whom of a firm he gave credit in a sale made by him to the firm, states mere opinion, not competent, 4 Iowa, 230; if one introduces a witness to a preliminary question the other can not use him for the main question, 4 Iowa, 179; it is presumed that the possessor of a promissory note is the owner, and that the assignee thereof before maturity is entitled to recover, and the onus of all defenses rest on defendant until the bona fides of plaintiff's possession has been successfully assailed, 4 Iowa, 140; the objection that a question is leading must be made when it is put, 4 Iowa, 44; declarations of partners made during firm existence, in the course of its trade, before question made as to who were members of the firm, may be shown to prove a co-defendant not a co-partner, 4 Iowa, 230; only one who avers that land was bought with his money can prove by parol the same equitably his, 4 Iowa, 222; negro incompetent under code, 2 Iowa, 82; sole heir same, 3 G., 543; value of wife's testimony, 6 Iowa, 263; see 2 Iowa, 82; the defendant in a case for malicious prosecution can not make himself a witness, 5 Iowa, 283; approved, *Scott v. Babcock*, 3 G., 133; 5 Iowa, 285; self-crimination, 2 G., 532.

Dismissal of suit as to indorser qualifies, 2 Iowa, 67; true test of interest, 2 Iowa, 580; see 3 Iowa, 532; interestedness, 1 Iowa, 212; competency of defendant called, 4 G., 115; sole heir incompetent, 3 G., 542; parties incompetent, 3 G., 541; officer incompetent when? 2 G., 208; payee incompetent to prove usury, *ibid.*, 217; attorney competent, *ibid.*, 227; a partner having suffered judgment against him for debt and costs is competent to prove a co-defendant, not a co-partner, and he can not be excluded by the plaintiff's refusal to accept such judgment, 4 Iowa, 230; a vendor as against the vendee is competent for the vendor's creditor to prove fraud in such sale; so also such vendor's wife or widow, 4 Iowa, 44; when a party would establish a contract touching real estate, by other means than writing, he can only avoid the statute of frauds by clear proof of the contract and compliance, 4 Iowa, 279; vary contract by parol, 6 Iowa, 523; 1 *ibid.*, 263; 4 G., 567; 3 Iowa, 74; 1 G., 78, 152; 3 G., 233; 1 Iowa, 423, 573; 2 G., 208; *Roberts v. Waters*, Dec., 1859; 2 Iowa, 30; same, 1 Iowa, 159; as to section 2406, see 6 Iowa, 488; plaintiff competent, 7 Iowa, 319; payment for rails, 4 G., 63; credit need not be proved, 2 G., 139; definition of section 2399, 3 Iowa, 89; and *Williamson v. Donaldson*, June, 1859; remarks at time of demanding writ not competent, 4 G., 265; in replevin a conversation competent, 3 G., 211; see a promise, not a promise to pay the debt of another, 5 Iowa, 511; *Bannon v. Bean*, Dec. term, 1859; a verbal agreement between two or more claimants of public land that one shall enter and convey part to the other, who shall pay his proportion of the price, creates an enforceable trust and is not within the statute of frauds, 5 Iowa, 259; voluntary agreement without consideration void as to heirs, 4 Iowa, 227; promise to pay debt of another, 4 G., 489; same as English statute of frauds, 2 Iowa, 528; verbal contract for land, 4 G., 536; place of signature, 3 G., 430; giving note evidence of consideration, 3 G., 342; resulting trust, 3 G., 371; same, *ibid.*, 527; contract may be shown quite void by parol, 1 Iowa, 573; trust established by parol, 4 G., 89; parol evidence competent to establish outside facts of contract, *ibid.*, 410.

*Documentary Evidence.*

- Affidavit.** SEC. 4030. An affidavit is a written declaration under oath, made without notice to the adverse party.
- Names in *jurat*.** SEC. 4031. In every affidavit made, the names of the several persons making such affidavit, shall be written in the *jurat*.
- Certificate.** SEC. 4032. When any affidavit is sworn by any person who from his signature appears to be illiterate, or a foreigner imperfectly acquainted with the English language, the officer taking such affidavit shall certify in the *jurat*, that the affidavit was read in his presence to the party making the same, and that such party seemed to understand the same, and that the said party wrote his mark or signature, in the presence of the officer taking such affidavit.
- Assurance of belief at least.** SEC. 4033. All facts authenticated by an oath, should be attended by the assurance of knowledge, or at least of a belief, and to that end, if the facts are stated in a positive manner, the oath may be that the affiant believes them, but if the facts, or any of them, are stated not positively, but as a belief, then the oath must not be of a belief, but of the truth of them, and no swearing to a belief of a belief shall be a sufficient oath.\*
- In the first person.** SEC. 4034. Every affidavit shall be drawn up in the first person, and the affiant shall sign his name immediately below the matter sworn to.
- Who may certify.** SEC. 4035. An affidavit may be made within or without this state, before any person authorized to administer oaths.
- Affidavits out of state.** SEC. 4036. (2475.) Affidavits taken out of the state before any judge or clerk of a court of record, or before a notary public or a commissioner appointed by the governor of this state to take acknowledgment of deeds in the state where such affidavit is taken, are of the same credibility as if taken within the state.
- Signature and seal, presumption.** SEC. 4037. (2476.) The signature and seal of such of the officers herein authorized to take depositions or affidavits as have a seal, and the simple signature of such as have no seal, are presumptive of the genuineness of such signature as well as of the official capacity of the officer, except as herein otherwise declared.

\* We will illustrate the evil to be averted by this section. A. makes a statement in an affidavit thus: "B. is a non-resident of the state of Iowa," and it is sworn to thus: "I believe the facts stated in the petition are true." Or perhaps, the statement is, "I believe B. is a non-resident of the state of Iowa," and it is sworn to thus: "the facts stated in the petition are true." Now, in both these cases the testimonial assurance is that of a belief. Although, formerly more assurance, than this comparative assertion, was in some cases demanded, the demand was not based on any sound philosophy, and now, the above would be, in all cases, where not otherwise provided by express law, sufficient. But, suppose that the petition stated, "I believe B. is a non-resident," and was sworn to thus: "I believe the facts stated in the petition are true." Now, you observe, the assurance is less than that of a belief—it is one stage further from positive assurance. It is not that the party believes, but only that he believes that he believes. The distinction is a plain one, and is practically drawn by men who take such last named oaths, who would not take the former. For, although one can be convicted of perjury on an oath as to his *belief* of an *external fact*, for that is a positive assurance, as to his state of mind; yet it is doubtful, if he could be on his belief, not of an external fact, but of his own belief—which is not a positive assurance of his state of mind, but a mere *belief* as to his state of mind. No form of *jurat* can be invented, which will avoid the evil. The rule suggests a simple remedy. Let the plaintiff state, in his petition, not states of mind, but *facts*, under a positive form, and let the *jurat* contain the qualification of the state of mind—assurance—if one is needed, as, "the facts are true," or "I believe the facts to be true." Much moral perjury which now is done, and can not be reached, will thus be averted. *Report on Civil Code*, p. 343.

SEC. 4038. (2480.) Where a person is desirous of obtaining the affidavit of another who is unwilling to make the same fully, he may apply to any officer competent to take depositions as herein declared, by petition, stating the object for which he desires the affidavit. Affidavits how compelled.

SEC. 4039. (2481.) If such officer is satisfied that the object is legal and proper, he shall issue his subpoena to bring the witness before him, and if he fails then to make a full affidavit of the facts within his knowledge to the extent required of him by the officer, the latter may proceed to take his deposition by question and answer in writing in the usual way, which deposition may afterwards be used instead of an ordinary affidavit. Same.

SEC. 4040. (2482.) The officer thus applied to, may in his discretion require notice of the taking of such affidavit or deposition to be given to any other person interested in the subject matter and allow him to be present and cross-examine such witness. Notice to opposite party.

SEC. 4041. (2483.) The court or officer to whom any *ex parte* affidavit is presented as a basis for some action, in relation to which any discretion is lodged with such court or officer, may, if deemed proper, require the witness to be brought before some proper officer and subjected to cross interrogatories by the opposite party. Witness cross-interrogated.

SEC. 4042. (2427.) Publications required by law to be made in a newspaper may be proved by the affidavit of any person having knowledge of the fact, specifying the times when, and the paper in which the publication was made. But such affidavit must, for the purpose now contemplated, be made within six months after the last day of publication. Publications in newspapers.

SEC. 4043. (2428.) The posting up or service of any notice or other paper required by law may be proved by the affidavit of any competent witness, attached to a copy of said notice or paper, and made within six months of the time of such posting up. Posting of papers.

SEC. 4044. (2429.) Any other fact which is required to be shown by affidavit, and which may be required for future use in any action or other proceeding, may be proved by pursuing the course above indicated as nearly as the circumstances of the case will admit. Other facts.

SEC. 4045. (2430.) Such proof so made may be perpetuated and preserved for future use by filing the papers above mentioned in the office of the judge of the county court. And the original affidavit appended to the notice or paper, if there be one, and if not the affidavit by itself, is presumptive evidence of the facts stated therein, but does not preclude other modes of proof now held sufficient. Above proof perpetuated.

SEC. 4046. (2431.) A copy of the field notes of any surveyor or a plat made by him and certified under oath as correct, may be received as evidence to show the shape or dimensions of a tract of land, or any other fact whose ascertainment requires only the exercise of scientific skill or calculation. Field notes and plat of surveyors.

SEC. 4047. (2432.) Duly certified copies of all records and entries or papers belonging to any public office or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original record or paper so filed. Copies when evidence.

SEC. 4048. It shall be the duty of the recorder, in each of the several counties in this state, to cause to be procured a book, entitled "copies of original entries," to be kept as a record, in his office, in which shall be copied a list of the original entries of lands within his county, with name of the person or persons entering the same, and the date of such entry, for which he shall receive a reasonable compensation, to be audited and allowed by the county judge of his county. Copies of original entries.

- Certified copies therefrom.** SEC. 4049. Said book, containing a copy of such entries, when compared with the originals, and certified to as true copies by the register of the land office at which such original entries were made, shall be deemed a matter of record, and certified copies thereof, under the hand of said recorder, may be received and read in evidence in all the courts in this state, with like effect as other certified copies of original papers recorded in his office.
- Additional entries.** SEC. 4050. Said recorder shall from time to time, as he may deem it necessary, procure in same manner, copies of any additional entries under the same restrictions, and with like effect, until all the lands in his county shall have been entered, and certified copies of the entries thereof procured.
- Officer to give copies.** SEC. 4051. (2433.) Every officer having the custody of a public record or writing is bound to give any person, on demand, a certified copy thereof on payment of the legal fees therefor.
- Copies of maps and documents, &c.** SEC. 4052. Copies of all maps, official letters, and other documents in the office of the surveyor general of this state, when certified to by that officer according to law, shall be received by the courts of this state as *prima facie* evidence of the existence of the originals; and that said copies are copies of the original, notwithstanding such maps, official letters, &c., may themselves be copied.
- Certificates of officer.** SEC. 4053. (2434.) The certificate of a public officer that he has made diligent and ineffectual search for a paper in his office, is of the same efficacy in all cases as if such officer had personally appeared and sworn to such facts.
- Receiver's certificate.** SEC. 4054. (2435.) The usual duplicate receipt of the receiver of any land office, or if that be lost or destroyed or beyond the reach of the party, the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent, against all but the holder of an actual patent.
- Certificate.** SEC. 4055. The certificate of the register or receiver of any land office of the United States, as to the entry of land within his district, shall be *prima facie* evidence of the person entering, to the real estate therein named.
- Signature.** SEC. 4056. In the cases contemplated in the last seven sections, the signature of the officer shall be presumed to be genuine, until the contrary is shown.
- Judicial record proved.** SEC. 4057. (2438.) A judicial record of this state or of any of the federal courts of the United States may be proved by the production of the original, or by a copy thereof certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one.
- Of a sister state.** SEC. 4058. (2438.) That of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of a judge, chief justice, or presiding magistrate that the attestation is in due form of law.
- Of justices of the peace.** SEC. 4059. (2439.) The official certificate of a justice of the peace of any of the United States, to any judgment, and the preliminary proceedings before him, supported by the official certificate of the clerk of any court of record within the county in which such justice resides, stating that he is an acting justice of the peace of that county, and that the signature to his certificate is genuine, is sufficient evidence of such proceedings and judgment.
- Of foreign countries.** SEC. 4060. (2440.) Copies of records and proceedings in the courts of a foreign country may be admitted in evidence upon being authenticated as follows:

1. By the official attestation of the clerk or officer in whose custody such records are legally kept, and

2. By the certificate of one of the judges or magistrates of such court, that the person so attesting is the clerk or officer legally entrusted with the custody of such records, and that the signature to his attestation is genuine, and

3. By the official certificate of the officer who has the custody of the principal seal of the government under whose authority the court is held, attested by said seal, stating that such court is duly constituted, specifying the general nature of its jurisdiction, and verifying the seal of the court.

SEC. 4061. (2441.) Acts of the executive of the United States, or of this or any other state of the Union, or of a foreign government, are proved by the records of the state department of the respective governments, or by public documents purporting to have been printed by order of the legislatures of those governments respectively, or by either branch thereof. Acts of the executive.

SEC. 4062. (2442.) The proceedings of the legislature of this or any other state of the Union, or of the United States, or of any foreign government, are proved by the journals of those bodies respectively, or of either branch thereof, and either by copies officially certified by the clerk of the house in which the proceeding was had, or by a copy purporting to have been printed by their order. Legislative proceedings.

SEC. 4063. (2443.) Printed copies of the statute laws of this or any other of the United States, or of Congress, or of any foreign government, purporting or proved to have been published under the authority thereof, or proved to be commonly admitted as evidence of the existing laws in the courts of such state or government, shall be admitted in the courts of this state as presumptive evidence of such laws. Statute laws.

SEC. 4064. (2444.) The public seal of the state or county affixed to a copy of a written law or other public writing, is also admissible as evidence of such law or writing respectively. The unwritten laws of any other state or government may be proved as facts by parol evidence, and also by the books of reports of cases adjudged in their courts. Unwritten laws.

### *Depositions.*

SEC. 4065. After the commencement of a civil action, or other civil proceeding, if a witness resides within this state, but in a different county from the place of trial, or is about to go beyond the reach of a subpoena, or is for any other cause expected to be unable to attend court at the time of trial, the party wishing his testimony, may, whenever he judges it expedient, take his deposition in writing before any person having authority to administer oaths; and if the action is by equitable proceedings, and no consent has been entered into to try the same by the second method of trying equitable actions, then without any other reason therefor, either party may so take the deposition of any witness. Take depositions.

SEC. 4066. Reasonable notice of the name of the witness, and of the time and place, when and where the same will be taken, must be given to the opposite party. Notice of.

SEC. 4067. If the case is in the district court, the deposition of a witness, residing out of the county, whether within or without the state, may be taken before one or more commissioners on written interrogatories. Deposition.

SEC. 4068. (2448.) The party wishing to take such deposition, may Who commissioners.

select any of the officers mentioned in the next section as such commissioner, or the parties may agree upon, or the court appoint in the commission, any other individual for that purpose.

Same.

SEC. 4069. The clerk or any judge of any court of record, or any commissioner appointed by the governor of this state to take acknowledgements of deeds in another state, or any notary public, or any consul of the United States may be selected and appointed by the party such commissioner, either by the name of office of such officer, or by his individual name and official style, and the name of the court of which such constituted commissioner is clerk or judge, and the name of the state and county, or if without the United States and Canada, the name of the state and town, or city in which such commissioner of deeds, notaries, or consul resides, must be stated in the notice and in the commission issued.

Qualification.

SEC. 4070. (2450.) None of the above named officers is permitted to take the depositions aforesaid, by virtue of a commission directed to him merely as such officer, unless taken within the geographical limits to which his official jurisdiction extends.

Notice

SEC. 4071. (2451.) Reasonable notice must be given to the opposite party of the time when a commission will be sued out of the office of the clerk of the district court for taking the deposition of the witness, (naming him,) which notice must be accompanied with a copy of the interrogatories to be asked him.

Cross-interrogatories.

SEC. 4072. At or before the time thus fixed, the opposite party may file cross-interrogatories—if cross-interrogatories are not filed—the clerk shall file the following:

1. Are you directly or indirectly interested in this action? and if interested, explain the interest you have.

2. Are all your statements in the foregoing answers made from your personal knowledge? and if not, do your answers show what are made from your personal knowledge, and what from information, and the source of that information? if not, now show what is from information, and give its source.

3. State everything you know concerning the subject of this action, favorable to either party.

Reasonable notice.

SEC. 4073. The reasonable notice hereinbefore mentioned, is at least when served on the attorney, ten days, and when served on the party, within the county, five days; if served on the party anywhere else, the reasonable notice shall be that required under other similar circumstances, in the service of an original notice; and when depositions are to be taken in pursuance of the first of the above methods, one day in addition must be allowed for every thirty miles travel from the place where the notice is served, to that where the depositions are to be taken. No party shall be required to take depositions when the court is in actual session.

Same.

SEC. 4074. The notice, or notice and copy of interrogatories may be served by the same persons, on the same persons, in the same manner, and may be returned, and the return shall be authenticated in the same way as should be an original notice in the same cause, when served other than by publication.

How served.

SEC. 4075. It may also be served personally on any attorney of the adverse party of record in the cause.

When served.

SEC. 4076. Whenever the adverse party has been notified by publication only, and has not appeared, he shall be deemed served with the notice or the notice and interrogatories, by the filing of the same with the clerk in the cause.

SEC. 4077. (2454.) Subject to the regulations herein contained, the court may establish farther rules for taking depositions and all other acts connected therewith. Farther rules.

SEC. 4078. The commission issues in the name of the court and under its seal. It must be signed by the clerk, and need contain nothing but the authority conferred upon the commissioner, and instructions to guide him, a statement of the cause in which the testimony is to be used, and a copy of the interrogatories on each side appended. How commission issues.

SEC. 4079. (2456.) The person before whom any of the depositions above contemplated are taken, must cause the interrogatories propounded (whether written or oral) to be written out and the answers thereto to be inserted immediately underneath the respective questions. The answers must be in the language, as nearly as practicable, of the witness, if either party requires it. The whole being read over by or to the witness must be by him subscribed and sworn to in the usual manner. Deposition how taken

SEC. 4080. (2457.) All exhibits produced before the person taking the deposition, or proved or referred to by any witness, or correct copies thereof, must be appended to the depositions and returned with them unless sufficient reasons be shown for not so doing. Exhibits.

SEC. 4081. (2458.) The person taking the deposition shall attach his certificate thereto stating that it was subscribed and sworn to by the deponent at the time and place therein mentioned. The whole, including the commission and interrogatories (when any such were issued,) must then be sealed up and returned to the clerk of the proper county by mail unless some other mode be agreed upon between the parties. Certificate. Return.

SEC. 4082. Where a deposition is taken upon interrogatories, neither party, nor his agent or attorney, shall be present at the examination of a witness, unless both parties are present, or represented by an agent or attorney, and the certificate shall state such fact, if party or agent is present. Interrogatories, how taken.

SEC. 4083. (2459.) The depositions when thus returned must be opened by the clerk and placed on file in his office; after which he shall at any time furnish any person with an attested copy of the same upon payment of the customary fees, but must not allow them to be taken from his office previous to the next term of the court unless by the mutual written consent of the parties. Opened.

SEC. 4084. The depositions when returned by mail, must be directed to the clerk of the court. They should state on the outside of the envelope the title of the cause in which they are to be used. Sent by mail.

SEC. 4085. (2461.) Unimportant deviations from any of the above directions shall not cause the depositions to be excluded where no substantial prejudice could be wrought to the opposite party by such deviation. Formal deviations.

SEC. 4086. (2462.) Where depositions are directed to be taken before a judge or justice of the peace merely by his name of office the return must contain an authentication by the clerk of the proper court under his seal of office verifying the fact that the person who took the deposition is really such officer. Taken by an officer.

SEC. 4087. (2463.) The deposition in each of the above cases must show that the witness is a non-resident of the county, or such other fact as renders the taking of the deposition legal, and no such deposition shall be read on the trial if at the time the witness himself is produced in court. Deposition what to show.

Exceptions.	SEC. 4088. Exceptions to depositions shall be in writing, specifying the grounds of objection, and filed with the papers in the cause.
When not regarded.	SEC. 4089. No exception other than for incompetency or irrelevancy shall be regarded, unless made and filed before the commencement of the trial.
Same heard.	SEC. 4090. The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions, before the commencement of the trial.
Errors waived.	SEC. 4091. Errors of the court in its decision upon exception to depositions, are waived, unless excepted to.
How for justice's courts.	SEC. 4092. (2465.) In cases in a justice's court, when the deposition of a witness is to be taken out of the state, the commission shall issue from the clerk of the district court under his seal of office. The appointment of the commissioner shall be in point of form made as from the district court but the commission shall state in what court it is to be used.
Transferred to district court.	SEC. 4093. (2466.) Depositions taken to be used in a justice's court shall be transferred to the district court if the case be appealed and may be used on the trial there in the same manner as if taken regularly after the case was in the district court.

**DECISIONS UNDER THE PRIOR PRACTICE.** A commission should issue to take the testimony of one without the state, but the testimony of one within the state, may be taken either with or without a commission, 5 Iowa, 457; the subscribing and swearing of the witness presumed to have been at the place of taking the deposition, 4 Iowa, 590; the commission issued under the seal of the district court will be presumed to have issued by the authority of the court, 4 Iowa, 590; the right of deposition evidence considered, 5 Iowa, 457; leading questions must have been objected on service of copy, 4 G., 416; notice of officer before whom, 4 Iowa, 459; the two modes of taking testimony, 5 Iowa, 457; reading enough, if no copy demanded, 4 G., 263; 2447, see 5 Iowa, 457; to be taken before the officer named, 6 Iowa, 232; oral testimony in equity, 3 G., 556; name of office of officer, 4 Iowa, 590; name of officer, *ibid.*, 459; 6 Iowa, 232; objection to deposition may be waived, 4 G., 290; so also to a bad notice by appearance to examine, 8 Iowa, 207; form of certificate, 1 Iowa, 1; same, 2 G., 186; a commission directed to the "clerk of the district court," is not sufficiently certified by "the clerk of the court of common pleas," unless it also appear that they are the same, 4 Iowa, 590; the deposition must be certified so as to show it taken before the very person before whom it was to be taken, 4 Iowa, 459; 6 Iowa, 229; 4 Iowa, 587; certificate of due form, 2 G., 186; 1 G., 196; 1 G., 78; 6 Iowa, 172; illegibility may be deciphered by a jury, 2 G., 238; 6 Iowa, 514; time of notice of deposition, 8 Iowa, 260; 4 Iowa, 551; if both parties put questions, the deposition may be used by either, 4 G., 290, and *Pelamourges v. Clark*, June, 1859; objection to questions should be made when it is taken, 4 G., 416; or when commission issues, 6 Iowa, 234; 4 Iowa, 44, 54; but that document was not appended, may be afterwards made, 7 Iowa, 435; parts of answers not responsive will be excluded, 1 G., 360; 7 Iowa, 224; 7 Iowa, 347; to obtain a new trial from the jury's having taken depositions to their room, there must appear to have been prejudice to the mover, *Shields v. Gaffey*, Dec., 1859; the appellant from a motion to suppress depositions because the notice did not give the time allowed for the distance, must show by the record that the distance was too great for the time, 4 Iowa, 552; value as title, of certificate of the treasurer of the Des Moines river board of public works, 4 G., 72; 2 G., 77; same, *ibid.*, 543; foreign laws how pleaded and proved, 4 Iowa, 464, 466; 5 Iowa, 337; *Taylor, Shipton & Co. v. Runyan & Brown*, Dec., 1859; 5 Iowa, 364; must be stated as facts, 4 Iowa, 468; 5 Iowa, 364; proved, 1 Iowa, 8; 5 Iowa, 509; unwritten law and practice under a statute may be proved by witnesses or deposition, *Greason v. Davis*, Dec., 1859; under a general denial without a specific statement of the statute of another state on which he relies as a fact, defendant can not give in evidence the law, 4 Iowa, 469; the true reading of the law, and from the files of the secretary's office, the court knows *ex-officio*, 5 Iowa, 510; provoking language is not a defense to an action for assault and battery, mitigation only, 5 Iowa, 480; no fact can be held as *res adjudicata*, except such fact as was an ultimate fact, put directly in issue and decided, 4 Iowa, 199; an intent to



injure, although averred need not be proved, where not necessary to fix liability, 4 Iowa, 506.

*Perpetuating Testimony.*

SEC. 4094. The testimony of a witness may be perpetuated in the following manner: Petition to perpetuate testimony

SEC. 4095. The applicant shall file in the office of the clerk of the district court, a petition to be verified, in which shall be set forth, specially, the subject matter, relative to which testimony is to be taken, and the names of the persons interested, if known to the applicant; and if not known, such general description, as he can give of such persons, as heirs, devisees, alienees, or otherwise. The petition shall also state the names of the witnesses to be examined, and the interrogatories to be propounded to each; that the applicant expects to be a party to an action in a court of this state, in which such testimony will, as he believes, be material, and the obstacles preventing the immediate commencement of the action, where the applicant expects to be the plaintiff.

SEC. 4096. The court or the judge thereof, may forthwith make an order allowing the examination of such witnesses. The order shall prescribe the time and place of the examination; how long the parties interested shall be notified thereof, and the manner in which they shall be notified. Order of court or judge.

SEC. 4097. When it appears satisfactorily to the court or judge, that the parties interested can not be personally notified, such court or judge shall appoint a competent attorney to examine the petition and prepare and file cross interrogatories to those contained therein. The witnesses shall be examined upon the interrogatories of the applicant, and upon cross interrogatories, where they are required to be prepared, and no others shall be propounded to them; nor shall any statement be received, which is not responsive to some of them. The attorney filing the cross interrogatories, shall be allowed a reasonable fee therefor, to be taxed in the bill of costs. If parties can not be personally notified, what to be done.

SEC. 4098. Such depositions shall be taken before some one authorized by law to take depositions, or before some one specially authorized by the court or judge, and shall be returned to the clerk's office of the court, in which the petition was filed. Taken before whom.

SEC. 4099. The court or judge, if satisfied that the depositions have been properly taken, and as herein required, shall approve the same and order them to be filed; and if a trial be had between the parties named in the petition, or their privies or successors in interest, such depositions, or certified copies thereof, may be given in evidence by either party, where the witnesses are dead or insane, or where their attendance for oral examination can not be obtained, as required; but such depositions shall be subject to the same objections for irrelevancy and incompetency, as may be made to depositions taken, pending an action. Court's approval, &c.

*Other Provisions.*

SEC. 4100. (2474.) In all cases of taking depositions as hereinbefore provided the costs thereof must be paid in the first place by the party at whose instance they are taken, subject like other costs to be taxed against the failing party in the suit. Costs, how regulated.

SEC. 4101. (2997.) Proof of actual penetration into the body is sufficient to sustain an indictment for rape. Rape.

SEC. 4102. (2988.) A conviction can not be had upon the testimony Testimony of accomplice.

of an accomplice unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof.

Of female enticed.

SEC. 4103. (2999.) Upon a trial for enticing or taking away an unmarried female of previously chaste character for the purpose of prostitution, or aiding or assisting therein, or for seducing and debauching any unmarried woman of previously chaste character, the defendant can not be convicted upon the testimony of the person injured unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense.

Existing rules.

SEC. 4104. (2484.) The ordinary rules of evidence not incompatible with those herein prescribed are not intended to be hereby changed.

PRIOR LAWS. 1. An act to prescribe the mode of proof of justice's judgments of sister states, passed March 1, 1831; M. D., 1833, p. 212.

2. An act for the prevention of frauds, passed April 12, 1827; M. D., 1833, p. 338.

3. An act concerning depositions, passed April 12, 1827; M. D., 1833, p. 415. Repealed April 12, 1839; I. T., 1st sess., p. 172.

4. An act making receiver's receipts or certificates, evidence, passed Dec. 9, 1836; Wis., 1st sess., No. 23, p. 53.

5. An act to authorize making party a witness, passed Jan. 19, 1838; Wis., 2d sess., No. 88, p. 296. All the above repealed Aug. 30, 1840.

6. An act regulating mode of taking depositions and for perpetuating testimony, passed Dec. 19, 1838, took effect April 1, 1839; I. T., 1st sess., p. 172; also Reprint, 1843, p. 225.

7. An act to prescribe the mode of proof of justice's judgments of sister states, passed Jan. 15, took effect Feb. 15, 1839; I. T., 1st sess., p. 282. Repealed by Reprint, 1843, chap. 86, p. 370.

8. An act making signature conclusive evidence unless denied on oath, section 10 of Jan. 4, took effect March 1, 1839; I. T., 1st sess., p. 385.

9. An act to authorize making party a witness, passed Dec. 23, took effect Jan. 23, 1840; I. T., 2d sess., chap. 9, p. 10. Repealed by Reprint, 1843, chap. 71, p. 261.

10. An act to prevent frauds, passed Jan. 16, took effect Feb. 16, 1840; I. T., 2d sess., chap. 54, p. 75; also Reprint, 1843, p. 270.

11. An act supplementary, on evidence by parties, passed Jan. 28, 1842; I. T., 4th sess., chap. 25, p. 21. Repealed by Reprint, chap. 71, p. 261.

12. An act as to value as evidence, of certificates of land office, passed Feb. 10, 1842; I. T., 4th sess., chap. 53, p. 38; also Reprint, 1843, p. 387.

13. An act to authorize evidence by the oath of parties, passed Jan. 20, took effect Feb. 20, 1843. Reprint, 1843, chap. 71, p. 261.

14. An act as to foreign law and evidence of it, passed Jan. 16, 1840; I. T., 2d sess., chap. 6, p. 87; also Reprint, 1843, p. 575.

15. An act as to conveyances, passed Feb. 15, 1844; I. T., 6th sess., chap. 30, p. 53.

16. An act as to proof of publication and distribution of laws of state, 1st sess., extra, chap. 5, p. 11, passed Jan. 22, 1848?

17. An act as to deeds from state, passed Jan. 22, 1848? 1st sess., extra, chap. 6, p. 12.

## CHAPTER 160.

### JUDGMENT LIEN.

[Code—Chapter 131.]

What judgments. SECTION 4105. (2485.) Judgments in the supreme or district court of this state, or in the district or circuit court of the United States, if

rendered within this state, are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire before the expiration of the lien as hereinafter provided. What property.

SEC. 4106. (2486.) When the lands lie in the county wherein the judgment was rendered, the lien shall attach from the date of such rendition. From what state.

SEC. 4107. (2487.) If the lands lie in any other county the lien does not attach until an attested copy of the judgment is filed in the office of the clerk of the district court of the county in which the land lies. In other counties.

SEC. 4108. (2488.) Such clerk shall, on the filing of a transcript of the judgment in his office, immediately proceed to docket and index the same in the same manner as though rendered in the court of his own county. Docketed in other counties.

SEC. 4109. (2489.) The liens above authorized continue in force for the term of ten years only from the date of the judgment. Liens ten years.

PRIOR LAW. 1. An act concerning judgment liens, passed Jan. 19, 1846; I. T., 8th sess., chap. 34, p. 33.

DECISIONS. Judgments not liens under the law of Wisconsin and Iowa, previous to the statute of January 16, 1840, 1 G., 275; and was by that law also a lien on equitable interests, 2 Iowa, 378; lien as to pre-emption right, 1 G., 131; judgment lien will hold against prior unrecorded deed without actual notice under registry law of 1840, 2 G., 39; not a lien on after acquired estate till levy made, 1 G., 275, 131; [but see section 4105;] see 3 Iowa, 382; see 2 G., 39.

## CHAPTER 161.

### GENERAL PROVISIONS.

[Code—Chapter 134.]

SECTION 4110. (2500.) The right of civil remedy is not merged in a public offense, but may in all cases be enforced independently of and in addition to the punishment of the latter. Civil remedy not merged.

SEC. 4111. (2501.) When a wrongful act produces death the perpetrator is civilly liable for the injury. The parties to the action shall be the same as though brought for a claim founded on contract against the wrong doer and in favor of the estate of the deceased. And the sum recovered shall be disposed of in the same manner, except that when the deceased left a wife, child or parent surviving him, it shall not be liable for the payment of debts. Homicides civilly liable. Frauds.

SEC. 4112. (2504.) A person whose religious faith and practice are to keep the seventh day of the week as a day set apart by divine command, and dedicated to rest and religious uses, can not be compelled to attend as a juror on that day, and shall in other respects be protected in the enjoyment of his opinions to the same extent as those who keep the first day of the week. Keepers of seventh day protected.

SEC. 4113. (2505.) When security is required by law to be given and no particular mode is prescribed, it shall be by bond. Security to be by bond.

- Its character.** SEC. 4114. (2506.) Such security, when not otherwise directed, may, if for the benefit of individuals, be given to the party intended to be thereby secured. If in relation to the public matters concerning the inhabitants of one county or part of a county, it may be made payable to the county; if concerning the inhabitants of more than one county, it may be made payable to the state. But a mere mistake in these respects, will not vitiate the security.
- Investments, how made.** SEC. 4115. (2507.) Where investments of money are directed to be made and no mode of investment is pointed out by statute, they must be made in the stocks of this state or of those of the United States, or upon bond and mortgage of real property of the clear unincumbered value of at least twice the investment.
- Security, how discharged.** SEC. 4116. (2508.) When such investment is made by order of any court, the security taken shall in no case be discharged, impaired, or transferred without an order of the court to that effect entered on the minutes thereof.
- Money received and reinvested.** SEC. 4117. (2509.) The clerk or other person appointed in such cases to make the investment, must receive all moneys as they become due thereon and apply or reinvest the same under the direction of the court, unless the court appoint some other person to do such acts.
- Accounts rendered.** SEC. 4118. (2510.) Once in each year, and oftener, if required by the court, the person so appointed must render to the court an account in writing and on oath of all moneys so received by him and of the application thereof.
- Defective bonds not to vitiate proceedings.** SEC. 4119. (2511.) No defective bond or other security, or affidavit in any case, shall prejudice the party giving or making it, provided it be so rectified within a reasonable time after the defect is discovered as not to cause essential injury to the other party.
- Inferior tribunals. Presumption.** SEC. 4120. (2512.) The future proceedings of all officers and of all courts of limited and inferior jurisdiction within this state shall, like those of general and superior jurisdiction, be presumed regular except in regard to matters required to be entered of record, and except where otherwise expressly declared.
- Time defined.** SEC. 4121. Unless the terms clear days are used, the mode of computing time is by excluding the first day and including the last, and should the last day fall on Sunday, the length of the time prescribed shall be extended one day, so as to include the whole of the following Monday, unless otherwise expressed.
- Money includes damages.** SEC. 4122. An action for the recovery of money in the meaning of this code, includes an action for the recovery of damages, as well as of money due by contract.
- Clerk means.** SEC. 4123. The word "clerk" means the clerk of the court in which the action is brought or is pending, or in which the proceeding is had; and the words "clerk's office," mean his office.
- Degrees.** SEC. 4124. Degrees of affinity and consanguinity in this act, shall be computed by the civil law.
- Affidavit of security.** SEC. 4125. The ministerial officer whose duty it is to take a surety in any bond provided for by this code, shall have the right to require the person offered as surety to make affidavit of his qualification, which affidavit may be made before such officer. The taking of such an affidavit shall not exempt the officer from any liability to which he might otherwise be subject, for taking insufficient security.
- Surety resident.** SEC. 4126. The surety in every bond provided for by this code, must be a resident of this state, and worth double the sum to be secured, beyond the amount of his debts, and have property liable to execution

in this state equal to the sum to be secured. Where there are two or more sureties in the same bond, they must, in the aggregate, have the qualification prescribed in this section.

SEC. 4127. No action to obtain a discovery shall be brought, except that where any person or corporation is liable, either jointly or severally with others, by the same contract, an action may be brought against any of the parties who are liable to obtain discovery of the names and residences of the others who are liable. In such action, the plaintiff shall state in his petition, in effect, that he has used due diligence, without success, to obtain the information asked to be discovered, and that he does not believe the parties to the contract, who are known to him, have property sufficient to satisfy his claim. The petition shall be verified as other petitions, and the cost of such action shall be paid by the plaintiff, unless the discovery be resisted. Bill of discovery

SEC. 4128. Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action has arisen therefrom. Successive actions ↓

SEC. 4129. In an action where an attachment has been granted, the execution by or for the defendant, of a bond whereby the attachment is discharged, or the possession of the attached property is obtained or retained by him, shall be an appearance of such defendant in the action. What shall be an appearance.

SEC. 4130. In an action against a boat or raft, the execution by or for the defendant of a bond whereby the attachment is discharged or the possession of the boat or raft is obtained or retained by him, shall be an appearance of such owner as a defendant in the action. Same.

**DECISIONS.** Every presumption is in favor of the proceedings and jurisdiction of courts of general jurisdiction. There is no presumption in favor of the jurisdiction of a limited court, but that being shown, then every presumption is in favor of its proceedings. The jurisdictional averments of the record of a limited court are presumed true. Jurisdiction existing, error is irremediable save by appeal. Where the court has adjudicated on the fact conferring jurisdiction, such adjudication shall not be assailed collaterally, unless there was a total, and not merely partial, want of such fact, 4 Iowa, 77; amending bond, 1 Iowa, 129; amend affidavit in case of attachment, 6 Iowa, 57; amended petition in attachment, 7 Iowa, 406; failure to fill recognizance, 3 G., 124; verity of record, 3 Iowa, 114 and 4 G., 445; record correctable, 3 Iowa, 189; record evidence on appeal, *ibid.*, 324; verity of record, 4 G., 468; unimpeachable, 2 G., 15; same, 2 G., 94; same, 2 G., 547; affidavits amended under sec. 2511, 6 Iowa, 56; 1 *ibid.*, 128; 1 G., 405; M., 230; *Pitman & Bro. v. Surrey*, June term, 1859; *Van Winkle v. Stevens & Co.*, Dec. term, 1859; 6 Iowa, 505, M., 230; 4 G., 76; *Cheever v. Lane*, June term, 1859; section 2506 defined, 8 Iowa, 129; meaning of ten days' notice, M., 8.

## CHAPTER 162.

## COMPENSATION OF OFFICERS.\*

[Code—Chapter 136.]

No fees unless allowed.	SECTION 4131. (2522.) No officer is allowed fees or other compensation for any services farther than is expressly permitted by law.	
General provision.	SEC. 4132. Any officer legally called upon to perform any of the following services is entitled to the following compensation :	
	For drawing and certifying an affidavit, or for giving a certificate not attached to any other paper or document,	\$.25
	For fixing his official certificate to any paper, whether the certificate be under seal or not,	.35
	For making out a copy or transcript of any public papers or records under his control, for the use of a private individual or company, or recording articles of incorporation, ten cents for every one hundred words.	
Secretary of state.	SEC. 4133. (2524.) The secretary of state may take the following fees in addition to his salary :	
	For making out each commission for a commissioner of deeds,	1.00
	For a copy of laws or records upon the request of any private person or company, for every one hundred words,	.10
	For recording articles of incorporation, for each one hundred words,	.10
	For certificate and seal,	1.00
Clerk of supreme court.	SEC. 4134. (2525.) The clerk of the supreme court may take the following fees as his whole compensation, and where they are payable by a party to a suit, they may, (except in criminal cases,) be required in advance. If not so paid in advance, the clerk may, at any time after judgment, issue a fee bill, which shall have the force of a special execution against the party adjudged to pay costs :	
	Upon filing each appeal,	3.00
	Upon entering each judgment where the cause has been decided upon its merits,	2.00
	Upon each continuance of a cause,	1.00
	Upon issuing each execution,	1.25
	Entering satisfaction of judgment,	.50
	Upon issuing each writ, rule, or order, to be served upon any person not in court,	.25
	For copying an opinion to be transmitted to the district court in case of a reversal of judgment, ten cents for every one hundred words, to be paid by the party against whom costs	

\* The outside history of this chapter is this ; the senate friends of the code, fearing that the question of costs might embarrass its passage, and knowing that this chapter was already the law either of the code of 1851 or of subsequent statutes, struck the same out, not intending thereby to repeal the law, but only to leave the same unchanged. The question then occurs, what effect has section 4187 on this chapter? Is it repealed by omission? Will it be intended that the legislature meant to repeal all of part third of the code which was not printed in the act presented by the commissioners, or all not included in it as finally passed? I include the chapter as modified by the fee bill of clerk and county judge.

are adjudged. [He shall be allowed the sum of eight cents per hundred words for recording the opinion of said court to be paid by the state.\*]

SEC. 4135. (2526.) In criminal cases the clerk shall charge no fees In criminal cases. against the county or state, except that where a judgment is reversed he is entitled to the legal fees for a copy of the decision, to be paid from the county treasury. As against the accused he is entitled to the same compensation as is allowed in civil cases.

SEC. 4136. (2527.) The clerk of the district court must, in addition Clerk of district court. to the fees elsewhere authorized, charge and collect the following :†

On the filing of an appeal or the commencement of an original suit,	\$2.50
Additional amount on issuing an attachment,	2.00
On entering a judgment by confession in a case not pending in court, in all,	3.00
If the case is already pending, in addition to the first charge at the commencement of the suit,	1.00
On the submission of a cause without action,	2.50
On entering judgment when not by confession,	2.50
On entering a general continuance,	1.00
On entering a special continuance at a party's costs and judgment thereon,	2.50
On issuing execution and entering return,	1.25
On entering satisfaction of judgment,	.50

SEC. 4137. (2528.) The above fees of the clerk of the district court Paid in advance. must be paid in advance, unless ample security is given to the approval of the clerk, for the payment thereof, when the suit is determined.

SEC. 4138. (2529.) Where security is given as contemplated in the Unless security given. preceding section, if the money is not paid at the time stipulated, the security shall be treated as an authority to confess judgment for the proper amount, and the clerk must enter up judgment, either in term time or vacation, and issue execution thereon accordingly. And in all cases heretofore decided in the district court, the clerk is authorized to issue a fee bill in the same manner as is above provided for the clerk of the superior court.

SEC. 4139. (2530.) The above fees of the supreme or district court By whom paid clerk must, unless otherwise provided by law, be paid in the first instance, by the plaintiff or appellant, as the case may be, except in cases where the services are rendered at the instance and for the benefit of some other person, in which case the fees must be paid by such person. But unless otherwise ordered by the court, the party paying such fees, if successful in the suit, is entitled to recover them back from the opposite party.

SEC. 4140. (2531.)‡ In criminal cases, where the defendant is ad- Criminal cases. judged to pay the costs, the clerk of the district court must charge fees as follows :

In cases of appeals, the same fees in all respects as are allowed on appeals in civil cases.

On an indictment for a misdemeanor where there is no trial,	5.00
Where there is a trial by the court,	7.00

\* Chapter 142, 6th session.

† Are these fees to be charged yet and put into the treasury, while the clerk gets the fees of chapter 29, article 3 as his part for compensation? Not desiring to decide this question, the section is inserted unchanged.

‡ See last note.

	Where by a jury, . . . . .	\$10.00
	In cases of indictment for felonies the above fees shall be doubled.	
	The same fees for issuing execution and entering satisfaction of judgment must be charged in criminal as in civil cases.	
In criminal cases not advanced, }	SEC. 4141. (2532.) In criminal cases, whether commenced by indictment or brought up on appeal, the fees shall not be required in advance but must be collected by execution against the defendant, being added to and treated as a part of the judgment or fine, in case a judgment for money has been rendered against the defendant.	
County judge	SEC. 4142. (2533.) The county judge shall, in addition to the fees elsewhere permitted, charge ten cents for every one hundred words for all wills and certificates recorded in his office as required by law, and shall retain pay therefor out of the first money coming into the hands of the executor after the payment of the charges of the last sickness and funeral expenses of the deceased.	
Recorder, r	SEC. 4143. The recorder of deeds must charge for recording each premium note given to a mutual insurance company, containing less than fifty words, . . . . .	.25
	For each deed and mortgage containing not more than four hundred words, . . . . .	.50
	For every additional one hundred words or fraction thereof, in either case,* . . . . .	.10
Same.	SEC. 4144. (2535.) The fees allowed the recorder must be paid him in advance, and he will be charged with them as so much money actually received by him.	
Sheriff.	SEC. 4145. (2536.) The sheriff is entitled to the following fees: For serving any writ or notice (not including subpoenas,) and return thereof—	
	For the first person served, . . . . .	.50
	For each additional person, . . . . .	.25
	For each copy of such writ or notice when required, ten cents for each hundred words.	
	Serving writ with <i>posse comitatus</i> , . . . . .	1.50
	Each commitment to prison, . . . . .	.25
	Discharge from prison, . . . . .	.25
	Attending with a person before a judge or court when required— not at a regular term of the court in his county—for each day, besides mileage, . . . . .	1.00
	Copy of a paper required by law, for each one hundred words, . . . . .	.10
	Serving and returning subpoena, for each person, . . . . .	.20
	Calling a jury, in each case, . . . . .	.10
	Summoning a grand or petit jury, for each pannel, including mileage, (to be paid out of the county treasury) . . . . .	8.00
	Traveling fees in other cases required by law, going and returning, per mile, . . . . .	.05
	Selling land or other property on execution, per day, . . . . .	1.00
	For time actually employed by him as assessor, two dollars per day, to be regulated by the same rules, and allowed in the same manner as the compensation of supervisors of roads.	

\* Code section 2534 and chapter 94, 5th session.



Making and executing a deed for land sold on execution, . . .	\$1.00
Serving one person with order of court, besides mileage, . . .	.50
For each additional person embraced in the same order, . . .	.25
Summoning a jury in cases of forcible entry and detainer, including mileage, . . . . .	1.50
Serving an execution or order for the partition of real estate, or assigning dower, (besides mileage,) . . . . .	2.00
For each bond required by law, . . . . .	.25
For summoning a jury to assess the damages to the owner of lands, taken for any work of internal improvement, and attending upon them, in all, . . . . .	5.00
If such case occupies more than one day he may charge for each additional day or fraction thereof, . . . . .	1.50
For serving each attachment, . . . . .	1.00
For the time necessarily employed in making an inventory of property attached or levied upon, per day, . . . . .	1.00

For collecting and paying over money on the first two hundred dollars, or part thereof, three per cent.

On the next three hundred dollars, or any part thereof, two per cent.

And on all excess over five hundred dollars, one per cent.

But when property is purchased by a plaintiff in execution, so that the money does not pass through the sheriff's hands, he is entitled to only one-half the above named rates.

Returning a writ not served, . . . . .	.05
Receiving prisoner on surrender by bail, . . . . .	.25
Taking new bail, . . . . .	.25
Dieting a prisoner, per day, . . . . .	.25

SEC. 4146. (2537.) The above items, when chargeable in criminal cases where the prosecution fails, or where the money can not be made from the person liable to pay the same, the facts being certified to by the clerk as far as his knowledge extends, and sworn to by the sheriff, shall be allowed, and paid out of the county treasury. When prosecution fails.

SEC. 4147. (2538.) The sheriff is also entitled to receive one tenth of the annual salary of the county judge, for delivering notices, (including mileage,) and for other services for which no other compensation is allowed by law. Sheriff's salary.

*Coroner's Fees.*

SEC. 4148. For a view of each body, and for taking and returning inquest, . . . . .	\$5.00	Coroner.
For a view of each body, and for examination without inquest, . . . . .	3.00	
Each subpoena, warrant or venire, . . . . .	.25	
For each mile traveled to and returning from an examination or inquest, . . . . .	.10	

The above fees are to be paid from the county treasury where they can not be obtained from the estate of the deceased.

For all other services, the same fees as are allowed to sheriffs in similar cases.\*

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\* Code, section 2539, and chapter 119, 6th session.

*Constable's Fees.*

Constable.	SEC. 4149. (2540.) For serving any notice or process, on each person named therein, . . . . .	\$0.25
	Copy thereof, when required, . . . . .	.10
	For serving an attachment or writ of replevin, . . . . .	.50
	Traveling fees, going and returning, per mile, . . . . .	.05
	Summoning a jury (including mileage), . . . . .	.50
	Attending same on trial, . . . . .	.25
	Serving execution (besides mileage), . . . . .	.25
	Advertising and selling property (besides mileage), . . . . .	.50
	Advertising without selling, . . . . .	.25
	Notifying plaintiff of the time of such sale (besides mileage), unless he waives such notice, . . . . .	.20
	Return of execution when no levy is made, . . . . .	.05
	On taking bond in any case, . . . . .	.25
	On all sums collected on execution and paid over, four per cent.	
	Serving subpoena (besides mileage), . . . . .	.15
Posting up each notice required by law (besides mileage), . . . . .	.15	
Commitment to prison (besides mileage), . . . . .	.25	

In criminal cases. SEC. 4150. (2541.) The fees of a constable for services in criminal cases where the prosecution fails, or when the money can not be made from the person liable to pay the same, the facts being certified by the justice and sworn to by the constable, shall be allowed and paid out of the county treasury.

*Notary's Fees.*

Notary.	SEC. 4151. (2542.) For every protest of a bill or note, . . . . .	\$0 75
	Noting a bill of exchange for non-acceptance or non-payment, . . . . .	.25
	Notarial affidavit to an account under seal, . . . . .	.25
	Registering protest of a bill of exchange or promissory note for non-acceptance or non-payment, . . . . .	.50
	Certifying power of attorney, . . . . .	.25
	Administering any oath, . . . . .	.05
	Being present at demand, tender, or deposit, and noting the same, . . . . .	.35
	Other services, the same fees as are allowed to other officers for like services.	

*Justice's Fees.*

Justice.	SEC. 4152. (2543.) At the commencement of each suit, . . . . .	.50
	In case of an attachment or forcible entry and detainer, . . . . .	1.00
	On taking judgment by confession after suit is commenced, . . . . .	.50
	If not on suit previously brought, . . . . .	1.00
	On submitting controversies without action the same fees as on suit brought.	
	The following additional fees are allowed in the cases to which they apply :	
	On entering judgment when not contested, . . . . .	.50
	If contested, . . . . .	1.00
If jury is called, additional, . . . . .	1.00	
On issuing execution (for issuing as well as for return and entering satisfaction,) . . . . .	.50	

When any cause consumes more than one entire day of six hours, the justice is entitled to one dollar for each day or fraction of a day thereafter in addition.

And on all amounts of money coming into the justice's hands without suit, and by him actually paid over, two per cent. shall be allowed him therefor.

For every continuance or adjournment at the request of either party, . . . . .	.50
Making and certifying transcript, . . . . .	.50
On setting aside a judgment of non-suit or by default, . . . . .	.50
Justices shall also be allowed the following fees in criminal cases:	
For process of any kind except subpoenas, . . . . .	.50
Entering judgment, . . . . .	.50
Taking recognizance or any undertaking, . . . . .	.25
Order of discharge to jailer, . . . . .	.25
The first of the above charges shall be payable by the county in cases where the prosecution fails.	

*Witnesses.*

SEC. 4153. (2544.) Each witness for attending before the district court, each day is entitled to . . . . .	\$1.00	Witnesses.
Before a justice of the peace, . . . . .	.50	
Mileage for actual travel per mile, each way, . . . . .	.05	
An attorney or juror or officer who is in habitual attendance on the court during the term at which he is subpoenaed as a witness, shall charge for only one day's attendance.		
A witness who is subpoenaed in two or more cases by the same party, shall be entitled to but one single compensation from such party for the same day's attendance or travel.		
The court may disallow to the successful party any witness who without sufficient cause was absent at the trial, or whose testimony was unimportant or unnecessary.		
For attending before a grand or petit jury in a criminal case, witnesses are entitled to a like fee, which, when they are called in behalf of the prosecution, shall be paid out of the county treasury. But they can not claim their fees in such cases in advance.		

*Jurors.*

SEC. 4154.* A juror for each day's attendance, whether as grand or petit juror, . . . . .	\$2.00	Jurors.
Before justices of the peace, . . . . .	1.00	
Traveling per mile, going and returning, . . . . .	.05	

*County Surveyor.*

SEC. 4155. (2546.) For each day's service actually performed in traveling to and from the place where the survey is to be made, making survey and return, . . . . .	\$3.00	Surveyor.
For a certified copy of the plat or field notes, . . . . .	.25	

SEC. 4156. (2548.) The township trustees and township clerk shall each receive at the rate of one dollar per day for services rendered by

Township officers.

\* Chapter 171, 6th session.

them, reckoning six hours as one day. And from week to week when they perform any services for which they are entitled to compensation from the county treasury, they must keep a register thereof, and must at the time of their settlements with the county court, make oath to the correctness of their accounts. When serving as fence viewers, they must be paid by the parties interested.

**Receipts.** SEC. 4157. (2549.) Every officer charging fees shall, if required by the person paying them, give him a receipt therefor, setting forth the items, and the date of each.

**Appraisers.** SEC. 4158. (2550.) Every appraiser of property is entitled to fifty cents for each day or fraction thereof during which he is employed as such, except when a different compensation is provided.

**Marriage.** SEC. 4159. (2551.) Any person authorized to marry is entitled to charge two dollars for officiating in each case, and making return thereof.

**Depositions.** SEC. 4160. (2552.) Any officer or person taking depositions is authorized to charge therefor at the rate of ten cents per hundred words, exclusive of the certificate.

**Fees sworn to.** SEC. 4161. (2553.) Where fees are charged against the county as hereinbefore provided in certain cases, their correctness and the actual rendition of the services for which they are charged must be sworn to.

**Paid in cash.** SEC. 4162. (2554.) All fees allowed to the county judge, \* \* clerk, and recorder, whether in this chapter or elsewhere, are to be deemed a part of the county revenue and appropriated as provided by law, but are to be paid in cash.

**Blanks.** SEC. 4163. (2555.) The county judge is authorized in his discretion to procure printed blanks necessary for the use of the salaried officers of the county, as far as can be conveniently done, and to pay therefor out of the county treasury.

**Payment on rendering service.** SEC. 4164. (2557.) Where no other provision is made on the subject, the party requiring any service shall pay the fees therefor upon the same being rendered, and a bill of particulars being presented if required.

**Advertisements.** SEC. 4165. (2558.) In all cases where an officer in the discharge of his duty is required to set up an advertisement, he shall, when not otherwise provided, be allowed twenty-five cents, and if an advertisement is required to be published in a newspaper, the money therefor shall be paid by the party, and may be taxed in the bill of costs.

**Fees posted.** SEC. 4166. (2559.) Every officer entitled to fees shall keep posted up in his office a fair table thereof on pain of forfeiture of two dollars per day, for the benefit of the county, for each day he fails to keep such table of fees thus posted up.

**Penalty.** SEC. 4167. (2560.) Any officer who willfully takes higher or other fees than are allowed by law, is guilty of a misdemeanor, and may be fined therefor a sum not less than ten nor more than fifty dollars.

**Attorney appointed.** SEC. 4168. (2561.) An attorney appointed by a court to defend a person indicted for any offense, on account of such person being unable to procure counsel, is entitled to receive from the county treasury one of the following fees:

For defending in a case of murder,	\$25.00
In cases of other felonies,	10.00
In cases of misdemeanor,	5.00

**Same.** SEC. 4169. (2562.) An attorney can not in such case be compelled to follow a case into another county or into the supreme court, and if he

does so may recover an enlarged compensation to be graduated on a scale corresponding to the prices above allowed.

SEC. 4170. (2563.) Only one attorney shall receive the compensation above contemplated, nor is he entitled to this compensation until he files his affidavit that he has not directly or indirectly received any compensation for such services from any other source. Only one attorney.

- PRIOR LAWS. 1. An act on costs and fees, passed April 23, 1833; M. D., 1833, p. 245.  
 2. An act concerning costs and fees, passed Jan. 19, 1838; Wis., 2d sess., No 81, p. 266.  
 3. Same amended, Jan. 19, 1838; Wis., 2d sess., No. 102, p. 319. All the above repealed Aug. 30, 1840.  
 4. An act to provide compensation of probate judges, passed Jan. 21, took effect Feb. 21, 1839; I. T., 1st sess., p. 75.  
 5. An act concerning costs and fees, passed Jan. 23, took effect, Feb. 23, 1839; I. T., 1st sess., p. 75; repealed by No. 7 hereof.  
 6. An act to amend an act concerning costs and fees, passed Feb. 15, took effect Aug. 1, 1842; I. T., 4th sess., chap. 64, p. 51; repealed by no 7 hereof.  
 7. An act concerning costs and fees, passed Feb. 11, took effect Feb. 20, 1843; Reprint, chap. 56, p. 212.  
 8. An act to amend same, passed Feb. 15, 1844; I. T., 6th sess., chap. 40, p. 60.  
 9. An act to provide for the compensation of printers of the laws in newspapers, passed Jan. 15, 1849; 2d sess., chap. 84, p. 112.  
 10. An act amendatory to act of Feb. 11, 1843, passed Jan. 15, 1849; 2d sess., chap. 88, p. 119.

DECISIONS. No advance in case of jury, 3 G., 512; witness fees on preliminary examination, 4 G., 79; costs, discretion, 1 Iowa, 106; fees in advance, 2 G., 460; attorney's right to fees if employed by county, 2 G., 473; plaintiff dismissing his suit is liable for all the costs legally made or being made, in the cause, whether then taxed or not, 4 Iowa, 569; costs in specific performance, 1 Iowa 573; partition cases, 3 G., 489; the supreme court can not review a case of mistaxed costs, until the district court has first passed on it, 1 G., 251, 301, 438; justice can not demand security for costs, *Gordon v. Ell*, Dec., 1859; see also, 3 G., 489; M., 378; 1 G., 134; a rule of the district court as to costs sustained, *David v. Aetna Ins. Co'y*, June, 1859; counties liable in state cases, when? 2 G., 230; M., 302; 1 G., 416; when not? 7 Iowa, 419; unsuccessful party pay costs, 4 Iowa, 568; 1 Iowa, 42.

## CHAPTER 163.

### APPLICATIONS, RESTRICTIONS AND QUALIFICATIONS OF PART OF THIS ACT—TIME WHEN IT TAKES EFFECT AND WHAT IT REPEALS.

SECTION 4171. This act shall take effect on the first day of September, A. D. 1860. When to take effect.

SEC. 4172. Actions and special proceedings, already commenced, shall be continued in accordance with the law heretofore in force, except as to the provisions of chapter 159. Pending actions.

SEC. 4173. The rules of proceeding prescribed for civil actions by ordinary proceedings in the district court, shall be followed in all proceedings of a special character, whether before the district court or any other tribunal, so far as applicable and not otherwise regulated. Special proceedings how conducted.

SEC. 4174. The rules of proceeding prescribed in this act, for the commencement and conduct of civil actions, by ordinary proceedings in The code to be the guide in what cases.

the district court, shall be followed in every particular, in all actions and in all proceedings of a special character, unless it is declared that the same shall be prosecuted by equitable proceedings, or unless in the provisions concerning such action or special proceeding, it is expressly otherwise provided, and when it is provided that any action or special proceeding shall be prosecuted by equitable proceedings, the same shall not differ in the mode of procedure from an action by ordinary proceedings, except as such distinction may in this act be made, or may be in such action or proceeding itself provided, and the general principles of procedure herein enacted are applied and restricted as follows:

- Replevin.** SEC. 4175. In replevin there shall be no joinder of any but another cause of replevin; nor shall there be allowed any set-off, counter-claim or cross-demand.\*
- Exemption.** SEC. 4176. A money judgment obtained in replevin for property, which property was in whole or part exempt from execution, shall also be to the same extent exempt from execution to the party obtaining it, and from all set-off or diminution, either by the party against whom the same is, or by any other person, and where the facts are so and the party desires it, the record shall state the facts of such total or partial exemption; and all the provisions of this and the preceding section shall also obtain as to the action of detinue.
- Real action.** SEC. 4177. All actions for the recovery of real property shall be by ordinary proceedings. There shall be no joinder, except as therein contemplated, and of a like action. There shall be no set-off, counter-claim or cross-demand, by ordinary proceedings, except as provided therein†
- Partition.** SEC. 4178. The action of partition shall be prosecuted by ordinary proceeding. No joinder of any other cause shall be allowed therein.
- Foreclosure.** SEC. 4179. The action on a note, together with a mortgage or deed of trust, for foreclosure of the same, shall be by equitable proceedings, and tried by the second method of trying equitable actions. An action on the bond or note alone, without regard therein to the mortgage or deed of trust, shall be by ordinary proceedings.
- Information.** SEC. 4180. To an information there shall be no joinder of any other cause of action, nor any set-off, counter-claim, or cross-demand.
- Mandamus.** SEC. 4181. When the action of *mandamus* is by a private person, there may be joined therewith the injunction of chapter 155, and no other; but there shall be no set-off, counter-claim, or cross-demand, by ordinary proceedings, and the action shall be by ordinary proceedings.
- Habeas Corpus.** SEC. 4182. No verification shall be required in the answer or reply in *habeas corpus*.
- Mechanic's lien.** SEC. 4183. The action for mechanic's lien shall be prosecuted by ordinary proceedings, and therewith shall be no other cause of action joined.
- Divorce.** SEC. 4184. An action for divorce shall be prosecuted by equitable

\*To allow a cross-demand in replevin, would let a man take by force his debtor's goods, which were exempt from execution, and when sued in replevin, to keep them away, and make his debt a cross-demand, to cancel the money judgment which might be got against him. To prevent this defeat of the exemption law, this and the next sections are provided. *Report on Civil Code*, p. 343.

†This would allow an equitable defense, set-off, counter-claim, or cross-demand. So in an action to obtain possession of land, an equitable defense might be made, or a counter claim, or cross-demand, equivalent to the former bill for specific performance. This might necessitate a transfer to the equitable docket, but would not be dismissed or disregarded. *Report on Civil Code*, p. 343.

proceedings of the second method of trial of equitable actions, and no cause of action, save for alimony, shall be joined therewith.

SEC. 4185. Actions by sureties, and by occupying claimants, and on a lost note or bond, shall be by ordinary proceedings. Sureties.

SEC. 4186. If a term has a meaning affixed to it by this act, it shall be held to be used in such sense, except when the contrary is expressed, but the use of a term herein, which has at common law a technical meaning, shall not imply its use in such technical sense when the same would be inconsistent with the general intent of this act; for instance, the term "count," shall not imply that the proceeding wherein used is law, as contradistinguished from equity. The words "defense," "abatement," &c., shall not imply the class of rights and forms of procedure associated with the terms at common law, but such terms, and all other technical terms, shall be intended to be used in a sense consistent with the spirit and declared object of this code. Meaning of terms.

SEC. 4187. This act includes many sections of part third of the code of Iowa of 1851; some of such sections, to save printing, are included herein by the numerical designation of such sections, and some are herein printed in full, and some are in part made a part hereof in only the modified form in which herein found. Now, it is intended that that portion of part third of the code aforesaid which is incorporated into this act, either by being set out herein, or by numerical designation herein as aforesaid, together with what other matter may be herein set out, shall be substituted for part third of the code of Iowa of 1851, and to that end every portion of part third of the code of Iowa of 1851, which is neither literally set out herein nor as a section designated herein by the numerical designation of such section, as such section is numbered in said code of Iowa of 1851, is hereby repealed, and all parts of all acts which are within the purview of this act, are also repealed, so that this act shall be the sole law in civil pleadings and practice, and when this act is published, the sections of the code aforesaid shall be printed in full, each in that place now herein designated, by the number by which such section is now known in said code, and then all the sections of this act shall be consecutively numbered, beginning with the first, as section one, and the proper numbers as herein indicated shall be also incorporated into those sections which refer to other sections, either of this act or of the code aforesaid.\* Repeal, &c.

JOHN EDWARDS,

*Speaker of the House of Representatives.*

N. J. RUSCH,

*President of the Senate.*

Approved March 20, 1860.

SAMUEL J. KIRKWOOD,

*Governor.*

PRIOR LAWS UNDER PART THIRD.—*Law Practice.* 1. An act concerning the process and proceedings of courts of record, passed April 22, 1833; M. D., 1833, p. 346.

\* It will be seen that the reported act did not include the sections of the old code except by numerical reference, but in its enrolment all the old code matter retained was incorporated in full.

2. An act concerning bail, passed April 22, 1833; M. D., 1833, p. 366.
3. The old fictions and formula, and old writs abolished, trial by battle, grand assize, &c., passed Feb. 26, 1821; M. D., 1833, p. 330.
4. An act concerning appeals, writs of error, certiorari, and habeas corpus, passed Dec. 21, 1820; M. D., 1833, p. 400.  
The above repealed as to supreme court, and extended to circuit court, passed Oct. 7, 1829; M. D., 1833, p. 404.
5. An act allowing mutual debts and demands to be set off, and concerning tenders, passed March 12, 1827; M. D., 1833, p. 405.
6. Mode of proceeding in mechanics' lien, passed April 23, 1833; M. D., 1833, p. 406, sec. 2.
7. An act to prevent abatement in certain cases, passed Oct. 12, 1829; M. D., 1833, p. 409; repealed I. T., 1st sess., p. 41. All the above repealed Aug. 30, 1840.
8. An act concerning amendments and jeofails, passed April 12, 1827; M. D., 1833, p. 409.
9. An act concerning the supreme and district courts and defining their jurisdiction and powers, passed Dec. 8, 1836; Wis., 1st sess., No. 9, p. 23.
10. An act to abolish imprisonment for debt, passed Jan. 12, 1838; Wis., 2d sess., No. 37, p. 76.
11. An act amending same, by making second term, trial term, passed Jan. 19, 1838; Wis., 2d sess., No. 78, p. 260; repealed Dec. 14, took effect Jan. 14, 1839; I. T., 1st sess., p. 108. All the above repealed Aug. 30, 1840.
12. An act relative to pleas in abatement, and abatement by death, I. T., 1st sess., p. 41; passed Dec. 5, 1838, took effect Jan. 5, 1839; Reprint, 1843.
13. An act concerning amendments and jeofails, passed Jan. 24, took effect Feb. 24, 1839; I. T., 1st sess., p. 43; also Reprint, 1843.
14. An act concerning bail, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 59; also Reprint, 1843, p. 91; repealed I. T., 6th sess., chap. 20, p. 26. Amended on June 10, 1845, I. T., 7th sess., chap. 24, p. 45.
15. An act repealing the Wisconsin act of Jan. 19, 1838, as to terms of court, passed Dec. 14, took effect Jan. 14, 1839; I. T., 1st sess., p. 108.
16. An act fixing terms of court and other things, passed Jan. 21, took effect Feb. 21, 1839; I. T., 1st sess., p. 128.
17. An act on practice in district court of territory, passed Jan. 25, took effect May 1, 1839; I. T., 1st sess., p. 370. Repealed by chap. 112, of Reprint, p. 466.
18. An act to change venue, passed Jan. 18, took effect Feb. 18, 1839; I. T., 1st sess., p. 457.
19. An act amending the act of Jan. 25, 1839, passed Jan. 17, took effect Feb. 17, 1840; I. T., 2d sess., chap. 77, p. 112. Repealed by Reprint, chap. 112, p. 466.
20. An act to abolish imprisonment for debt, passed Jan. 17, took effect Feb. 17, 1840; I. T., 2d sess., chap. 82, p. 122. Repealed by Reprint, 1843, chap. 63, p. 235.
21. An act providing for the service of writs by copy, in certain cases, passed Dec. 31, took effect Jan. 31, 1841; I. T., 3d sess., chap. 26, p. 20. Repealed by Reprint, 1843, chap. 112, p. 466.
22. An act supplemental to an act regulating practice in district court, passed Dec. 31, 1840, took effect March 3, 1841; I. T., 3d sess., chap. 27, p. 21. Repealed by Reprint, 1843, chap. 112, p. 466.
23. An act to amend an act relative to practice in the district courts, passed Jan. 9, 1841; I. T., 3d sess., chap. 42, p. 32. Repealed by Reprint, 1843, chap. 112, p. 466.
24. An act further to amend same, passed Jan. 15, 1841; I. T., 3d sess., chap. 77, p. 87.
25. An act to abolish imprisonment for debt, passed Feb. 8, 1843; also Reprint, 1843, chap. 63, p. 235. Repealed I. T., 6th sess., chap. 20, p. 26.
26. An act regulating practice in the district courts in the territory of Iowa, passed Feb. 10, took effect July 4, 1843; Reprint, chap. 112, p. 466. (This act aims at being alone the law, but leaves much unrepealed. See chap. 20, sec. 6.)
27. An act to abolish imprisonment for debt, passed Feb. 14, 1844; I. T., 6th sess., chap. 20, p. 26.
28. An act to amend the practice act of Feb. 10, 1843, passed May 28, 1845; I. T., 7th sess., chap. 3, p. 20.
29. An act to amend that regulating practice in the district courts of Iowa, passed Jan. 19, 1846; I. T., 8th sess., chap. 31, p. 29.
30. An act amendatory to the practice in the district and supreme courts of this state, passed Feb. 24, took effect March 18, 1847; 1st sess., chap. 87, p. 119.
31. An act amending that of Feb. 10, 1843, passed Jan. 24, took effect March 15, 1843; 1st sess., extra, chap. 55, p. 57.
32. An act further amending that of Feb. 10, 1843, passed Jan. 15, took effect Jan. 31, 1849; 2d sess., chap. 106, p. 135.



33. An act in relation to bonds and other securities, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 70; also Reprint, 1843, p. 104.
34. An act for regulating references, &c., passed April 12, 1827; M. D., 1833, p. 421. Repealed Aug. 30, 1840.
35. An act on arbitrators and referees, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 57; also Reprint, 1843, p. 57.
36. An act to provide for writs of error, *coram nobis*, passed Feb. 15, 1844; I. T., 6th sess., chap. 28, p. 51.
37. An act concerning appeals, writs of error, certiorari, habeas corpus, passed Dec. 21, 1820; M. D., 1833, p. 400. Repealed Aug. 30, 1840.
- Chancery Practice.* 38. An act to provide for masters in chancery, passed June 10, 1828; M. D., 1833, p. 214.
39. An act concerning present proceedings in courts of record, passed April 22, 1833; M. D., 1833, p. 246.
40. An act to prescribe the mode of proceeding in chancery, passed April 23, 1833; M. D., 1833, p. 354.
41. An act on appeals, &c., passed Dec. 21, 1820; M. D., 1833, p. 400. The above repealed Aug. 30, 1840.
42. An act relative to proceedings in chancery, passed Jan. 23, took effect Feb. 23, 1839; I. T., 1st sess., p. 130; also Reprint, 1843, p. 105.
43. An act regulating *ne exeat* and injunctions, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 350. Repealed Feb. 15, 1844, I. T., 6th sess., chap. 36, p. 57.
44. An act for the relief of securities of criminals, passed Jan. 3, took effect Feb. 3, 1839; I. T., 1st sess., p. 440; also Reprint, 1843, p. 567.
45. An act amending an act relative to proceedings in chancery of Jan. 23, 1839, took effect Feb. 15, 1844; I. T., 6th sess., chap. 27, p. 49.

# PART FOURTH.

## OF CRIMES AND PUNISHMENTS, AND PROCEEDINGS IN CRIMINAL CASES.

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### TITLE XXIII.

#### OF CRIMES AND PUNISHMENTS.

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#### CHAPTER 164.

##### OFFENSES AGAINST THE SOVEREIGNTY OF THE STATE.

[Code—Chapter 137.]

- Treason.** SECTION 4188. (2565.) Whoever is guilty of treason, by levying war against the state, or adhering to its enemies, giving them aid and comfort, shall be punished with death.
- Misprison of treason, &c.** SEC. 4189. (2566.) If any person have knowledge of the commission of the crime of treason against the state, and conceal the same, and not as soon as may be disclose such offense to the governor or some judge within the state, he is guilty of misprison of treason and shall be fined not exceeding one thousand dollars or be imprisoned in the penitentiary not exceeding three years nor less than one year.
- Evidence.** SEC. 4190. (2567.) No person can be convicted of the crime of treason unless on the evidence of two witnesses to the same overt act, or on confession in open court.

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#### CHAPTER 165.

##### OFFENSES AGAINST THE LIVES AND PERSONS OF INDIVIDUALS.

[Code—Chapter 138.]

##### ARTICLE 1.

- Definition.** SECTION 4191. (2568.) Whoever kills any human being with malice aforethought either express or implied is guilty of murder.
- First degree.** SEC. 4192. (2569.) All murder which is perpetrated by means of poison or lying in wait or any other kind of willful, deliberate, and pre-

meditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, is murder of the first degree and shall be punished with death.

SEC. 4193. (2570.) Whoever commits murder otherwise than is set forth in the preceding section is guilty of murder of the second degree, and shall be punished by imprisonment in the penitentiary for life or for a term of not less than ten years. Second degree

SEC. 4194. (2571.) Upon the trial of an indictment for murder the jury if they find the defendant guilty must inquire, and by their verdict ascertain, whether he be guilty of murder of the first or second degree; but if such defendant be convicted upon his own confession in open court the court must proceed by the examination of witnesses to determine the degree of murder and award sentence accordingly. Degree, how determined.

SEC. 4195. (2572.) Whoever fights a duel with deadly weapons and inflicts a mortal wound on his antagonist, whereof death ensues, is guilty of murder of the first degree and shall be punished accordingly. Dueling

SEC. 4196. (2573.) Any person who fights a duel with deadly weapons or is present at the fighting of such duel, as aid, second, or surgeon, or advises, encourages, or promotes such duel although no homicide ensue, and any person who challenges another to fight a duel or sends or delivers any verbal or written message purporting or intended to be such challenge, although no duel ensue, shall be fined in a sum not exceeding one thousand dollars nor less than four hundred dollars and imprisoned in the penitentiary not more than three years nor less than one year. Same, aiding, &c.

SEC. 4197. (2574.) Any person who accepts such challenge or who consents to act as a second, aid, or surgeon on such acceptance, or who advises, encourages, or promotes the same, although no duel ensue, shall be punished as prescribed in the preceding section. Accepting challenge, aiding, &c.

SEC. 4198. (2575.) If any person post another, or in writing or print use any reproachful or contemptuous language to or concerning another, for not fighting a duel or for not sending or accepting a challenge, he shall be fined not exceeding three hundred dollars nor less than one hundred dollars and shall be imprisoned in the county jail for not more than six months nor less than two months. Posting for not accepting, &c

SEC. 4199. (2576.) Any person guilty of the crime of manslaughter shall be punished by imprisonment in the penitentiary not more than eight years nor less than one year and by fine not exceeding one thousand dollars nor less than one hundred dollars. Manslaughter

SEC. 4200. (2577.) If any person, with intent to maim or disfigure, cut or maim the tongue; put out or destroy an eye; cut, slit, or tear off an ear; cut, slit, bite, or mutilate the nose, or lip; or cut off or disable a limb or any member of another person, he shall be punished by imprisonment in the penitentiary not more than five years and by fine not exceeding one thousand dollars nor less than one hundred dollars. Maiming or disfiguring.

SEC. 4201. (2578.) If any person, with force or violence or by putting in fear, steal and take from the person of another any property that is the subject of larceny, he is guilty of robbery and shall be punished according to the aggravation of the offense as is provided in the following two sections. Robbery

SEC. 4202. (2579.) If such offender at the time of such robbery is armed with a dangerous weapon with intent, if resisted, to kill or maim the person robbed; or if being so armed he wound or strike the person robbed; or if he have any confederates aiding and abetting him in such robbery, present and so armed, he shall be punished by imprisonment in First degree.

- the penitentiary for a term not exceeding twenty years nor less than ten years.
- Second degree.** SEC. 4203. (2580.) If such offender commit such robbery otherwise than is mentioned in the preceding section he shall be punished by imprisonment in the penitentiary not exceeding ten years nor less than two years.
- Rape.** SEC. 4204. (2581.) If any person ravish and carnally know any female of the age of ten years or more by force and against her will, or carnally know and abuse any female child under the age of ten years, he shall be punished by imprisonment in the penitentiary for life or any term of years.
- Compelling to marry, &c.** SEC. 4205. (2582.) If any person take any woman unlawfully and against her will, and by force, menace, or duress compel her to marry him or any other person or to be defiled, he shall be fined not exceeding one thousand dollars and imprisoned in the penitentiary not exceeding ten years.
- Carnal knowledge by producing stupor** SEC. 4206. (2583.) If any person unlawfully have carnal knowledge of any female by administering to her any substance or by any other means producing such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, he shall upon conviction be punished as provided in the section relating to ravishment.
- Enticing female under 15 years.** SEC. 4207. (2584.) If any person take or entice away any unmarried female under the age of fifteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, he shall upon conviction be punished by imprisonment in the penitentiary for not more than three years, or by fine of not more than one thousand dollars and imprisonment in the county jail not more than one year.
- Enticing child under 12.** SEC. 4208. (2585.) If any person maliciously, forcibly, or fraudulently lead, take, decoy, or entice away any child under the age of twelve years with the intent to detain or conceal such child from its parent, guardian, or any other person having the lawful charge of such child, he shall be punished by imprisonment in the penitentiary not more than ten years or by fine not exceeding one thousand dollars, or by both such fine and imprisonment.
- Seduction.** SEC. 4209. (2586.) If any person seduce and debauch any unmarried woman of previously chaste character, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.
- Marriage a bar.** SEC. 4210. (2587.) If before judgment upon an indictment the defendant marry the woman thus seduced it is a bar to any farther prosecution for the offense.
- Kidnapping, &c.** SEC. 4211. (2588.) If any person willfully and without lawful authority forcibly or secretly confine or imprison any other person within this state against his will; or forcibly carry or send such person out of the state; or forcibly seize and confine, or inveigle or kidnap any other person with the intent either to cause such person to be secretly confined or imprisoned in this state against his will or to cause such person to be sent out of the state against his will, he shall be punished by imprisonment in the penitentiary not more than five years or by fine not exceeding one thousand dollars, or by both fine and imprisonment at the discretion of the court.
- Exposing child.** SEC. 4212. (2589.) If the father or mother of any child under the age of six years, or any person to whom such child has been entrusted

or confided expose such child in any highway, street, field, house, or outhouse, or in any other place with intent wholly to abandon it, he or she, upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding five years.

SEC. 4213. (2590.) If any person either verbally or by any written or printed communication maliciously threaten to accuse another of a crime or offense or to do any injury to the person or property of another, with intent thereby to extort any money or pecuniary advantage whatever or to compel the person so threatened to do any act against his will, he shall be punished by imprisonment in the penitentiary not more than two years or by fine not exceeding five hundred dollars. Malicious threats to extort.

SEC. 4214. (2591.) If any person assault another with intent to commit murder he shall be punished by imprisonment in the penitentiary not exceeding ten years. Assault with intent to murder.

SEC. 4215. (2592.) If any person assault a female with intent to commit a rape he shall be punished by imprisonment in the penitentiary not exceeding twenty years. With intent to commit rape.

SEC. 4216. (2593.) If any person assault another with intent to maim, rob, steal, or commit arson or burglary, he shall be punished by imprisonment in the penitentiary not exceeding five years or by fine not exceeding one thousand dollars, or by both fine and imprisonment at the discretion of the court. With intent to maim, rob, steal, &c.

SEC. 4217. (2594.) If any person assault another with intent to inflict a great bodily injury he shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding five hundred dollars. With intent to inflict injury.

SEC. 4218. (2595.) If any person assault another with intent to commit any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall be punished by imprisonment in the penitentiary not more than five years or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year. With intent to commit any felony.

SEC. 4219. (2596.) If any person mingle any poison with any food, drink, or medicine, with intent to kill or injure any human being; or willfully poison any spring, well, cistern, or reservoir of water, he shall be punished by imprisonment in the penitentiary not exceeding ten years and by fine not exceeding one thousand dollars. Mingling poison with food. &c

SEC. 4220. (2597.) Whoever is convicted of an assault or an assault and battery, where no other punishment is prescribed, shall be punished by imprisonment in the county jail not exceeding *thirty days* or by fine not exceeding *one* hundred dollars, or both such fine and imprisonment at the discretion of the court.\* Assault and battery.

ARTICLE 2.

An Act for the punishment of Feticide.

[Passed March 15, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 58, page 93.]

SECTION 4221. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That every person who shall willfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or Imprisonment and fine for this crime.

\* This is amended as indicated by the italics, by laws of seventh general assembly, chapter 50, page 55.

Penalty.

shall use or employ any instrument or other means whatever, with the intent thereby to procure the miscarriage of any such woman, unless the same shall be necessary to preserve the life of such woman, shall upon conviction thereof, be punished by imprisonment in the county jail for a term of not exceeding one year, and be fined in a sum not exceeding one thousand dollars.

**DECISIONS.** No offenses at common law in Iowa, 7 Iowa, 254; value of common sense as a guide to construction, M., 235; a pending case may be defeated by a change of the time of punishment, *State v. Burdick*, Dec., 1859; deadly weapon defined, M., 235; in cases of assault and battery language no defense, 5 Iowa, 478; only palliation, *ibid.*; provocation recent, 5 Iowa, 480; the pendency of the danger or injury the provocation of which will justify, 2 Iowa, 67; expulsion from railroad car, 7 Iowa, 204; the force in murder may be applied to the mind, 8 Iowa, 477; malice inferable from the weapon, 7 Iowa, 287; "premeditation" needed in the definition of murder, 4 G., 500; 8 Iowa, 525; "intention," 7 Iowa, 287; "self defense," in homicide, *State v. Thompson*, 5 Iowa, 433; the indictment must charge as the statute defines, and a good common law indictment will not be good for first degree, 4 G., 500; burden of proof in murder, 5 Iowa, 433; degrees of the crime of assault and battery, 4 Iowa, 477; assistance by countenance constitutes an assault, 8 Iowa, 203; on a charge of assault and battery on two can not convict of same on one, *ibid.*; what will not justify an assault, 4 Iowa, 477; 3 G., 339; 4 G., 137; 5 *ibid.*, 478; what will justify an assault, 3 G., 435; what is included in an assault with intent, &c., 3 Iowa, 416; when assailed with a deadly weapon one need not flee to the wall, 5 Iowa, 435; when the defendant in murder relies on an exposition of all the facts attendant on the commission of the killing, he may claim that the state must create a reasonable inference of his guilt from all the facts, 5 Iowa, 435; in murder proof of the killing will not change the burden of proof to the defendant so as to require him to show beyond a reasonable doubt the facts of justification when those facts arise out of the circumstances of the killing, 5 Iowa, 435; may be convicted of an assault under indictment for maiming, 1 Iowa, 542; one indicted for murder may be found guilty of manslaughter, 3 Iowa, 410; upon a plea of guilty in murder, the court must examine witness to find degree, and the record must show that fact, and the result, M., 486; 7 Iowa, 236; blow in one county and death in another, 2 G., 286; section 2582 defined, 2 Iowa, 567; the name may imply the sex, 7 Iowa, 409; case of enticing away female, 8 Iowa, 447; what abortion, 3 Iowa, 274, 278; what constitutes an assault, 8 Iowa, 413; every battery includes an assault, 1 Iowa, 542; 3 Iowa, 416, 410; the chastity of a female will be presumed in an indictment for seduction, 5 Iowa, 389; meaning of "chaste character," 5 Iowa, 430, 389; "corroborating evidence," 5 Iowa, 389; the character herein does not mean repute, but means fixed habit of body and mind; it means the state of the person and not the state of opinion about her, and she may be of unchaste character, though personally unsoiled by contact, 5 Iowa, 394; the chastity of the female will be presumed, 5 Iowa, 397; the habit or state of body is not alone to be considered, but also that of mind and sentiment, in inquiring into chaste character, 5 Iowa, 431.

## CHAPTER 166.

## OFFENSES AGAINST PROPERTY.

[Code—Chapter 139.]

## ARTICLE 1.

Burning inhabited building, &c., in night time.

**SECTION 4222. (2598.)** If any person willfully and maliciously burn in the night-time the inhabited building, boat, or vessel of another; or willfully and maliciously set fire to any other building, boat, or vessel owned by himself or another by the burning whereof such inhabited building, boat, or vessel is burnt in the night-time, he shall be punished by imprisonment in the penitentiary for life or any term of years.

SEC. 4223. (2599.) If any person willfully and maliciously burn in the day-time the inhabited building, boat, or vessel of another, or any building, boat, or vessel adjoining thereto; or willfully and maliciously set fire to any building, boat, or vessel, owned by himself or another by the burning whereof such inhabited building, boat, or vessel is burnt in the day-time; or in the day-time willfully and maliciously set fire to any building, boat, or vessel owned by himself or another by the burning of which any such inhabited building, boat, or vessel is burnt in the night-time, he shall be punished by imprisonment in the penitentiary for a term not exceeding thirty years.

SEC. 4224. (2600.) If any person willfully and maliciously burn in the night-time any uninhabited dwelling-house, boat, or vessel belonging to another or any court-house, jail, college, church, or any building erected for public use; or any other building, boat, or vessel, by the burning whereof any building, boat, or vessel mentioned in this section is burnt in the night-time, he shall be punished by imprisonment in the penitentiary not exceeding twenty years.

SEC. 4225. (2601.) If any person willfully and maliciously burn in the day-time any building, boat, or vessel mentioned in the preceding section he shall be punished by imprisonment in the penitentiary not exceeding fifteen years.

SEC. 4226. (2602.) If any person willfully and maliciously burn either in the night or day-time, any warehouse, store, manufactory, mill, railroad depot, barn, stable, shop, office, out-house, or any building whatsoever of another other than is mentioned in the preceding section of this chapter, or any bridge, lock, dam or flume, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

SEC. 4227. (2603.) If any person set fire to any building, boat, or vessel mentioned in the preceding sections of this chapter, or to any material with intent to cause any such building, boat, or vessel to be burnt, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.

SEC. 4228. (2604.) If any person willfully and maliciously burn or otherwise destroy or injure any pile or parcel of wood, boards, timber, or other lumber, or any fence, bars, or gate, or any stack of grain, hay, or other vegetable product severed from the soil and not stacked, or any standing trees, grain, grass, or other standing product of the soil of another, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 4229. (2605.) The preceding sections of this chapter severally extend to a married woman who commits either of the offenses therein described, though the property burnt or set fire to may belong partly or wholly to her husband.

SEC. 4230. (2606.) If any person willfully burn any building, goods, wares, merchandize, or other chattels which are insured against loss or damage by fire, or willfully cause or procure the same to be burned, with intent to injure the insurer, whether such person be the owner of such property or not, he shall be punished in the penitentiary not exceeding ten years.

SEC. 4231. (2607.) If any person willfully or without using proper caution set fire to and burn or cause to be burnt any prairie or timbered land by which the property of another is injured or destroyed, he shall be fined not exceeding five hundred dollars or imprisoned in the county

- jail not more than one year, or by both fine and imprisonment at the discretion of the court.
- Burglary.** SEC. 4232. (2608.) If any person break and enter any dwelling-house in the night-time with intent to commit the crime of murder, rape, robbery, larceny, or any other felony; or after having entered with such intent break any such dwelling-house in the night-time, any person being then lawfully therein, such offender shall be punished according to the aggravation of the offense as is provided in the following two sections.
- Being armed or assaulting a person.** SEC. 4233. (2609.) If such offender at the time of committing such burglary is armed with a dangerous weapon, or so arm himself after having entered such dwelling-house, or actually assault any person being lawfully therein, or have any confederate present aiding and abetting in such burglary, he shall be punished by imprisonment in the penitentiary for life or any term of years.
- Without being armed.** SEC. 4234. (2610.) If such offender commit such burglary otherwise than is mentioned in the preceding section he shall be punished by imprisonment in the penitentiary not exceeding twenty years.
- Breaking in the day-time with intent to commit a felony.** SEC. 4235. (2611.) If any person with intent to commit a felony, in the day-time break and enter, or in the night-time enter without breaking, any dwelling-house; or at any time break and enter any office, shop, store, warehouse, boat, or vessel, or any building in which any goods, merchandize, or valuable things are kept for use, sale, or deposit, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year.

## ARTICLE 2.

An act to Punish the Makers of Chattel Mortgages in certain cases.

[Passed March 17, 1860, took effect July 4, 1860; *Laws of Eighth General Assembly, Chapter 33.*]

- Punishment for destroying, &c., mortgaged property.** SECTION 4236. *Be it enacted by the General Assembly of the State of Iowa,* That any mortgagor of personal property who shall during the time such mortgage remains in force and virtue, willfully destroy, conceal, sell, or otherwise dispose of the property mortgaged, without the consent express or implied of the mortgagee or assignee of the mortgagee, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail not less than five nor more than thirty days, or by both such fine and imprisonment at the discretion of the court.
- Penalty.**

DECISIONS. Indictment for burglary under code, *State v. Jones*, Dec., 1859; proof of ownership in a case of arson, *State v. Tennay*, Dec 1859; setting out fire, 1 Iowa, 108; 4 Iowa, 506; 3 *ibid.*, 81; 2 G., 462; the setter out of fire must use all reasonable diligence to prevent any injury or be liable, 4 Iowa, 507.



CHAPTER 167.

LARCENY AND RECEIVING STOLEN GOODS.

[Code—Chapter 140.]

ARTICLE 1.

SECTION 4237. (2612.) If any person steal take and carry away, of Larceny. the property of another, any money, goods, or chattels; any writ, process, or public record; any bond, bank note, promissory note, bill of exchange, or other bill, order or certificate; or any book of accounts respecting money, goods, or other things; or any deed or writing containing a conveyance of real estate; or any contract in force; or any receipt, release, or defeasance; or any instrument or writing whereby any demand, right, or obligation is created, increased, extinguished or diminished; he is guilty of larceny and shall be punished, when the value of the property stolen exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than five years; and when the value of the property stolen does not exceed the sum of twenty dollars, by fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding *thirty days*.\*

SEC. 4238. (2613.) If any person in the night time commit larceny In the night time value over \$20. in any dwelling house, store, or any public or private building, or in any boat, vessel or water craft, when the value of the property stolen exceeds the sum of twenty dollars, he shall be imprisoned in the penitentiary not exceeding ten years; and when the value of the property stolen is less than twenty dollars, by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 4239. (2614.) If any person in the day time commit larceny as specified in the preceding section and the value of the property stolen exceeds twenty dollars, he shall be punished by imprisonment in the penitentiary not more than five years; and when the value of the property stolen is less than twenty dollars, by fine not exceeding two hundred dollars and imprisonment in the county jail not exceeding one year. In the day time value under \$20.

SEC. 4240. (2615.) If any person commit the crime of larceny by stealing from any building that is on fire, or by stealing any property removed in consequence of an alarm caused by fire, or by stealing from the person of another, he shall be punished by imprisonment in the penitentiary not exceeding fifteen years nor less than one year. At fires, or from the person.

SEC. 4241. (2616.) If any person falsely personate or represent another and in such assumed character receive any money or property intended to be delivered to the party so personated, with intent to convert the same to his own use, he is guilty of larceny and shall be punished accordingly. Fraudulently personating another.

SEC. 4242. (2617.) If any person come, by finding, to the possession of any personal property of which he knows the owner and unlawfully appropriate the same or any part thereof to his use, he is guilty of larceny and shall be punished accordingly. Finding property and appropriating it.

SEC. 4243. (2618.) If any officer within this state charged with the collection, safe keeping, transfer, or disbursement of public money unlawfully convert to his own use in any way whatever, or use by way of Officers embezzling public money.

\* The punishment clause of this section was made as here stated, by the 50th chapter of laws of seventh general assembly.

investment in any kind of property, or loan without the authority of law any portion of the public money intrusted to him for collection, safe keeping, transfer, or disbursement, every such act is an embezzlement of so much of said money as is thus taken, converted, invested, used, loaned, or unaccounted for, and upon conviction thereof he shall be imprisoned in the penitentiary not exceeding five years and fined in a sum equal to the amount of money embezzled, and moreover he is forever afterward disqualified from holding any office under the laws or constitution of this state.

Embezzlement by officers, &c.

SEC. 4244. (2619.) If any officer, agent, clerk, or servant of any incorporated company; or if any clerk, agent or servant of a copartnership; or of any person over the age of sixteen years embezzle and fraudulently convert to his own use, or take and secrete with intent to convert to his own use, without the consent of his employer or master, any money or property of another which has come to his possession or is under his care by virtue of such employment, he is guilty of larceny and shall be punished accordingly.

Embezzlement by carriers and others.

SEC. 4245. (2620.) If any carrier or other person to whom any money, goods, or other property which may be the subject of larceny has been delivered to be carried for hire, or if any other person intrusted with such property, embezzle or fraudulently convert to his own use any such money, goods, or other property either in the mass as the same were delivered or otherwise, and before the same were delivered at the place or to the person where and to whom they were to be delivered, he is guilty of larceny and shall be punished accordingly.

Receiving stolen goods.

SEC. 4246. (2621.) If any person buy, receive, or aid in concealing any stolen money, goods, or any property the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same was so obtained, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year.

Notorious thief.

SEC. 4247. (2622.) If any person, having been before convicted of larceny, afterward commit another larceny and be thereof convicted; or if any person at the same term of court is convicted as principal or as accessory after the fact in three distinct larcenies, he is deemed a common and notorious thief and shall be punished by imprisonment in the penitentiary for not less than five years.

Receivers of stolen goods on second conviction.

SEC. 4248. (2623.) If any person after having been convicted of the offense of buying, receiving or aiding in the concealment of stolen money, goods, or any property the stealing of which is larceny, or property obtained by robbery or burglary, be again convicted of the like offense; or if any person at the same term of court is convicted of three distinct acts of buying, receiving, or aiding in the concealment of stolen property or property obtained by robbery or burglary, knowing the same was so obtained, he shall be punished as provided in the preceding section.

Receiver tried though principal not convicted.

SEC. 4249. (2624.) In any prosecution for the offense of buying, receiving, or aiding in the concealment of stolen property or property obtained by robbery or burglary knowing the same was so obtained, it shall not be necessary to aver nor to prove on the trial thereof that the person who stole, robbed, or took the property, has been convicted.

Measure of value.

SEC. 4250. (2625.) If the property stolen consist of any bank note, bond, bill, covenant, bill of exchange, draft, order, or receipt; or any evidence of debt whatever; or any public security; or any instrument

whereby any demand, right, or obligation may be assigned, transferred, created, increased, released, extinguished or diminished, the money due thereon or secured thereby and remaining unsatisfied or which in any event or contingency might be collected thereon, or the value of the property transferred or effected, as the case may be, shall be adjudged the value of the thing stolen.

ARTICLE 2.

An Act to prevent Larceny of Personal Property taken on Legal Process.

[Passed March 24, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 54.]

SECTION 4251. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That any person who shall, knowingly, and without authority of law take, carry away, secrete, or destroy any goods or chattels while the same are lawfully in the custody of any sheriff, coroner, marshal, constable or other officer, and rightfully held by such officer by virtue of execution, writ of attachment or other legal process issued under the laws of the state of Iowa, shall be deemed guilty of larceny, and shall be punished when the value of the property so taken, carried away, secreted or destroyed exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than one year, and when the value of the same does not exceed twenty dollars, by fine not exceeding one hundred dollars, or imprisonment in the county jail not more than thirty days.

Removal of goods from possession of sheriff, &c., larceny.

When property worth \$20, how punished.

SEC. 4252. (2.) The possession or custody of goods and chattels by any person with whom the same have been left or deposited for safe keeping, to be returned for the purpose of being disposed of on legal process, shall be deemed to be in the possession and custody of the officer having or depositing the same, and entitled to the custody thereof, and in prosecution under this act, the property taken, carried away, secreted or destroyed, as in the first section of this act mentioned, may be laid in the officer entitled to the custody thereof at the time of the commission of the offense.

Goods in possession of officer when left with another for safe keeping.

DECISIONS. The verdict should fix the value of the property stolen when that fact determines the degree of punishment, 1 G., 106; see an irregular verdict which was held sufficient, 8 Iowa, 540; description of property stolen, 4 G., 483; 8 Iowa, 540; 2 G., 388; possession, 1 G., 106; what not subject of larceny, 1 G., 106; criminal intent necessary, 8 Iowa, 540; if there was an intent to commit larceny it need not to have been of property over twenty dollars in value, *State v. Jones*, Dec., 1859; coons not subjects of larceny, 1 G., 106; bears, monkeys, foxes, not subjects of larceny, 1 G., 111; the *alleged* value determines the jurisdiction, 8 Iowa, 252; aiding to conceal stolen property means assisting to hide it in order to avoid its discovery, 5 Iowa, 467.

## CHAPTER 168.

## FORGERY AND COUNTERFEITING.

[Code—Chapter 141.]

Forgery of records and instruments of writing.

SECTION 4253. (2626.) If any person, with intent to defraud, falsely make, alter, forge, or counterfeit any public record, or any process issued or purporting to be issued by any competent court, magistrate or officer; or any pleading or proceeding filed or entered in any court of law or equity; or any attestation or certificate of any public officer or other person in relation to any matter wherein such attestation or certificate is required by law or may be received or be taken as legal proof; any charter, deed, will, testament, bond, writing obligatory, power of attorney, letter of credit, policy of insurance, bill of lading, bill of exchange, promissory note; or any order, acquittance, discharge, or accountable receipt for money or other valuable thing; or any acceptance of any bill of exchange or order; or any indorsement or assignment of any bill of exchange, promissory note or order, or of any debt or contract; or any other instrument in writing, being or purporting to be the act of another, by which any pecuniary demand or obligation or any right or interest in or to any property whatever is or purports to be created, increased, transferred, conveyed, discharged, or diminished, he shall be punished by imprisonment in the penitentiary not more than ten years.

Uttering the same as true.

SEC. 4254. (2627.) If any person utter and publish as true, any record, process, certificate, deed, will, or any other instrument of writing mentioned in the preceding section, knowing the same to be false, altered, forged, or counterfeited, with intent to defraud, he shall be punished by imprisonment in the penitentiary not more than fifteen years and fined not exceeding one thousand dollars.

Forgery of public securities.

SEC. 4255. (2628.) If any person, with intent to defraud, falsely make, utter, forge, or counterfeit any note, certificate, state bond, warrant, or other instrument, being public security for money or other property, issued or purporting to be issued by authority of this state or any other of the United States; or any indorsement or other writing purporting to transfer the right or interest of any holder of such public security, he shall be punished by imprisonment in the penitentiary not more than twenty years nor less than five years.

Counterfeiting bank notes, &c.

SEC. 4256. (2629.) If any person make, alter, forge, or counterfeit any bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company duly authorized for that purpose by any state of the United States or any other government or country, with intent to injure or defraud, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year.

Having counterfeit bills with intent to defraud.

SEC. 4257. (2630.) If any person has in his possession any forged, counterfeited, or altered bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued as is mentioned in the preceding section, with intent to defraud, knowing them to be so forged, counterfeited, or altered, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding two hundred dollars and imprisonment in the county jail not exceeding one year.

SEC. 4258. (2631.) If any person utter or pass or tender in payment as true any false, altered, forged, or counterfeit note, certificate, state bond, warrant, or other instrument of public security; or any bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company duly authorized as heretofore mentioned, knowing the same to be false, altered, forged or counterfeit, with the intent to injure or defraud, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

Uttering as true counterfeit public securities.

SEC. 4259. (2632.) If any person, having been convicted of the offenses described in the preceding section, afterward be convicted of a like offense; or if any person at the same term of the court is convicted of three such distinct offenses, he shall be punished by imprisonment in the penitentiary, not less than two years, nor more than ten years.

Repetition of last offenses.

SEC. 4260. (2633.) If any person engrave, make, or mend or begin to engrave, make or mend any plate, block, press, or other tool, instrument, or implement; or make or provide any paper or other materials adapted and designed for the forging or making any false and counterfeit note, certificate, state bond, warrant or other instrument of public security for money or other property of this state or any other of the United States, or any bank bill, promissory note, draft, or other evidence of debt issued or purporting to be issued by any corporation or company; and every person who has in his possession any such plate or block engraved in any part, or any press or other tool, instrument or implement, paper or other material adapted and designed as aforesaid, with intent to use the same or to cause or permit the same to be used in forging or making any such false and forged certificates, notes, bonds, warrants, public securities, or evidences of debt, shall be punished by imprisonment in the penitentiary for not more than five years nor less than two years.

Tools for counterfeiting. &c

SEC. 4261. (2634.) If any person forge or counterfeit any gold or silver coin current by law or usage within this state, and if any person have in his possession at the same time five or more pieces of false money or coin counterfeited in the similitude of any gold or silver coin current as aforesaid, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, he shall be punished by imprisonment in the penitentiary not more than ten years nor less than one year.

Counterfeiting coin.

SEC. 4262. (2635.) Every person who has in his possession any number of pieces less than five of the counterfeit coin mentioned in the preceding section knowing the same to be false or counterfeit, with intent to utter or pass the same as true; and any person who utters, passes, or tenders in payment any false and counterfeit coin, knowing the same to be false and counterfeit, shall be punished by imprisonment in the penitentiary not exceeding eight years, or fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year.

Uttering counterfeit coin and having in possession

SEC. 4263. (2636.) If any person fraudulently connect together different parts of several genuine bank bills, notes, or other instruments in writing so as to produce one instrument, or alter any note or instrument in writing in a matter that is material, with intent to defraud, the same shall be deemed forgery in like manner as if such bill or note or other instrument had been forged and counterfeited, and the offender shall be punished accordingly.

Counterfeiting parts of instruments.

Affixing fictitious signatures.

SEC. 4264. (2637.) If any fictitious or pretended signature of an officer or agent of any corporation be fraudulently affixed to any instrument of writing purporting to be a note, draft, or other evidence of debt issued by such corporation, with intent to utter or pass the same as true, it is forgery though no such person may ever have been an officer or agent of such corporation, nor such corporation have ever existed. Every person guilty of this offense shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding three hundred dollars and imprisoned in the county jail not more than one year.

Fraudulent obliterations forgersy.

SEC. 4265. (2638.) The total or partial erasure or obliteration of any record, process, certificate, deed, will, or any other instrument in writing mentioned in this chapter, with intent to defraud, shall be deemed forgery and the offender shall be punished by imprisonment in the penitentiary not exceeding five years, or fined not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

Repetition of offenses.

SEC. 4266. (2639.) If any person, having been convicted of either of the offenses mentioned in the preceding section, be afterward convicted of a like offense; or if any person at the same term of court be convicted of three such distinct offenses, he shall be punished by imprisonment in the penitentiary not more than ten years nor less than three years.

Making or having instruments for counterfeiting.

SEC. 4267. (2640.) If any person cast, stamp, engrave, make or mend or have in his possession any mould, die, press, or other instrument or tool adapted and designed for the forging or counterfeiting of any coin before mentioned, with intent to use the same or permit the same to be used for that purpose, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.

Counterfeiting foreign coin.

SEC. 4268. (2641.) If any person forge or counterfeit any gold or silver coin of any foreign government or country, with intent to export the same to injure or defraud any such government or the citizens thereof, he shall be punished by imprisonment in the penitentiary not exceeding ten years.

Forgery of the great seal of this state, of public offices, &c.

SEC. 4269. (2642.) Every person who is convicted of having forged, counterfeited, or falsely altered the great seal of this state; or the seal of any public office authorized by law; or the seal of any court, corporation, city or county; or who falsely makes, forges, or counterfeits any impression purporting to be the impression of any such seal, with intent to defraud, shall be punished by imprisonment in the penitentiary not exceeding ten years.

Acts of incorporation proved by reputation; persons of skill competent.

SEC. 4270. (2643.) On the trial of any person for forging or counterfeiting any bill, note, or any other evidence of debt purporting to be issued by any incorporated company; or for uttering, passing or attempting to pass, or having in possession the same with intent to utter or pass such bill, note, or evidence of debt, it is not necessary to prove the incorporation by the charter or act thereof, but the same may be proved by general reputation, and persons of skill are competent witnesses to prove that such bill, note, or evidence of debt is forged or counterfeit.

DECISIONS. Put off equal "to pass and utter," 2 G., 162; as to the *scienter* of falseness, see 2 G., 162; name of him to whom counterfeit money was passed should be stated in the indictment, and if unknown, that fact should be stated, *ibid.* and 8 Iowa, 288; charge offense in language of statute, 8 Iowa, 533; the intent to defraud may be proved, 8 Iowa, 533, 231, 536; as to several counts, see *State v. McPherson*,

June, 1859; wht it is forgery, 8 Iowa, 231; proof of banks existence by general representation, *ibid.*; 7 Iowa, 242.

## CHAPTER 169.

### OFFENSES AGAINST PUBLIC JUSTICE.

[Code—Chapter 142.]

#### ARTICLE I.

SECTION 4271. (2644.) If any person on oath or affirmation law-fully administered willfully and corruptly swear or affirm falsely to any material matter in any proceeding in any court of justice or before any officer thereof, or before any tribunal or officer created by law, or in any proceeding or in regard to any matter or thing in or respecting which an oath or affirmation is or may be required or authorized by law, he is guilty of perjury and shall be punished, if the perjury was committed on the trial of a capital crime, by imprisonment in the penitentiary for life or any term not less than ten years; and if committed in any other case, by imprisonment in the penitentiary not more than ten years nor less than two years. Perjury

SEC. 4272. (2645.) If any person procure another to commit perjury he is guilty of Subornation of perjury and shall be punished as provided in the preceding section. Subornation of perjury.

SEC. 4273. (2646.) If any person endeavor to incite or procure another to commit perjury, though no perjury be committed, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisoned in the county jail not more than one year. Attempt to suborn.

SEC. 4274. (2647.) If any person give, offer, or promise to any executive or judicial officer or member of the general assembly after his election or appointment, and either before or after he has been qualified or has taken his seat, any valuable consideration, gratuity, service or benefit whatever with intent to influence his act, vote, opinion, or judgment in any matter, question, cause or proceeding which may be pending or which may legally come or be brought before him in his official capacity, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not more than one thousand dollars and imprisonment in the county jail not more than one year. Bribery of public officers.

SEC. 4275. (2648.) If any executive or judicial officer or member of the general assembly accept any valuable consideration, gratuity, service or benefit whatever, or any promise to make the same or to do any act beneficial to such officer or member under the agreement or with the understanding that his vote, opinion, decision or judgment shall be given in any particular manner or upon any particular side of any question, cause, or other proceeding which is, or may by law be brought, before him in his official capacity, or that in such capacity he will make any particular nomination or appointment, he shall be imprisoned in the penitentiary not more than ten years, or be fined not more than two thousand dollars and imprisoned in the county jail not more than one year. Acceptance of bribes, &c., by such officer.

SEC. 1276. (2649.) Every person who is convicted under either of the two preceding sections of this chapter shall forever afterward be disqualified from holding any office under the laws or constitution of this state.

Corrupt solicitation for places of trust.

SEC. 1277. (2650.) If any person directly or indirectly give, offer, or promise any valuable consideration or gratuity to any other person not being such officer as is mentioned in the preceding section, with intent to induce such other person to procure for him by his interest, influence, or any other means whatever any place of trust within this state, he shall be punished by fine not exceeding three hundred dollars and imprisoned in the county jail not exceeding one year.

Acceptance of such reward.

SEC. 4278. (2651.) If any person, not being such officer as is referred to in the preceding sections of this chapter, accept and receive of another any valuable consideration or gratuity whatever as a reward for procuring or attempting to procure any office or place of trust within this state for any person, he shall be punished by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year.

Bribery of jurors, referees, &c

SEC. 4279. (2652.) If any person give, offer, or promise any valuable consideration or gratuity whatever to any one summoned, appointed, or sworn as a juror; or appointed or chosen arbitrator, or umpire, or referee; or to any master in chancery; or appraiser of real or personal estate; or auditor, with intent to influence the opinion or decision of any such person in any matter, inquest, or cause, which may be pending or can legally come before him, or which he may be called on to decide in either of said capacities, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.

Acceptance of bribes by such persons.

SEC. 4280. (2653.) If any person summoned, appointed, or sworn as a juror; or appointed arbitrator, umpire, or referee; or master in chancery; or auditor; or appraiser as afore-said, take or receive any valuable consideration or gratuity whatever to give his verdict, award, or report in favor of any particular party in a matter for the hearing or decision of which such person has been summoned, appointed, or chosen as afore-said, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

Attempt to corrupt jurors or referees.

SEC. 1281. (2654.) If any person attempt improperly to influence any juror in any civil or criminal cause, or any one drawn or summoned or appointed or sworn as such juror, or any arbitrator or referee, in relation to any cause or matter pending in or to be brought before the court for which such juror has been drawn, summoned, appointed or sworn, or for the hearing and decision of which such arbitrator or referee has been chosen or appointed, he shall be punished by fine not exceeding five hundred dollars and by imprisonment in the county jail not more than six months.

Jurors receiving evidence without authority.

SEC. 4282. (2655.) If any person drawn, summoned, or sworn as juror make any promise or agreement to give a verdict for or against any person in any civil or criminal case, or corruptly receive any paper, evidence, or information from any one in relation to any matter or cause for the trial of which he is sworn, without the authority of the court or officer before whom such cause or matter is then pending, he shall be punished by a fine not exceeding two hundred dollars or imprisoned in the county jail not exceeding three months.



SEC. 4283. (2656.) If any sheriff, deputy sheriff, constable, or coroner receive from a defendant or any other person any money or other valuable thing as a consideration or inducement for omitting or delaying to arrest any defendant, or to carry him before a magistrate or to prison; or for postponing, delaying, or neglecting the sale of property on execution; or for omitting or delaying to perform any other duty pertaining to his office, he shall be punished by fine not exceeding five hundred dollars or imprisoned in the county jail not exceeding six months, or by both fine and imprisonment at the discretion of the court.

Sheriffs, &c., for neglect of duties.

SEC. 4284. (2657.) If any officer authorized to serve process willfully refuse to execute any lawful process to him directed requiring him to apprehend or confine any person charged with, or convicted of, any public offense; or willfully delay or omit to execute such process, whereby such person escape, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding one thousand dollars or by both fine and imprisonment at the discretion of the court.

Officers refusing to execute process in criminal cases.

SEC. 4285. (2658.) If any person corruptly and willfully demand and receive of another, for performing any service or official duty for which the fee or compensation is established by law, any greater fee or compensation than is allowed or provided for the same; or if any witness falsely and corruptly certify that as such he has traveled more miles or attended more days than he has actually traveled or attended, he shall be punished by fine not exceeding one hundred dollars for each offense, or imprisoned in the county jail not exceeding six months.

Extortion.

SEC. 4286. (2659.) If any person having knowledge of the commission of any offense punishable with death or imprisonment in the penitentiary for life, take any money or valuable consideration or gratuity, or any promise therefor, upon an agreement or understanding express or implied, to compound or conceal such offense, or not to prosecute the same, or not to give evidence thereof, he shall be punished by imprisonment in the penitentiary not more than six years or by fine not exceeding one thousand dollars.

Compounding the greater felonies.

SEC. 4287. (2660.) If any person having knowledge of the commission of any offense punishable by imprisonment in the penitentiary for a limited term of years is guilty of the offense described in the preceding section he shall be punished by imprisonment in the county jail not more than one year and by fine not exceeding four hundred dollars.

Compound the lesser felonies.

SEC. 4288. (2661.) If any jailer or other officer voluntarily suffer any prisoner in his custody upon charge or conviction of a capital felony to escape, he shall be punished by imprisonment in the penitentiary not more than ten years nor less than one year.

Suffering person on charge, &c. of capital felony, to escape.

SEC. 4289. (2662.) If any jailer or other officer voluntarily suffer any prisoner in his custody upon charge or conviction of a felony other than capital to escape, he shall be punished by imprisonment in the penitentiary not more than eight years or by fine not more than one thousand dollars.

One charged with a lesser felony.

SEC. 4290. (2663.) If any jailer or other officer voluntarily suffer any prisoner in his custody upon charge or conviction of any public offense to escape, he shall be fined not more than five hundred dollars or imprisoned in the county jail not exceeding one year, or both fined and imprisoned.

Other escapes.

SEC. 4291. (2664.) If any person by any means whatever aid or assist any prisoner lawfully detained in the penitentiary or in any jail

Assisting to escape in case of felony.

- or place of confinement for any felony, in an attempt to escape, whether such escape be effected or not, or forcibly rescue any person held in legal custody upon any criminal charge, he shall be punished by imprisonment in the penitentiary not exceeding ten years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.
- In cases of misdemeanor.** S1 c. 4292. (2665.) Every person who by any means whatever aids or assists any prisoner lawfully committed to any jail or place of confinement, charged with or convicted of any criminal offense other than a felony, whether such escape be effected or not; or who conveys into such jail or place of confinement any disguise, instrument, arms, or other thing proper or useful to facilitate the escape of any prisoner so committed, whether such escape be effected or attempted or not, shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding five hundred dollars, or by both such fine and imprisonment at the discretion of the court.
- From an officer.** S1 c. 4293. (2666.) Every person who aids or assists any prisoner in escaping or attempting to escape from the custody of any sheriff, deputy sheriff, marshal, constable, or other officer or person who has the lawful charge of such prisoner upon any criminal charge, shall be punished by fine not exceeding three hundred dollars or imprisonment in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court.
- Prisoners escaping from penitentiary.** S1 c. 4294. (2667.) If any person confined in the penitentiary for any less period than for life break such prison and escape from thence, he shall be punished by imprisonment in such prison for a term not exceeding five years, to commence from and after the expiration of the original term of his imprisonment.
- From county jail.** S1 c. 4295. (2668.) If any person confined in a county jail upon any conviction for a criminal offense break such jail and escape therefrom, he shall be imprisoned in such prison not exceeding one year, to commence from and after the expiration of his former sentence, and fined not exceeding three hundred dollars.
- Resisting execution of process.** S1 c. 4296. (2669.) If any person knowingly and willfully resist or oppose any officer of this state or any person authorized by law, in serving or attempting to execute any legal writ, rule, order, or process whatsoever, he shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding one thousand dollars nor less than fifty dollars, or by both fine and imprisonment at the discretion of the court.
- Refusing to assist officers.** S1 c. 4297. (2670.) If any person, being lawfully required by any sheriff, deputy sheriff, coroner, constable, or other officer, willfully neglect or refuse to assist him in the execution of his office in any criminal case or in any case of escape or rescue, he shall be punished by imprisonment in the county jail not more than six months or by fine not more than one hundred dollars.
- Falsely assuming to be a judge, justice, &c.** S1 c. 4298. (2671.) If any person falsely assume to be a judge, justice of the peace, magistrate, sheriff, deputy sheriff, coroner, or constable, and take upon himself to act as such or to require any one to aid or assist him in any matter pertaining to the duty of any such officer, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding three hundred dollars.
- Exercising office without authority, and officers exceeding authority.** S1 c. 4299. (2672.) If any person take upon himself to exercise or officiate in any office or place of authority in this state without being legally authorized, or if any person by color of his office willfully and corruptly oppress any person under pretense of acting in his official

capacity, he shall be punished by fine not exceeding one thousand dollars or imprisonment in the county jail not more than one year, or by both fine and imprisonment.

SEC. 4300. (2673.) If any judge, justice of the peace, clerk of any court, sheriff, coroner, constable, attorney or counselor at law encourage, excite or stir up any suit, quarrel, or controversy between two or more persons with intent to injure such person or persons, he shall be punished by fine not exceeding five hundred dollars and shall be answerable to the party injured in treble damages.

Stirring up quarrels.

SEC. 4301. (2674.) When any duty is, or shall be enjoined by law upon any public officer or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision has been made for the punishment of such delinquency is a misdemeanor.

Neglect of duty by public officers.

SEC. 4302. (2675.) When the performance of any act is prohibited by any statute and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor.

Certain acts misdemeanors.

SEC. 4303. (2676.) Every person who is convicted of a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.

Punishment for misdemeanors where not otherwise provided for.

SEC. 4304. (2677.) If any public officer fraudulently make or give false entries or false returns or false certificates or receipts in cases where entries, returns, certificates, or receipts are authorized by law, he shall be fined not exceeding five hundred dollars or imprisoned in the county jail not exceeding one year, or both at the discretion of the court.

Public officers making false entries, returns, &c.

ARTICLE 2.

An Act to provide for the Punishment of Willful and Malicious Oppression.

[Passed March 12, 1858, took effect March 24, 1858; Laws of Seventh General Assembly, Chapter 43, page 50.]

SECTION 4305. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That if any judge or other officer in this state shall by color of his office, willfully and maliciously oppress any person under pretense of acting in his official capacity, the person so offending shall upon conviction thereof be fined in any sum not exceeding three hundred dollars, and undergo imprisonment in the jail of the county where such conviction is had, not less than five nor more than thirty days.

Oppression of judge, punished by fine and imprisonment.

SEC. 4306. (2.) Any person who by color of his office shall willfully and maliciously oppress any person, under pretense of acting in his official capacity, such person so offending shall be liable to any damages sustained by the injured party, to be recovered by civil action.

Oppression of any officer punished.

SEC. 4307. (3.) Proceedings under either of the foregoing sections shall not affect or bar proceedings under the other.

No conflict of proceedings.

ARTICLE 3.

An Act defining the Crime and punishing the Offense of making False Entries of Fines and Fees on Dockets of Courts and otherwise, and of failing or neglecting to pay over such fines or fees according to law.

[Passed Feb. 24, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 21, page 24.]

SECTION 4308. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That any justice of the peace, clerk of the district or

Officers failing to pay over fees or fines, guilty of misdemeanor.

Subject to civil action	<p>other court, county recorder, or any other officer who by law is authorized to receive and required to pay over fees of office, or who is or may be authorized to impose or collect fines, who shall fail, neglect or refuse to pay over as prescribed, or as may hereafter be prescribed by law, all such fees and fines, shall be guilty of a misdemeanor, and shall be subject and liable to be prosecuted therefor in any court having jurisdiction of the offense, besides being liable and subject to a civil action for the recovery of such fines and fees as may be by any such officer illegally withheld or appropriated.</p>
Officer making false entries in relation to fees or fines guilty of misdemeanor.	<p>SEC. 4309. (2.) If any justice of the peace, clerk of the district or other court which is now or may hereafter be established, county recorder or other officer, who by law is authorized or required to keep a court docket, or who is or may be required to keep an account of fees or fines, and to pay over, or in any way account for the same, shall in any manner falsify such docket or account, or shall fail, neglect or refuse to make an entry upon such docket, or account of such fees and fines, as are required to be paid over according to law, such justice of the peace, clerk of the district court, or clerk of any other court, county recorder and other officer shall be guilty of a misdemeanor, and shall be subject and liable to be prosecuted therefor in any court having jurisdiction of the offense.</p>
Officer appropriating fees to his own use, when required to pay over is liable to removal	<p>SEC. 4310. (3.) Any justice of the peace, district court clerk, or clerk of any other court which is or may be established, county recorder, or other officer who may be found guilty of the offense of appropriating to his own use fees of office or fines collected for violation of law, or of neglecting to pay over the same as prescribed by law, shall be removed from office by the court before or by whom the offense may be tried and judgment or conviction had, and each and every person so found guilty shall be punished by a fine not exceeding 300 dollars nor less than 10 dollars, or imprisoned in the county jail for a period not exceeding one year, or by both such fine and imprisonment, in the discretion of the court.</p>
Punished by fine and imprisonment.	<p>SEC. 4311. (4.) Prosecutions under this act may be commenced by any person having cognizance of the offense, in the same manner as any other criminal offense may be commenced or prosecuted, and it is hereby made the duty of the prosecuting attorney of the county in which the offense herein contemplated may be committed, and of the district attorney of the judicial district in which such offense may be committed, to take such action respecting the commencement and prosecution of such offense as may in their respective judgment be most conducive and effectual in carrying out the intention of this act, whether they or either of them become personally cognizant of its commission, or by or on the affidavit of another party.</p>
By whom prosecution commenced	<p>SEC. 4312. (5.) Until otherwise provided by law, fines and fees shall be collected and accounted for as prescribed by existing law, * * * and the * * * district attorney * shall institute and prosecute to judgment a civil action against any and every person or office who may have neglected or refused, or may hereafter neglect or refuse to pay over according to law, fees and fines collected by them.*</p>
Duty of prosecuting attorney	<p>SEC. 4313. (6.) This act shall take effect and be in force from and after its publication according to law.</p>
District attorney institute suit	

\* Thus amended by article 4th of this chapter.

ARTICLE 4.

“An Act to carry into effect the provisions of Chapter Twenty-one of the Acts of the Seventh General Assembly and amendatory thereto.”

[Passed April 2, 1860, Chapter 96, 8th Session, page 148.]

SECTION 4314. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That all officers required by the provisions of chapter twenty-one of the acts of the seventh general assembly, to collect and pay over fines, fees, &c., shall make report thereof under oath, to the county judge of the proper county showing the amount of fines assessed, amount of fines, fees, &c., collected, together with the vouchers for the payment of all sums by him collected, to the proper officer required to keep the same, which report shall be made on the 1st Monday in January in each year. Officers required to pay fees, under oath to report to county judge.

SEC. 4315. (2.) It shall be the duty of the district courts of the several counties of this state, to give in charge especially to the grand-jury, this act and also said chapter twenty-one of the acts of the seventh general assembly. Duty of district courts.

SEC. 4316. (3.) So much of the fifth section of said chapter twenty-one of the acts of the seventh general assembly as requires the prosecuting attorneys of each county, or the district attorneys respectively to make or cause to be made, an examination of the docket of justices of the peace, and clerk of the district courts, and of the accounts of the fees of the recorders of deeds clerks of the district courts and such other officers as are required to account for the same, for any other purpose than their own benefit, and all other acts and parts of acts contravening the provisions of this act be and the same are hereby repealed. Part of 5th section of chapter 21-t repealed.

SEC. 4317. (4.) This act to be in force from and after its publication in the Iowa State Journal and Iowa State Register. Take effect.

DECISIONS. Averment as to jurisdiction in perjury, 1 G., 160; see as to proof, 6 Iowa, 138.

CHAPTER 170.

MALICIOUS MISCHIEF AND TRESPASS ON PROPERTY.

[Code—Chapter 143.]

ARTICLE 1.

SECTION 4318. (2678.) If any person maliciously kill, maim, or disfigure, any horse, cattle, or other domestic beast of another; or maliciously administer poison to any such animals; or expose any poisonous substance with intent that the same should be taken by them, he shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding three hundred dollars. Injuries to beasts of another.

SEC. 4319. (2679.) If any person maliciously injure or destroy any dam, lock, canal, trench, or reservoir, or any of the appurtenances thereof, or any of the gear or machinery of any mill or manufactory; or maliciously draw off the water from any mill pond, reservoir, canal, Injuries to dams, &c.

or trench; or destroy, injure, or render useless any engine or the apparatus thereto belonging, prepared or kept for the extinguishment of fires, he shall be punished by imprisonment in the county jail not exceeding one year and by fine not exceeding five hundred dollars.

Injuries to  
bridges, &c.

SEC. 4320. (2680.) If any person maliciously injure, remove, or destroy any bridge, rail or plank road; or place, or cause to be placed any obstruction on such bridge, or road; or willfully obstruct or injure any public road or highway; or maliciously cut, burn, or in any way break down, injure or destroy, any telegraph post, or in any way cut, break or injure the wires or any apparatus thereto belonging, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.

Setting loose  
rafts, boats, &c.

SEC. 4321. (2681.) If any person maliciously cut away, let loose, injure or destroy, any boom or raft of wood, logs, or other lumber, or any boat or vessel fastened to any place, of which he is not the owner or legal possessor, he shall be punished by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year, and shall also forfeit to the use of the person so injured double the amount of damages by him thereby sustained to be recovered in an action at law.

Injuring trees,  
and breaking  
down fences,  
gates, &c.

SEC. 4322. (2682.) If any person maliciously cut down, injure or destroy, any fruit or ornamental tree or other tree, vine, or shrub of another, standing or growing for ornament or use; or maliciously break down, mar, deface, or injure, any fence hedge, or ditch inclosing lands belonging to another; or throw down, or open, any gate, or bars not his own or under his charge and leave them open, whereby an injury is done to another; or maliciously injure, destroy, or sever from the land of another any produce thereof or any thing attached thereto, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding one hundred dollars, or by both imprisonment and fine at the discretion of the court.

Monuments,  
mile stones, sign  
boards, &c.

SEC. 4323. (2683.) If any person maliciously take down, injure, or remove any monument erected or any tree marked as a boundary of any tract of land, city, town, or lot; or destroy, deface, or alter the marks of any such monument or tree made for the purpose of designating such boundary, or injure or deface any mile stone, post, or guide board, erected on any public way; or remove, deface, or injure any sign board; or break or remove any lamp or lamp post, or extinguish any lamp on any bridge, way, street, or passage, he shall be punished by fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court.

Trespass by dig-  
ging, cutting,  
carrying away,  
&c.

SEC. 4324. (2684.) If any person willfully commit any trespass by cutting down or destroying any timber or wood standing or growing on the land of another; or by carrying away timber or wood being on such land; or by digging or carrying away any earth, stone, marble, slate, coal, copper, lead, iron ore, or any other ore or metal; or by taking and carrying from such land, any grass, hay, corn, grain, fruit or other vegetables; or carrying away from any wharf, street, or landing place, any goods whatever in which he has no interest, he shall be punished by fine not exceeding five hundred dollars or imprisonment in the county jail not more than one year or by both fine and imprisonment at the discretion of the court.

Trespass on gar-

SEC. 4325. (2685.) If any person willfully commit any trespass by

entering upon the garden, orchard, or improved land of another with intent to take, carry away, destroy, or injure the trees, shrubs, grain, grass, hay fruit, or vegetables there being, he shall be punished by fine not exceeding *one hundred*\* dollars or by imprisonment in the county jail not more than thirty days.

dens, orchards, &c.

SEC. 4326. (2686.) If any person maliciously injure, deface, or destroy any building or fixture attached thereto, or willfully and maliciously destroy, injure, or secrete, any goods, chattels, or valuable papers of another, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars, and is liable to the party injured in a sum equal to three times the value of the property so destroyed or injured, in a civil action.

Injury to building, fixtures, goods, &c.

SEC. 4327. (2687.) If any person willfully write, make marks, or draw characters on the walls or any other part of any church, college, academy, school house, court house, or other public building; or willfully injure, or deface the same, or any wall or fence inclosing the same, he shall be punished by fine not exceeding *one hundred dollars* or by imprisonment in the county jail not more than *thirty days*. \* \* \* †

Defacing public buildings.

SEC. 4328. (2688.) If any person intentionally deface, obliterate, tear down, or destroy, in whole or in part, any transcript, or extract from or of any law of the United States or of this state, or any proclamation, advertisement, or notification set up at any place within this state by authority of law or by order of any court, during the time for which the same is to remain set up, he shall be fined in a sum not exceeding one hundred dollars \* \* \* \* or imprisoned in the county jail not exceeding thirty days.†

Defacing and destroying notices, &c.

SEC. 4329. (2689.) If any owner, master, clerk, or any other person having charge of or belonging to any boat, vessel, or raft, take any cord wood or any other species of property from the owner or his agent without the knowledge of such owner or agent or without paying the customary price for the same, he shall be punished by fine not exceeding two hundred dollars or by imprisonment in the county jail not exceeding six months.

Taking cord wood, &c., without consent.

SEC. 4330. (2690.) If any person willfully dig up, pull down, break, or destroy or in any other manner injure or remove any of the cast iron pillars or other evidences planted and fixed, or which may hereafter be planted or fixed, in and along any part of the boundaries of this state, he may be indicted therefor, and upon conviction before any court having competent jurisdiction shall be punished by fine not less than fifty dollars nor more than two hundred dollars or by imprisonment in the penitentiary for a term not less than six months, or by both such fine and imprisonment at the discretion of the court.

Injuring monuments of state boundary.

ARTICLE 2.

An Act relating to the crime of placing obstructions on Railroad Tracks, or removing any Rail therefrom, or committing any injuries to Railroads.

[Passed March 22, 1858, took effect July 4, 1858: *Laws of Seventh General Assembly, Chapter 115, page 234*]

SECTION 4331. (1.) *Be it enacted by the General Assembly of the State of Iowa, If any person or persons shall willfully and maliciously place any obstruction on the track of any railroad in this state, or remove any rail therefrom, or in any other way injure such railroad, or*

Placing obstructions on tracks punished

\* Thus amended as indicated by italics, by laws of seventh general assembly, chapter 50, page 55.

† Thus amended by laws of seventh general assembly, chapter 50, page 55.

do any other thing thereto, whereby the life of any person is or may be endangered, he or they shall be punished by confinement in the state penitentiary for life, or for any term not less than two years.

## ARTICLE 3.

An Act fixing punishment for Malicious Mischief.

[Passed March 20, 1858, took effect March 31, 1858, Laws of Seventh General Assembly, Chapter 83, page 118.]

Fine and imprisonment for breaking levee.

SECTION 4332. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That if any person maliciously injure, break, or cause to be broken, any levee erected to prevent the overflow of land within this state, such person so offending shall upon conviction be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding one year.

## CHAPTER 171.

## OFFENSES AGAINST THE RIGHT OF SUFFRAGE.

[Code—Chapter 144.]

Bribery.

SECTION 4333. (2691.) If any person offer or give a bribe to any elector for the purpose of influencing his vote at any election authorized by law; and if any elector entitled to vote at such election receives such bribe, he shall be punished by fine not exceeding five hundred dollars or imprisoned in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court.

Voting more than once.

SEC. 4334. (2692.) If any elector unlawfully vote more than once at any election which may be held by virtue of any law of this state, he shall be punished by fine not exceeding two hundred dollars or by imprisonment in the county jail not exceeding one year.

Voting when not qualified.

SEC. 4335. (2693.) If any person knowing himself not to be qualified vote at any election authorized by law, he shall be punished by fine not exceeding two hundred dollars or by imprisonment in the county jail not exceeding six months.

Voting in a county when not a resident.

SEC. 4336. (2694.) If any person go or come into any county of this state and vote in such county, not being a resident thereof, he shall be punished by fine not exceeding two hundred dollars or by imprisonment in the county jail not exceeding one year.

Voting without being qualified.

SEC. 4337. (2695.) If any person willfully vote who has not been a resident of this state for six months next preceding the election, or who at the time of the election is not twenty-one years of age, or who is not a citizen of the United States, or who is not duly qualified from other disability to vote at the place where and time when the vote is to be given; he shall be fined in a sum not exceeding three hundred dollars or imprisoned in the county jail not exceeding one year.

Counseling one to vote when not qualified.

SEC. 4338. (2696.) If any person, procure, aid, or assist, counsel, or advise another to give his vote, knowing that such person is disqual-



ified he shall be punished by fine not exceeding five hundred dollars nor less than fifty dollars and by imprisonment in the county jail not exceeding one year.

SEC. 4339. (2697.) If any person furnish an elector with a ticket or ballot informing him that it contains a name or names different from those which are written or printed therein with an intent to induce him to vote contrary to his inclination, or fraudulently or deceitfully change a ballot of any elector by which such elector is deprived of voting for such candidate or person as he intended, he shall be punished by imprisonment in the county jail not exceeding two years and by fine not exceeding one thousand dollars nor less than one hundred dollars.

Inducing to vote by false representation.

SEC. 4340. (2698.) If any person unlawfully and by force, or threats of force, prevent or endeavor to prevent an elector from giving his vote at any public election in this state, he shall be punished by imprisonment in the county jail not exceeding six months and a fine not more than two hundred dollars.

Preventing from voting by force or threats.

SEC. 4341. (2699.) If any person give or offer a bribe to any judge, clerk, or canvasser of any election authorized by law, or any executive officer attending the same, as a consideration for some act done or omitted to be done contrary to his official duty in relation to such election, he shall be punished by fine not exceeding seven hundred dollars and imprisonment in the county jail not exceeding one year.

Giving bribe to judge, clerk, &c., of election.

SEC. 4342. (2700.) If any person procure or endeavor to procure the vote of any elector or the influence of any person over other electors at any election, for himself or for or against any candidate, by means of violence, threats of violence, or threats of withdrawing custom or dealing in business or trade, or enforcing the payment of debts, or bringing a suit or criminal prosecution, or any other threat of injury to be inflicted by him or by his means, he shall be punished by fine not exceeding five hundred dollars or imprisonment in the county jail not more than one year.

Procuring vote or influence by force or threats.

SEC. 4343. (2701.) If any judge or clerk of any election authorized by law knowingly make or consent to any false entry on the list of voters or poll books; or put into the ballot box or permit to be so put in any ballot not given by a voter; or take out of such box or permit to be so taken out any ballot deposited therein, except in the manner prescribed by law; or by any other act or omission designedly destroy or change the ballots given by the electors, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

Judges and clerks making false entry, &c.

SEC. 4344. (2702.) When any one who offers to vote at any election is objected to by an elector as a person not possessing the requisite qualifications, if any judge of such election unlawfully permit him to vote without producing proof of such qualification in the manner directed by law, or if any such judge willfully refuse the vote of any person who complies with the requisites prescribed by law to prove his qualifications, he shall be punished by fine not exceeding two hundred dollars nor less than twenty dollars or by imprisonment in the county jail not exceeding six months.

Refusing to permit electors to vote, and the contrary.

SEC. 4345. (2703.) If any judge, clerk, or executive officer, designedly omit to do any official act required by law, or designedly do any illegal act in relation to any public election by which act or omission the votes taken at any such election in any city, town, precinct, township, or district be lost or the electors thereof be deprived of their suffrage at such election, or designedly do any act which renders such

Acts of officers rendering election void.

election void, he shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in the county jail not more than one year, or by both fine and imprisonment at the discretion of the court.

Not returning  
poll-books in  
time

SEC. 4346. (2704.) If any judge, clerk, or messenger, after having been deputed by the judges of the election to carry the poll-books of such election to the place where by law they are to be canvassed, willfully or negligently fail to deliver such poll-books within the time prescribed by law safe with the seal unbroken, he shall for every such offense be punished by fine not exceeding five hundred dollars nor less than fifty dollars.

DECISION. Illegal voting—good indictment therein, 7 Iowa, 413.

## CHAPTER 172.

### OFFENSES AGAINST CHASTITY, MORALITY, AND DECENCY.

#### ARTICLE 1.

[Code—Chapter 145.]

Adultery.

SECTION 4347. (2705.) Every person who commits the crime of adultery, shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding three hundred dollars and imprisonment in the county jail not exceeding one year; and when the crime is committed between parties only one of whom is married both are guilty of adultery and shall be punished accordingly. No prosecution for adultery can be commenced but on the complaint of the husband or wife.

Bigamy.

SEC. 4348. (2706.) If any person who has a former husband or wife living marry another person, or continue to cohabit with such second husband or wife in this state, he or she, except in the cases mentioned in the following section, is guilty of bigamy and shall be punished by imprisonment in the penitentiary not more than five years or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year.

Excepted cases.

SEC. 4349. (2707.) The provisions of the preceding section do not extend to any person whose husband or wife has continually remained beyond seas or who has voluntarily withdrawn from the other and remained absent for the space of three years together, the party marrying again not knowing the other to be living within that time; nor to any person who has good reason to believe such husband or wife to be dead; nor to any person who has been legally divorced from the bonds of matrimony.

Knowingly marry-  
ing husband  
or wife.

SEC. 4350. (2708.) Every unmarried person who knowingly marries the husband or wife of another when such husband or wife is guilty of bigamy thereby, shall be punished by imprisonment in the penitentiary not exceeding three years, or by fine not more than three hundred dollars and imprisonment in the county jail not exceeding one year.

Lewdness.

SEC. 4351. (2709.) If any man and woman not being married to each other lewdly and viciously associate and cohabit together, or if

any man or woman married or unmarried is guilty of open and gross lewdness and designedly make any open and indecent or obscene exposure of his or her person or of the person of another, every such person shall be punished by imprisonment in the county jail not exceeding six months or by fine not exceeding two hundred dollars.

SEC. 4352. (2710.) If any person keep a house of ill-fame resorted to for the purpose of prostitution or lewdness, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars; and any person who, after having been once convicted of such offense, is again convicted of the like offense shall be punished by imprisonment in the penitentiary not less than one year nor more than three years.

Keeping house of ill-fame.

SEC. 4353. (2711.) When the lessee of a dwelling house is convicted of keeping the same as a house of ill-fame the lease or contract for letting such house is, at the option of the lessor, void and such lessor may thereupon have the like remedy to recover possession as against a tenant holding over after the expiration of his term.

Lease to person convicted, void.

SEC. 4354. (2712.) If any person let any house knowing that the lessee intends to use it as a place or resort for the purpose of prostitution and lewdness, or knowingly permit such lessee to use the same for such purpose, he shall be punished by fine not exceeding three hundred dollars or imprisonment in the county jail not exceeding six months.

Leasing house for such purpose.

SEC. 4355. (2713.) If any person inveigle or entice any female, before reputed virtuous, to a house of ill-fame, or knowingly conceal or aid or abet in concealing such female so deluded or enticed, for the purpose of prostitution or lewdness, he shall be punished by imprisonment in the penitentiary not more than ten years nor less than three years.

Enticing virtuous females to bad houses.

SEC. 4356. (2714.) If any person without lawful authority willfully dig up, dis-inter, remove, or carry away any human body or the remains thereof from its place of interment, or aid or assist in so doing; or willfully receive, conceal, or dispose of any such human body or remains thereof; or if any person willfully and unnecessarily and in an improper manner indecently expose, throw away, or abandon any human body or the remains thereof in any public place or in any river, stream, pond, or other place, every such offender shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding one thousand dollars, or by both fine and imprisonment.

Violation of sepulchre and exposure of dead bodies.

SEC. 4357. (2715.) If any person willfully destroy or injure any tomb, grave-stone, monument, or other thing placed or designated as a memorial of the dead; or any fence, railing or other thing placed about the same; or any place inclosed for the burial of the dead; or willfully destroy, injure or remove any tree, shrub or plant within such inclosure, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars, or by both fine and imprisonment.

Injury to monuments, &c.

SEC. 4358. (2716.) If any person cruelly beat or torture any horse or ox or other beast, whether belonging to himself or another, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.\*

Cruelty to animals.

SEC. 4359. (2717.) If any person import, print, publish, sell, or distribute any book, pamphlet, ballad, or any printed paper containing obscene language or obscene prints, pictures or descriptions manifestly tending to corrupt the morals of youth; or introduce into any family,

Selling obscene books, pictures, &c.

\* This was thus amended by laws of seventh general assembly, chapter 50, page 55.

school, or place of education; or buy, procure, receive, or have in his possession any such book, pamphlet, ballad, printed paper, picture or description, either for the purpose of loan, sale, exhibition, or circulation; or with intent to introduce the same into any family, school, or place of education, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding *one* hundred dollars.\*

Disturbing wor-  
shipping congrega-  
tions.

SEC. 4360. (2718.) If any person willfully, disturb or disquiet any assembly of persons met for religious worship, by profane discourse or rude and indecent behavior, or by making a noise either within the place of worship or so near as to disturb the order and solemnity of the assembly, he shall be punished by imprisonment in the county jail not more than thirty days or by fine not exceeding *one* hundred dollars.\*

Same.

SEC. 4361. (2719.) If any person, within one mile from the place where any religious society is collected together for religious worship in any field or woodland, expose to sale or gift any spirituous or other liquors or any articles of merchandise or any provisions or other articles of traffic, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.\*

Saving.

SEC. 4362. (2720.) The preceding section does not apply to tavern or grocery keepers exercising their calling or business in the places mentioned in their licenses (if they have such); nor to any distillers or manufacturers or others in the prosecution of their ordinary calling or business, so as to prevent them from vending or exposing to sale the articles above prohibited at their place of residence; nor to any person who has a written permit from the person having the charge of such religious society to sell any of such prohibited articles on complying with the regulations of such religious assembly and with the laws of the state.

Keeping gam-  
bling houses.

SEC. 4363. (2721.) If any person keep a house, shop, or place resorted to for the purpose of gambling; or permit or suffer any person in any house, shop, or other place under his control or care, to play at cards, dice, faro, roulette, equality, or other game for money or other thing, such offender shall be fined in a sum not less than fifty dollars nor more than three hundred dollars or imprisoned in the county jail not exceeding one year, or be both fined and imprisoned. In a prosecution under this section any person who has the charge of or attends to any such house, shop, or place, may be deemed the keeper thereof.

Search warrant  
against.

SEC. 4364. (2722.) If any person make oath before a justice of the peace that he has probable cause to suspect and does suspect that any house, building, or place (naming the house or place and the occupant) is unlawfully used as a common gaming house or place for the purpose of gaming for money or other property, and that persons resort to the same for that purpose, whether they be known to the complainant or not, such justice may issue his warrant for the purpose of searching such house or building for all such implements or gambling devices mentioned in the preceding section and for the apprehension of the occupant or keeper of said house or building; and after such search, seizure, and arrest, the said implements and keeper shall be carried before such justice of the peace to be dealt with as provided by law. And any gambling device brought before the justice may be destroyed by him, and an entry thereof shall be made upon his docket.

Gaming and bet-  
ting.

SEC. 4365. (2723.) If any person play at any game for any sum of

\* Thus amended by laws of seventh general assembly, chapter 50, page 55.

money or other property of any value, or make any bet or wager for money or other property of value, he shall be punished by fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding *thirty days*.\*

SEC. 4366. (2724.) All promises, agreements, notes, bills, bonds, or other contracts, mortgages, or other securities, when the whole or any part of the consideration thereof is for money or other valuable thing won or lost, laid, staked, or bet at or upon any game of any kind or on any wager, are absolutely void and of no effect. Gaming contracts void.

## ARTICLE 2.

An Act relating to Incest.

[Passed March 22, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 47.]

SECTION 4367. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That no man shall marry his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's son's widow, brother's daughter or sister's daughter. Prohibited degrees.

SEC. 4368. (2.) No woman shall marry her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son, or sister's son. Same.

SEC. 4369. (3.) All persons being within the degrees of consanguinity or affinity in which marriages are prohibited by the foregoing sections, who shall intermarry with or carnally know each other shall be deemed guilty of incest and shall be punished by imprisonment in the state penitentiary for a term not exceeding ten years and not less than one year. Penalty.

SEC. 4370. (4.) All acts and parts of acts inconsistent with this act are hereby repealed. Repeal.

DECISIONS. Adultery how proved, 5 Iowa, 204; letting house for purposes of prostitution, 6 Iowa, 117; 4 Iowa, 541; common reputation as to house of ill-fame, 7 Iowa, 411; incest under statute of 1839, M., 330; sec. 2709 defined, 8 Iowa, 401; the permission of sec. 2712 can not be shown by a mere non-user of means to prevent the same, but the state must show a consent under a knowledge of such use, 4 Iowa, 542.

## CHAPTER 173.

## OFFENSES AGAINST PUBLIC HEALTH.

[Code—Chapter 146.]

## ARTICLE 1.

SECTION 4371. (2725.) If any person knowingly sell any kind of diseased, corrupted, or unwholesome provisions, whether for meat or drink, without making the same fully known to the buyer he shall be Selling unwholesome provisions.

\* Thus amended by laws of seventh general assembly, chapter 50, page 55.

punished by imprisonment in the county jail not more than *thirty days* or by fine not exceeding *one* hundred dollars.\*

Adulterating  
food or liquor.

SEC. 4372. (2726.) If any person fraudulently adulterate for the purpose of sale, any substance intended for food, or any wine, spirituous or malt liquor or other liquor intended for drinking, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding three hundred dollars, and the articles so adulterated shall be forfeited and destroyed.

Adulterating  
drugs or medi-  
cines.

SEC. 4373. (2727.) If any person fraudulently adulterate for the purpose of sale any drug or medicine in such manner as to lessen the efficacy or change the operation of such drugs or medicines, or to make them injurious to health; or sell them knowing that they are thus adulterated, he shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding five hundred dollars, and such adulterated drugs and medicines shall be forfeited and destroyed.

Apothecaries,  
&c., neglecting  
to label poisons.

SEC. 4374. (2728.) If any apothecary, druggist, or other person, sell and deliver any arsenic, corrosive sublimate, prussic acid, or any poisonous liquid or substance, without having the word "poison" and the true name thereof written or printed upon a label attached to the vial, box, or parcel containing the same, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars.\*

Inoculating with  
small pox with  
intent to cause  
its spread.

SEC. 4375. (2729.) If any person inoculate himself or any other person, or suffer himself to be inoculated with the small pox within this state, or come within the state with intent to cause the prevalence or spread of this infectious disease, he shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

#### ARTICLE 2.

An Act to punish the Selling of Drugged Intoxicating Liquors.

[Passed March 23, 1858, took effect July 4, 1858; *Laws of Seventh General Assembly, Chapter 140, page 264.*]

Fine and impris-  
onment for sell-  
ing drugged  
liquors.

SECTION 4376. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That any person who shall willfully sell or keep for sale intoxicating malt or vinous liquors which have been adulterated or drugged by admixture with any deleterious or poisonous substance, shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars or by imprisonment in the penitentiary not exceeding two years.

\* Thus amended by law of seventh general assembly, chapter 50, page 35.

CHAPTER 174.

OFFENSES AGAINST PUBLIC POLICY.

[Code—Chapter 147.]

ARTICLE 1.

SECTION 4377. (2730.) If any person make or aid in making or establishing any lottery in this state; or advertise or make public any scheme for any such lottery; or advertise or offer for sale any ticket or part of a ticket in any lottery; or sell, negotiate, or dispose of, or purchase, or receive the same, or have in his possession any ticket or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, he shall be punished by imprisonment in the county jail not more than *thirty days* or by fine not exceeding one *hundred* dollars, or by both fine and imprisonment at the discretion of the court.\*

Establishment of lotteries and sale of tickets.

[2731, 2732, 2733, 2734, repealed by banking laws.]

SEC. 4378. (2735.) If any \* \* \* person give, sell, or dispose of any spirituous or intoxicating drink to any indian within this state or to any person who is intoxicated, he shall be punished by fine not exceeding two hundred dollars or by imprisonment in the county jail not exceeding one year, or by both fine and imprisonment at the discretion of the court.

Disposing of liquor to indians or persons intoxicated.

SEC. 4379. (2736.) If any person knowingly bring within this state, any pauper or poor person with the intent of making him a charge on any of the townships or counties therein, he shall be punished by fine not exceeding five hundred dollars and stand charged with his support.

Bringing paupers within this state.

SEC. 4380. (2737.) If any person carry on or transact any business or occupation without license therefor when such license is required by any law of this state; he shall be fined in a sum not exceeding *one hundred* dollars or imprisoned in the county jail not exceeding *thirty days*.†

Transacting business, license.

ARTICLE 2.

An Act to Protect Game.

[Passed January 23, 1857, took effect February 17, 1857; Laws of Sixth General Assembly, Chapter 164, page 254.]

SECTION 4381. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That it shall be unlawful for any person except on his own premises, to kill, ensnare or trap any wild deer, elk or fawn, wild turkey, prairie hen or chicken, grouse or quail, between the first day of *January* and the fifteenth day of *August* in each and every year.‡

Killing game prohibited.

SEC. 4382. (2.) It shall be unlawful for any person to buy or sell any kind of the abovementioned animals or birds which shall have been trapped, ensnared or killed between the days above mentioned; the having in possession any of the above animals or birds recently killed, by any person or persons, between said dates, shall be deemed and taken as

Sale unlawful.

\* Amended thus by laws of seventh general assembly, chapter 50, page 55.

† Thus amended, laws of seventh general assembly, chapter 50, page 55.

‡ February was changed to January and July to August, laws of seventh general assembly, chapter 147, page 289, passed March 23, took effect July 4, 1858.

	<i>prima facie</i> evidence that the same was trapped, ensnared or killed by the person or persons having the possession of the same, in violation of the provisions of this act.
Penalties.	SEC. 4383. (3.) Any person violating any of the provisions of this act, shall forfeit and pay a fine of fifteen dollars for each deer, fawn or elk, snared, entrapped, killed, bought, sold or held in possession; and three dollars for any bird of game above mentioned, thus killed, trapped, ensnared, bought, sold or held in possession.
Trespass.	SEC. 4384. (4.) Any person who shall go upon the premises of any person or corporation, whether inclosed or not, and shall be found hunting, trapping or ensnaring any of the above named birds or animals within the dates aforesaid, shall be deemed guilty of trespass, and may be prosecuted by any person in possession of said premises, before any justice of the peace of the county, or other court of competent jurisdiction, and fined in any sum not less than three dollars nor more than fifty dollars, to be paid one moiety to the complainant, and one moiety to the <i>school fund commissioner</i> of the county, for the use and benefit of the schools of said county: <i>provided, however</i> , that a judgment against a person for a violation of this act, under the first, second and third sections of the same, shall be a bar to any suit under the fourth section of this act for the same offense.
Fine.	
Before whom.	SEC. 4385. (5.) A prosecution may be brought by any person in the name of the state of Iowa, against any person or persons violating the first, second, or third sections of this act, before any justice of the peace of the county in which such violation of this act is alleged to have taken place, or before any court of competent jurisdiction thereof, and any sum or sums so recovered shall be paid to the <i>school fund commissioner</i> of the county, for the benefit of the common schools of said county.
Fine paid to school fund.	

## CHAPTER 175.

### OFFENSES AGAINST THE PUBLIC PEACE.

[Code—Chapter 148.]

#### ARTICLE 1.

Affray between two or more.	SECTION 4386. (2738.) If two or more persons voluntarily or by agreement engage in any fight, or use any blows or violence toward each other in an angry or quarrelsome manner; in any public place to the disturbance of others, they are guilty of an affray and shall be punished by imprisonment in the county jail not exceeding <i>thirty days</i> or by fine not exceeding <i>one hundred</i> dollars.*
Unlawful assembly of three or more	SEC. 4387. (2739.) When three or more persons in a violent or tumultuous manner assemble together to do an unlawful act, or when together attempt to do an act whether lawful or unlawful in an unlawful, violent, or tumultuous manner to the disturbance of others, they are guilty of an unlawful assembly and every such offender shall be punished by imprisonment in the county jail not more than <i>thirty days</i> or by fine not exceeding <i>one hundred</i> dollars.*

\* Thus amended by laws of seventh general assembly, chapter 50, page 55.



SEC. 4388. (2740.) When three or more persons together and in a riot. violent or tumultuous manner commit an unlawful act, or together do a lawful act in an unlawful, violent, or tumultuous manner, to the disturbance of others, they are guilty of a riot, and every such offender shall be punished as is provided in the preceding section.\*

SEC. 4389. (2741.) Any person guilty of unlawfully assembling, or of a riot, may alone be indicted and convicted thereof, but it must be alleged in the indictment and proved on the trial that three or more persons were engaged therein. One person may be convicted of a riot.

SEC. 4390. (2742.) If any person make or excite any disturbance in any tavern, store, or grocery, or at any election or public meeting, or in any other place where the citizens are peaceably and lawfully assembled, he shall be punished by fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding *thirty days*.† Exciting disturbance in certain houses.

SEC. 4391. (2743.) If any person or persons unlawfully or riotously assembled pull down, injure, or destroy; or begin to pull down, injure or destroy, any dwelling house or other building; or destroy or attempt to injure or destroy any boat or vessel; or perpetrate any premeditated injury on the person of another, not being a felony, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year, and shall also be answerable to any person injured to the full amount of the damages by him sustained, in an action at law. Injuring or destroying houses, boats, &c.

ARTICLE 2.

An Act for the Observance of the Sabbath.

[Passed January 19, 1855, took effect July 1, 1855: *Laws of Fifth General Assembly, Chapter 33, page 47.*]

SECTION 4392. (1.) *Be it enacted by the General Assembly of the State of Iowa,* That if any person be found on the first day of the week, commonly called Sabbath, engaged in any riot, fighting, or offering to fight, or hunting, shooting, carrying fire arms, fishing, horse racing, dancing, or in any manner disturbing any wor-shiping assembly, a private family, or in buying or selling property of any kind, or in any labor, (the work of necessity and charity only excepted,) every person so offending, shall on conviction be fined in a sum not more than five dollars, nor less than one dollar, to be recovered before any justice of the peace in the county where such offense is committed: *provided,* nothing herein contained shall be construed to extend to those who conscientiously observe the seventh day of the week as the Sabbath, or to prevent persons traveling, or families emigrating from pursuing their journey, or keepers of toll bridges, toll gates, and ferrymen from attending the same. Breach of Sabbath. Fine. Seventh day. Travelers.

SEC. 4393. (2.) For all offenses, and assessments under the provisions of this act, the offenders shall be committed to the jail of said county until the said fines, together with costs of prosecution shall be paid. Committed.

\* Amended to conform to the preceding section by laws of seventh general assembly, chapter 50, page 55.

† Thus amended by laws of seventh general assembly, chapter 50, page 55.

## CHAPTER 176.

## CHEATING BY FALSE PRETENSES, GROSS FRAUDS, AND CONSPIRACY

[Code—Chapter 149.]

- Cheating by false pretenses.** SECTION 4394. (2744.) If any person designedly and by false pretense or by any privy or false token and with intent to defraud obtain from another any money, goods or other property; or so obtain the signature of any person to any written instrument the false making of which would be punished as forgery, he shall be punished by imprisonment in the penitentiary not more than seven years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year.
- Fraudulent conveyances.** SEC. 4395. (2745.) Any person who knowingly being a party to any conveyance or assignment of any estate or interest in lands, goods, or things in action, or of any rents or profits arising therefrom; or being a party to any charge on such estate, interest, rents, or profits, made or created with intent to defraud prior or subsequent purchasers or to hinder, delay, or defraud creditors or other persons; and every person who being privy to or knowing of such fraudulent conveyance, assignment, or charge, puts the same in use as having been made in good faith, shall be fined not exceeding one thousand dollars and imprisoned in the county jail not exceeding one year.
- Suppression of last will.** SEC. 4396. (2746.) If any person, having in his possession or under his control any last will and testament of any deceased person, willfully suppress, secrete, deface, or destroy the same, or any codicil thereto belonging, with intent to injure or defraud any devisee, legatee, or other person, he shall be punished by imprisonment in the penitentiary not more than seven years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year.
- False weights and measures.** SEC. 4397. (2747.) If any person with intent to defraud use a false balance, weight, or measure in the weighing or measuring of any thing whatever that is purchased, sold, bartered, shipped or delivered for sale or barter or that is pledged or given in payment, he shall be punished by fine not exceeding five hundred dollars nor less than fifty dollars or by imprisonment in the county jail not more than six months, or by both fine and imprisonment at the discretion of the court.
- Forfeited to the county.** SEC. 4398. (2748.) The magistrate granting the warrant of arrest for this offense must also direct the seizure of the false weights, balances, or measures; and if the party be convicted, or they are found to be false, they shall be forfeited to the county and after being made of the standard weight or measure may be sold and the money arising from such sale must be paid into the county treasury.
- Altering stamps, marks and brands.** SEC. 4399. (2749.) If any person falsely alter any stamp, brand, or mark on any cask, package, box, or bale containing merchandise or produce, made by a public officer appointed for that purpose in order to denote the quality, weight, or quantity of the contents thereof, with intent to defraud, he shall be fined not more than five hundred dollars and imprisoned in the county jail not exceeding one year.
- Counterfeiting mark of another** SEC. 4400. (2750.) If any person counterfeit any mark, stamp, or brand of another, or falsely mark any cask, package, box, or bale as to quality or quantity, with intent to defraud, he shall be punished by fine not exceeding two hundred dollars or by imprisonment in the county jail not more than six months, or by both fine and imprisonment.

SEC. 4401. (2751.) If any person with intent to defraud use any <sup>Using box, &c.,</sup> cask, package, box or bale, marked, branded, or stamped by another, for <sup>marked by another with intent</sup> the sale of merchandise or produce of an inferior quality or less in quantity or weight than is denoted by such mark, stamp or brand, he shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding two hundred dollars, or by both fine and imprisonment at the discretion of the court. <sup>to defraud.</sup>

SEC. 4402. (2752.) Every person who is convicted of any gross fraud or cheat at common law shall be punished as provided in the preceding section.

SEC. 4403. (2753.) If any person cast away, sink, or otherwise destroy any raft, boat, or vessel within any county of this state with intent <sup>Fraudulent destruction of boats, &c.</sup> to injure or defraud any owner or insurer thereof, or the owner or insurer of any property laden on board the same or of any part thereof, he shall be punished by imprisonment in the penitentiary not exceeding five years, or fined not exceeding two thousand dollars and imprisoned in the county jail not exceeding one year.

SEC. 4404. (2754.) If any person lade, equip, or fit out, or assist in lading, equipping or fitting out any raft, boat, or vessel with intent <sup>Fitting them out for such purpose</sup> that the same be cast away, burnt, sunk, or otherwise destroyed, to injure or defraud any owner or insurer thereof or of any property laden on board the same, he shall be punished by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year.

SEC. 4405. (2755.) If any owner of any boat or vessel or of any property laden or pretended to be laden on board the same, or if any other person concerned in the lading or fitting out such boat or vessel, <sup>Making false bills of lading, &c.</sup> make out and exhibit or cause to be made out and exhibited any false estimates of any goods or property laden or pretended to be laden on board such boat or vessel, with intent to injure or defraud any insurer of such boat or vessel or property or of any part thereof, he shall be fined not exceeding one thousand dollars or imprisoned in the penitentiary not more than three years.

SEC. 4406. (2756.) If any master or other officer of any boat or vessel make or cause to be made any false affidavit or protest, or if any owner or other person concerned in such boat or vessel or in the goods or property laden on board the same procure any such false affidavit or protest to be made or exhibit the same, with intent to injure, deceive, or defraud any insurer of such boat or vessel or of the goods or property laden on board of the same, he shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine not exceeding two thousand dollars and imprisonment in the county jail not exceeding one year. <sup>Making false affidavits and protests.</sup>

SEC. 4407. (2757.) If two or more persons conspire or confederate together with intent falsely and maliciously to cause or procure another person to be indicted or in any way impleaded or prosecuted for an offense of which he is innocent, whether such person be so impleaded, indicted or prosecuted or not, they shall be deemed guilty of a conspiracy and upon conviction thereof shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars nor less than one hundred dollars and imprisonment in the county jail not exceeding one year. <sup>Conspiracy to prosecute.</sup>

SEC. 4408. (2758.) If any two or more persons conspire or confederate together with the fraudulent or malicious intent wrongfully to injure the person, character, business, or property of another; or to do <sup>Conspiracy in other cases.</sup>

any illegal act injurious to the public trade, health, morals or police; or to the administration of public justice; or to commit any felony, they are guilty of a conspiracy, and every such offender, and every person who is convicted of conspiracy at common law, shall be punished by imprisonment in the penitentiary not more than three years, or by fine not exceeding five hundred dollars and imprisonment in the county jail not more than one year.

DECISION. An indictment for cheating and the certainty of the charge as to the means and intent, 7 Iowa, 255.

## CHAPTER 177.

### NUISANCES, AND ABATEMENT THEREOF.

[Code—Chapter 150.]

What deemed  
nuisances

SECTION 4409. (2759.) The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which by occasioning noxious exhalations, offensive smells, or other annoyances becomes injurious and dangerous to the health, comfort, or property of individuals or the public; the causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others; the obstructing or impeding without legal authority the passage of any navigable river, harbor, or collection of water; or the corrupting or rendering unwholesome or impure the water of any river, stream, or pond; or unlawfully diverting the same from its natural course or state to the injury or prejudice of others; and the obstructing or incumbering by fences, buildings, or otherwise, the public highways, private ways, streets, alleys, commons, landing places, or burying grounds, are nuisances.

Building for  
manufacture of  
gunpowder.

SEC. 4410. (2760.) If any person carry on the business of manufacturing gunpowder or of mixing or grinding the composition therefor in any building within eighty rods of any valuable building erected at the time when such business may be commenced, the building in which such business is thus carried on is a public nuisance and such person is liable to be prosecuted accordingly.

Houses of ill-  
fame, gambling  
houses, &c.

SEC. 4411. (2761.) Houses of ill fame kept for the purpose of prostitution and lewdness, gambling houses, or houses where drunkenness, quarreling, fighting, or breaches of the peace are carried on or permitted to the disturbance of others, are nuisances and may be abated and punished as provided in this chapter.

Punishment and  
abatement of  
nuisances

SEC. 4412. (2762.) Whoever is convicted of erecting, causing, or continuing a public or common nuisance as described in this chapter, or at common law when the same has not been modified or repealed by statute, where no other punishment therefor is specially provided shall be punished by a fine not exceeding one thousand dollars, and the court with or without such fine may order such nuisance to be abated, and issue a warrant as hereinafter provided.

Process for the  
abatement of

SEC. 4413. (2763.) When upon indictment, complaint or action, any person is adjudged guilty of a nuisance, the court before whom such conviction is had may, in addition to the fine imposed if any or to the judgment

for damages and costs for which a separate execution may issue, order that such nuisance be abated or removed at the expense of the defendant, and after inquiry into and estimating as nearly as may be the sum necessary to defray the expense of such abatement, the court may issue a warrant therefor.

SEC. 4414. (2764.) When the conviction is had upon an action before a justice of the peace and no appeal is taken, the justice after estimating as aforesaid the sum necessary to defray the expenses of removing or abating the nuisance may issue a like warrant. Justice of peace may issue such warrant.

SEC. 4415. (2765.) Instead of issuing such warrant the court or justice may order the same to be stayed, upon motion of the defendant and upon his entering into an undertaking in such sum and with such surety as the court or justice may direct, to the state, conditioned either that the defendant will discontinue said nuisance or that within a time limited by the court and not exceeding six months he will cause the same to be abated and removed as either is directed by the court; and upon his default to perform the condition of his undertaking the same shall be forfeited and the court in term time or vacation, or justice of the peace as the case may be, upon being satisfied of such default may order such warrant forthwith to issue, and a *scire facias* on such undertaking. Warrant stayed, if, &c.

SEC. 4416. (2766.) The expense of abating a nuisance by virtue of a warrant can be collected by the officer in the same manner as damages and costs are collected on execution, except that the materials of any building, fences, or other things, that may be removed as a nuisance may be first levied upon and sold by the officer, and if any of the proceeds remain after satisfying the expense of the removal such balance must be paid by the officer to the defendant or to the owner of the property levied upon, and if said proceeds are not sufficient to pay such expenses the officer must collect the residue thereof. Expenses of abatement.

DECISIONS. In an indictment, location of house need not be stated, but if stated must be proved, 8 Iowa, 523; the offense is complete as well in an hour as a year, *ibid.*; form of a charge in an indictment which was held good, 7 Iowa, 406, 479; 3 G., 276; playing for liquor, is gambling, 7 Iowa, 406; right to remove what is a private nuisance, 1 G., 247; obstructing public way, 1 G., 439; what is public way, *ibid.*; sufficient description of such way, 4 Iowa, 502.

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## CHAPTER 178.

### LIBEL.

[Code—Chapter 151.]

SECTION 4417. (2767.) A libel is the malicious defamation of a Definit on. person made public by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends.

Punishment.	SEC. 4418. (2768.) Every person who makes, composes, dictates, or procures the same to be done ; or who willfully publishes or circulates such libel ; or in any way knowingly and willfully aids or assists in making, publishing, or circulating the same shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding one thousand dollars.
The truth given in evidence.	SEC. 4419. (2769.) In all prosecutions or indictments for libel the truth thereof may be given in evidence to the jury, and if it appear to them that the matter charged as libelous was true and was published with good motives and for justifiable ends the defendant shall be acquitted.
No libel without publication.	SEC. 4420. (2770.) No printing, writing, or other thing is a libel unless there has been a publication thereof.
What is publication	SEC. 4421. (2771.) The delivering, selling, reading or otherwise communicating a libel; or causing the same to be delivered, sold read, or otherwise communicated, to one or more persons or to the party libeled, is a publication thereof.
Jury to determine law and fact.	SEC. 4422. (2772.) In all indictments or prosecutions for libel the jury, after having received the direction of the court, shall have the right to determine at their discretion the law and the fact.

DECISIONS. Publication what—form of petition—proof of publication, 1 Iowa, 482 ; evidence in libel, 2 G., 231 ; 2 Iowa, 571.

- PRIOR LAWS UNDER TITLE 23. 1. An act for the punishment of crimes, passed April 12, 1827 ; M. D., 1833, p. 444.
2. An act amending same, passed April 12, 1833 ; M. D., 1833, p. 463.
3. An act to prevent the cutting and waste of timber, passed March 15, 1821 ; M. D., 1833, p. 464.
4. An act to prevent firing woods and prairies, passed March 12, 1827.
5. An act to prevent the destruction of muskrats, passed April 20, 1833 ; M. D., 1833, p. 46.
6. An act to prevent damage by mischievous dogs, passed April 9, 1825 ; M. D., 1833, p. 466.
7. An act to enforce observance of the Sabbath, passed March 12, 1827 ; M. D., 1833, p. 467.
8. An act to restrain peddlers selling without license, passed April 12, 1827 ; M. D., 1833, p. 468. All the above repealed Aug. 30, 1840.
9. An act to regulate blacks and mulattoes, and to punish the kidnapping of such, passed April 13, 1827 ; M. D., 1833, p. 470.
10. An act for the prevention of immoral practices, passed April 13, 1827 ; M. D., 1833, p. 472.
11. An act concerning habitual drunkards, and to protect their estates, passed April 12, 1827 ; M. D., 1833, p. 475.
12. An act to punish idle and disorderly persons, passed April 12, 1827 ; M. D., 1833, p. 477.
13. An act to prevent gaming, passed April 12, 1827 ; M. D., 1833, p. 477 ; repealed Jan. 18, 1838 ; Wis., 2d sess., No. 65, p. 203. All the above repealed Aug. 30, 1840.
14. An act to prevent the selling of spirituous liquors to Indians, passed Feb. 4, 1825 ; M. D., 1833, p. 482.
15. An act to prevent private lotteries, passed June 30, 1828 ; M. D., 1833, p. 483.
16. An act to prevent the sale of lottery tickets, passed June 14, 1832 ; M. D., 1833, p. 483.
17. An act relative to nine pins, passed July 21, 1830 ; M. D., 1833, p. 484. All the above repealed Aug. 30, 1840.
18. An act to prevent the circulation of foreign bills of less than five dollars, passed June 26, 1832 ; M. D., 1833, p. 530.
19. An act to prevent and punish gambling, passed Jan. 18, 1838 ; Wis., 2d sess., No. 65, p. 203.
20. An act to prevent bribery, passed Jan. 18, 1838 ; Wis., 2d sess., No. 77, p. 258. All the above repealed Aug. 30, 1840.
21. An act to regulate blacks and mulattoes, passed Jan. 21, took effect, Feb. 21, 1839 ; I. T., 1st sess., p. 65.

22. An act defining crimes and punishments, passed Jan. 25, 1839, took effect June 1, 1839; I. T., 1st sess., p. 142; repealed by Reprint, 1843, chap. 49, p. 162, sec. 48.

23. An act to prevent and punish gambling, passed Dec. 25, 1838; I. T., 1st sess., p. 221; repealed by Reprint, 1843, chap. 76, p. 273.

24. An act to punish the vendors of unwholesome liquors and provisions, passed Dec. 29, took effect Jan. 29, 1839; I. T., 1st sess., p. 457; also, Reprint, 1843, p. 625.

25. An act to protect worshipping congregations, passed Jan. 24, took effect Feb. 24, 1839; I. T., 1st sess., p. 513; also, Reprint, 1843, p. 657.

26. An act to punish trespass on school and other lands, passed Jan. 17, 1840; I. T., 2d sess., chap. 78, p. 113.

27. An act to prevent the exercise of foreign jurisdiction in the territory of Iowa, passed July 1, 1840; I. T., 2d sess., extra, chap. 35, p. 48.

28. An act to amend an act to prevent and punish gambling, passed Feb. 16, took effect March 16, 1842; I. T., 4th sess., chap. 68, p. 60; repealed by Reprint, 1843, chap. 76, p. 273.

29. An act defining crimes and punishments, passed Feb. 16, 1843; Reprint, chap. 49, p. 162. "*The Code of Crime.*" Did this repeal all else? I think none but that of 1839.

30. An act to repeal the 42d sec. of the above act, passed Feb. 17, took effect March 17, 1843; Reprint, chap. 50, p. 194.

31. An act to prevent and punish gaming, passed Feb. 13, took effect March 13, 1843; Reprint, chap. 76, p. 273.

32. An act to prevent certain immoral practices, passed Feb. 10, took effect March 10, 1843; Reprint, chap. 82, p. 294, and again printed in I. T., 6th sess., chap. 43, p. 63.

33. An act to punish the obstruction of public roads, passed Feb. 14, took effect March 14, 1844; I. T., 6th sess., chap. 18, p. 24.

34. An act to amend an act of Jan. 24, 1839, as to worshipping congregations, passed Jan. 15, took effect March 1, 1846; I. T., 8th sess., chap. 10, p. 8.

35. An act to amend an act of Feb. 16, 1843, defining crimes, &c., passed Jan. 17, took effect June 1, 1846; I. T., 8th sess., chap. 17, p. 16.

AN ACT TO ESTABLISH  
A CODE OF CRIMINAL PRACTICE.\*

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CHAPTER 179.

PRELIMINARY PROVISIONS.

Name of act.      SECTION 4423. *Be it enacted by the General Assembly of the State of Iowa, That this act shall be known as, The Code of Criminal Practice.*

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\* The Code of Criminal Practice was, together with the report thereon, drawn by William Smyth, one of the commissioners, and concurred in by his colleagues, W. T. Barker and Charles Ben Darwin. The concurrence of Mr. Barker, however, was qualified by an objection on a few points, as shown in his separate report on these points. The Code as adopted, was in some measure modified by reason of Mr. Barker's report. As the points involved in his objection are of great interest, and the report difficult to be got, I here subjoin the entire report on the Criminal Code, except an act on appeals, drawn by Mr. Barker as a substitute for the chapter on that subject. The figures used in the report are conformed to the sections of this revision, but in some cases the section, it will be seen, has been changed in its passage.

*Remarks of Mr. Barker.*—While I unite with Judge Smyth and Mr. Darwin, in recommending the principal parts of the report of the Revising Commissioners, relative to the practice in criminal cases, the report contains several provisions which I am unable to approve.

It is proposed to limit the counsel for the state to one argument before the trial jury, giving the closing argument to the defendant's counsel in all cases. (See section 356 [4785] of the reported act.) This rule does not prevail generally in other states, it has never been the law in this state, and I think there are good reasons, why such innovation should not now be adopted. I am aware, that it is urged that the proposed rule has the sanction of a great name—that of EDWARD LIVINGSTON, but I think however well his reasoning might apply to the conditions of society, the laws and the judicial system of Louisiana, it is not correct, when applied to the present condition of our state. He supports the proposition by the singular reason, among others, that by giving the closing argument to the prosecution, "sometimes defeats the ends of justice by enlisting the feelings of humanity on the side of the accused." He assigns as another reason, that the defendant's counsel "is generally the youngest counsel at the bar," and the public prosecutor "one of the highest abilities and standing." In our state, it is well known that in all prosecutions of much importance, the most experienced and eminent counsel are employed or assigned for the defense. Again, our law prohibits the judge from charging upon the facts, while in Louisiana he may recapitulate any part, or all of the testimony, if desired by the jury so to do.

It is well known that persons on trial charged with a crime, are generally objects of the pity, if not the recipients of active sympathy, from the court, jury and community.

Jurors prefer rather to acquit than convict, and often allow their judgments to be swerved from the even balance of justice through sympathy for the defendant. It is well known, that appeals to the sympathies of jurors, is a staple article in all defenses for great crimes, and verdicts of acquittal are of frequent occurrence, which can be



SEC. 4424. The provisions of this act shall regulate the proceedings <sup>What to do.</sup> in all prosecutions in all the courts of this state from and after the first day of September, A. D., 1860, except as hereinafter provided.

accounted for upon no other hypothesis, and which shake the confidence of injured communities in the ability of judicial tribunals to protect society from crime.

In every stage of a criminal prosecution, the rights of the defendant are jealously guarded, and great advantages are allowed him which are denied the state. He is allowed a sufficient number of challenges to make the jury substantially one of his own selection. He is furnished with counsel, by the state, if unable to employ one himself; and his counsel, by a special provision of our statute (Code sec. 1614) is exempted from the obligation resting upon attorneys in other cases, to maintain nothing but what is "legal and just," and is impliedly licensed to obtain the acquittal of his client by any means in his power, whether he believes the defense "legal and just," or not; while it would be a violation of the official and professional oath of the attorney for the state, to avail himself of anything illegal or unjust, or to ask the conviction of a defendant he did not believe had been legally proven guilty.

The defendant is presumed to be innocent until the state has removed every reasonable doubt of his guilt, and that by the most strict legal evidence, for that which would produce a moral conviction in the mind, would be insufficient for the purpose of establishing guilt in a criminal trial.

The defendant is permitted to keep the nature of his defense, and the names of his witnesses secret, until it, and they, are made known on the trial. The dissent of one juror prevents a conviction; and while, if the jury err in acquitting the defendant, he can not be again tried for the same offense, yet the court may, on application of the defendant, or upon its own motion, set aside a verdict of conviction if it believes any error has been committed, or injustice done the defendant.

It is apparent that it must be wholly impossible for the counsel for the state to divine, and properly answer, in advance, all the specious arguments, false propositions of law, erroneous deductions of fact from the evidence, which an experienced counsel might advance in behalf of a defendant. Often several defenses are made and urged with great plausibility, that are first made known by the argument of the defendant's counsel. A capital case was recently tried in this state, in which distinguished and experienced counsel, urged the following several defenses, viz.: 1. That the defendant did not commit the act of killing. 2. That the death was the result of accident, from the act of the deceased. 3. That the killing was accidental by the defendant. 4. That the defendant was insane. 5. That at the time of the killing the defendant was intoxicated and incapable of a murderous intent.

To prohibit the state from replying to the arguments and authorities, which might be introduced to substantiate a defense of such a character, or in fact in any criminal prosecution, would undoubtedly be an "advantage" to the defendant, and would at the same time operate as a denial of justice to the community in many cases that readily suggest themselves to the mind. It might lessen the number of convictions, but would not prevent crime.

The proper administration of the criminal law, is the only shield the state provides the peaceable citizen, for the protection of his person and life, and to a great extent his property, against the acts of the vicious and lawless, and its efficiency should not be weakened by unnecessary legislative restrictions.

I know of no existing evil which the proposed rule would remedy, while its adoption would, in my opinion, tend to a laxity in the enforcement of the criminal law, and to weaken the confidence of the people in the ability of the court for the protection of life and property, and would have a direct tendency from that cause, to revive and extend that state of public feeling so much to be regretted, which has occasioned in some localities, men who otherwise are law-abiding citizens, to band together for the punishment of criminals, without authority of law. The proposed rule is not demanded to secure to the defendant an impartial trial, and is not well adapted to our condition as a people, our judicial system, or the manner of conducting criminal trials.

I do not approve of the chapter on appeals, as reported by the commission, and herewith present a draft of an act, which I think should be substituted for that chapter.

The proposed substitute, is mainly the existing law, revised and amended. The most important change proposed in the present law, and in the report, by the proposed substitute, is designed to prevent appeals in capital cases merely for the purpose of delay.

Appeals in such cases may now be taken without any cause, whatever, except for delay, and thus impose needless expense upon the public.

The proposed substitute secures the defendant all just and reasonable rights, and

Not to render invalid, prosecutions commenced.

**SEC. 4425.** All prosecutions or proceedings in criminal cases which shall be commenced before the first day of September, A. D. 1860, and which by the existing laws would be valid, shall not be rendered invalid by this act, but may be prosecuted to their conclusion, and enforced according to the existing laws, as if this act had not been passed.

will tend to suppress an existing public evil, which requires a remedy. Legal gentlemen of prominent standing have advised this change, saying to me they felt bound to take advantage of the law for their clients, but believed it unjust to the public.

I think that section 380 [4809] should be modified so as to leave it discretionary with the court to employ a person to keep a record of the testimony, in such cases as it may deem necessary. If the provision be adopted as recommended, it will occasion unnecessary delays, and much needless expense. There are many trivial cases, in which it would cost the county several times more to procure the testimony to be written out in full, than the amount of the fine which would be imposed on the defendant, if convicted. There are but two classes of persons qualified to keep "full and accurate" minutes of the testimony, without seriously delaying the progress of the trial, and they are experienced lawyers and stenographers. To employ either would more than equal the expense of an additional public officer for each judicial district.

I think it would better subserve public interests, to modify section 225 [4647] and strike out section 357 [4886], so as to leave the law on that subject as it existed in the Code. Every person conversant with ordinary proceedings before the grand jury, is aware of the fact, that many witnesses are examined before the jury whose testimony is wholly immaterial to either party. Sometimes the private prosecutor is ignorant that this testimony is incompetent, sometimes mistaken as to what they will testify to; and often the grand jury and the public prosecutor, after finding that a crime has been committed, are unable to ascertain what persons know about it, except from the witness stand; it often being the case that those who know of the commission of an offense, are reluctant from sympathy with the guilty party or from other causes to inform against him until compelled so to do by law.

It is of frequent occurrence that not one half of the witnesses examined before the grand jury, are able to testify to any important material fact, touching the case under investigation.

If all the immaterial witnesses, sworn before the grand jury, are to be recognized or subpoenaed to appear before the trial jury, it will create unnecessary expense to the public, and annoyance to the witnesses; and unless they are to be recognized and subpoenaed, the mere formality of indorsing their names upon the indictment is a useless requirement.

But more serious objections exist against the provision, making it a cause for quashing the indictment, should the grand jury omit by accident or otherwise, to indorse the name of any witness sworn before it upon the indictment. This is carrying technicalities to the utmost extreme.

There are no valid reasons why the state should be limited in establishing the guilt of a defendant to the witnesses, whose names were indorsed upon the indictment by the grand jury, or whose names have been furnished the defendant three days before the trial, with a notice that they will be examined.

It often happens that important witnesses are discovered during the progress of the trial, or immediately before it commences, or it is ascertained that a witness whose testimony was relied upon, as sufficient to establish some material fact, is absent, other persons may be present, who could speak to the same point, yet none of them could be called because the district attorney did not know of their materiality in time to give three days' previous notice of his intention to examine them, and the consequence follows that the defendant must be discharged or the trial postponed.

Such a rule can but operate to increase the expenses of administering the criminal law and aid the guilty in escaping, without affording any real protection to the wrongfully accused.

The supreme court, in the case of the *State v. Abrahams*, 6th Iowa Reports, page 121, says, "there is no principle of law, or of natural right, which entitles a defendant to a previous knowledge of all the witnesses to be called against him. Our statute has gone sufficiently far, probably, in giving him the knowledge of those upon whose information the charge is based, by requiring their names to be indorsed upon the indictment."

This case overrules the cases of *Ray v. the State*, and *Harriman v. the State*, so far as they tended to establish a contrary doctrine.

The section amendatory of the Code, was drafted and reported to the judiciary

SEC. 4426. All laws coming within the purview of this act, shall Repealing clause become repealed when this act goes into effect, except as hereinafter provided.

committee by myself, for the purpose of avoiding the rule partially established in the cases of *Ray and Harriman v. the State*, prior to the decision in the case of the *State v. Abrahams*. I am now satisfied that the Code, as construed by the supreme court is the just and proper rule upon that subject.

W. T. BARKER.

*Remarks of the majority of the Commissioners on the provisions from which Mr. Barker dissents.* 1. Mr. Barker dissents from the provisions of section 225, [4647.] "He thinks it would better subserve the public interest to so modify it as to leave the law on that subject as it existed in the Code of 1851." The provisions of the Code of 1851 on the subject, are contained in section 2913, which reads: "When an indictment is found, the names of the material witnesses for the state examined before the grand jury, or whose depositions have been read before it, must in all cases be indorsed thereon before it is presented to the court." The provision in that section requiring the names of the material witnesses on the part of the state whose depositions have been read before the grand jury to be indorsed has reference to section 2898, of the Code of 1851, which provides that, "the grand jury may when the defendant has been held to answer for a public offense, find an indictment upon the testimony taken before the magistrate." The testimony taken before the magistrate spoken of in section 2898, of the Code of 1851, has reference again to section 2868, of the same Code, which required the testimony given on the part of the state and the defendant, on the preliminary examination, to be reduced to writing, &c., and the testimony thus required to be taken in writing was required by section 2880, of the same Code, to be returned by the magistrate to the district court, before which the defendant had been held to answer. Section 2868 of the Code of 1851, with such other parts of chapter 165 of the same Code as required the magistrate to take this testimony in writing, and return the same to the district court, was repealed by chapter 57, of acts of the 4th general assembly, session laws of 1853, page 94. Now, the majority of this commission was in favor of restoring section 2868, of the Code of 1851, and requiring the testimony before the examining magistrate in all cases to be taken in writing and returned to the district court, and to go farther and require in all cases a preliminary examination before indictment; but Mr. Barker was opposed to it, and for the sake of unanimity a compromise was made on the provisions of sections 171 [4593] and 172 [4594,] of this Code. For these reasons the majority of the commission can not see "that the law on this subject, could have been left as it existed in the Code of 1851," so far as that Code required the names of the material witnesses on the part of the state, whose depositions were read before the grand jury to be indorsed on the indictment. We did not find it in the statute book, and so we could not leave it there. We agreed not to restore it, but compromised as before stated.

Again, *who are the material witnesses on the part of the state*, as contemplated in section 2913 of the Code of 1851, whose names only, Mr. Barker thinks ought to be indorsed on the indictment, and which would better subserve public interests? Are they the witnesses whose evidence goes to support the case on the part of the state only, and not those whose evidence operates in favor of the defendant also? or, do they include both? If the former, we can not agree with him, if the latter, we think the provisions of section 225 [4647] of this Code, does not materially differ from that of section 2913 of the Code of 1851, relative to the names of the witnesses examined before the grand jury, which are required to be indorsed on the indictment. Indeed we can not see how it can become very material to public interests, or to the interest of either the state, or the defendant, whether the names of all the witnesses examined before the grand jury, or any of them, are indorsed on the indictment. We think it is at least a matter of convenience, and equally so to the state and the defendant, to have presented at one glance, by this indorsement, the names of all the witnesses so examined. That it is not treated in this Code as very material, we think is apparent from the fact, that although the lack of this indorsement is made by the second sub-division of section 269 [4691,] one, among other grounds, of the motion to set aside the indictment, yet a very easy mode of supplying the defect or omission, is provided in section 270 [4692,] viz.: by the district attorney, or the clerk of the court, correcting the indorsement, by the insertion of the names, or name, omitted, so as to correspond with the minutes required to be kept by the clerk of the grand jury, and returned and presented with the indictment, to the court. This also answers the "more serious objections" urged against

## CHAPTER 180.

## PUBLIC OFFENSES AND THE MODES OF PREVENTING AND PROSECUTING, AND SOME GENERAL PROVISIONS.

Definition of crime.

SECTION 4427. A crime or public offense in the meaning of this code is any act or omission forbidden by law, and to which is annexed upon conviction thereof a punishment.

this requirement of section 225 [4647,] and which is alleged to be "carrying technicalities to the utmost extreme."

But it is also alleged against this requirement, "that it frequently occurs that not one-half the witnesses examined before the grand jury, are able to testify to any fact material to the case under investigation," and it is urged "that if all immaterial witnesses so examined, are to be required to appear and testify before the trial jury, it will create unnecessary expense to the public, and annoyance to the witnesses." By reference to section 523 [4951] it will be seen, that it is made the duty of the clerk of the court to issue subpoenas for witnesses, both on the part of the defendant and the state, but on the part of either, only when required. Now the parties need not require the clerk to issue subpoenas for these immaterial witnesses. If the state makes unnecessary expense by requiring immaterial witnesses to be subpoenaed, or by requiring them to enter into an undertaking to appear and testify, the public ought to pay such expense. A little care on the part of the district attorney, a little trouble in examining the minutes of the evidence of the witnesses examined before the grand jury, and which are required to be presented with the indictment to the court, and filed by the clerk, there to remain, open to the inspection of the district attorney, will enable him to determine the materiality of the testimony, (and surely he is more competent to judge of its materiality than the grand jury is,) will save any unnecessary expense to the public. The same is also true as to the defendant, if he makes expenses by subpoenaing immaterial witnesses, he will be making an unnecessary expense which he will certainly have to pay, for by the law as decided in the case of *Donnelly v. The County of Johnson*, 7 Iowa, 419, (and that law remains unchanged,) the defendant has to pay all his own witnesses, whether convicted or acquitted.

Thus we see if unnecessary expenses are incurred by subpoenaing immaterial witnesses, or requiring them to enter into an undertaking to appear and testify, it can only be under the system in this Code recommended, the result of gross carelessness on the part of either the state or the defendant, and the costs consequent thereon have to be paid by the party in fault. This is as it ought to be, we think. As to the "annoyance to the witnesses," we have seen that they have to be paid, those for the state by the county, those for the defendant have to look to the defendant. The interest of the parties, respectively, we think, will be a sufficient guaranty to the witnesses that they will not wantonly and unnecessarily be annoyed in this respect. But it is said that unless the witnesses, whose names are indorsed on the indictment, "are to be subpoenaed or required to enter into an undertaking to appear and testify, the mere formality of indorsing their names is a useless requirement." Is this all? We think it is at least convenient as we have before stated, and an error or omission in respect to it is easily remedied, as before shown. Besides, the argument, if good for any thing, we think would be good against requiring the names of any of the witnesses to be indorsed; but some indorsement in this particular has always been required by our laws, and we think it will be convenient yet to preserve it. True, there will not be the same necessity for it under the system in this Code recommended, that there is by the system at present in force. But the consequence of a mistake or omission in respect to it, is not near as serious to the indictment under this Code, as under the present system. Under this Code, it is easily remedied, under the system at present in force, the indictment must be set aside, a new one found and presented, and trouble and expense, both to the public and to individuals, thereby incurred.

The system at present in force provides that minutes should be kept by the clerk of the grand jury, but because it does not provide that these minutes should be filed with the clerk of the court, they never have been so filed, and thus no easier mode of correcting the want of, or omission in, this indorsement than the finding and presentment of a new indictment is provided. It can not be denied that the costs of witnesses in criminal cases, are the heavy items in the taxed costs; we can not but believe that this provision will cause more circumspection on the part of the district attorney, than the present system. If he requires the attendance of imma-

SEC. 4428. Public offenses are divided into—

1. Felonies.
2. Misdemeanors.

SEC. 4429. A felony is a public offense punishable with death, or <sup>Felony.</sup> which is, or in the discretion of the court may be, punishable by imprisonment in the penitentiary.

terial witness on the part of the state, when the means of ascertaining and determining their materiality is so easy, he can not avoid the responsibility—he can not shift it to the grand jury, as he may under the present system.

The next objection urged against section 225 [4647] and which grows out of it, but which goes more directly to section 357 [4786] is, “that the state should not be limited on the trial, to the witnesses examined by the grand jury, (see errors and corrections in section 357,) or whose names have been furnished the defendant three days before the trial, with a notice that they will be so examined.” This is no new feature in the criminal practice in this state. It is substantially the recent expression of the legislative will, embodied in chapter 109, of the acts of the seventh general assembly. Session laws of 1858, page 211. This act was passed undoubtedly to remedy what the legislature conceived to be a mischief, in the practice generally established throughout the state; under section 2913 of the Code of 1851, (which Mr. Barker is in favor of leaving as it was,) and a previous statute, similar in its provisions; that no witness could be examined in chief, on the part of the state, whose name was not indorsed on the indictment, if objected to by the defendant, and this practice was certainly sanctioned by the opinions of the supreme court, in *Ray v. The State*, 1 G. Greene, 316, and *Harriman v. The State*, 2 G. Greene, 272, and expressly decided in *Smith v. The State*, 4 G. Greene, 190, and it is believed also, in *Montgomery v. The State*, not regularly reported. These cases had all been decided long before the legislation of 1858 on the subject, which took effect before June 10th, 1858, the day on which the decision in the case of *The State v. Abrahams*, (referred to by Mr. Barker) was made; that case having doubtlessly originated before the legislation of 1858 went into effect. We believe, (and those who have had the best means of knowing will attest the correctness of our belief,) that it was no uncommon practice, to indorse the names of witnesses on indictments, who had not been examined before the grand jury, which found and presented them, and yet it will scarcely be denied that to do so was in violation of the spirit, if not the letter, of section 2913 of the Code of 1851. This latter mischief we propose to remedy by the provision of section 225 [4647] of this Code, that the names of “no other” witnesses than those examined before the grand jury, shall be indorsed on the indictment. We have thus endeavored to show that section 2913 of the Code of 1851, was far from being free from objections, that it was capable of being differently understood and construed by different judges and courts, and by the supreme court, at different times, that its provisions were not enforced by sanctions adequate to secure its true intent in its operation, and that it became necessary for the legislature to intervene and declare how it should be construed, and enact some additional provisions, and that section 225 [4647] of the Code, herewith reported, embraces substantially, both the construction and additional enactments of the legislature recently expressed. These provisions are reasonable, and as well calculated to promote the administration of substantial justice, equally to the state and to the defendant, as any which we can conceive of. We can not see how the operation of these provisions can lead in practice to the escape of the guilty, or delay in arriving at justice. We do not believe that such have been their practical operations. Other witnesses can be introduced on the part of the state, without any notice, to rebut the case made by the witnesses for the defense. The state has had its witnesses examined before the grand jury, minutes of their evidence have been kept, it knows what facts each witness will testify to, or may know them, the grand jury are required not to find an indictment, unless all the evidence before it, taken together, is such as in its own judgment would, if unexplained, warrant a conviction by the trial jury, (section 215,) [4637.] If any witness on the part of the state is absent, the minutes of his evidence before the grand jury filed in court and matter of record, show what facts the district attorney expects to prove by the absent witness; if the evidence is material all that he has further to show, is that he has used due diligence to procure the attendance of the witness; if he does this, he can have a continuance to another day in the same term, or to another term. If the evidence of the witness is not material, he has still enough of witnesses aside from the absent one, to make out a case, for the indictment is found, and the evidence must have been sufficient, if unexplained; if he has not used due diligence to procure the attendance of the witness, it is his own neglect, and he ought not to complain. The same is required of the defendant if he asks a continuance, as to the materiality of the evidence, and diligence in procuring it.

Misdemeanor.	SEC. 4430. Every other public offense is a misdemeanor.
How punishable.	SEC. 4431. No person can be punished for a public offense, except upon legal conviction in a court having jurisdiction thereof.
How prosecuted.	SEC. 4432. Every public offense must be prosecuted by indictment, except,

If the state finds a witness who was not examined before the grand jury, by whom any material fact can be proved, by giving the required notice, he can testify on the trial. There is no unreasonable hardship in requiring this, if it expects to prove any fact by the witness, the district attorney usually knows what it is, or ought to know. So far from increasing expenses, we believe it will save expenses; true it will require attention on the part of the district attorney, for instead of subpoenaing witnesses at random, without knowing what he can prove by them, and putting them on the witness-stand in the vague hope of proving something, but what, he knows not, perhaps nothing; he will first make careful inquiry and then subpoena those witnesses only who are material.

We concur with the Code commissioners of the state of New York, who in support of a provision (germain to this) in the criminal code, reported by them to the legislature of that state, in 1850, use the following language:

"The theory of a prosecution is, that the defendant is called upon to explain circumstances appearing against him, which if unexplained, tend to establish his guilt; and to deny him this right, is to convert a criminal prosecution into the means of destroying the defendant, by springing upon him on the trial, when wholly unprepared to explain them, a state of facts which if the opportunity had been allowed would have admitted of abundant explanation."

2. Mr. Barker objects to the change in the existing practice, recommended by the majority of the commissioners, to be introduced by the 5th sub-division of section 356, [4785,] which gives the defendant or his council the right to conclude the argument to the jury. The report of the New York commissioners, before referred to, (which we here take occasion to remark, seems to have been the basis of our criminal practice as contained in the Code of 1851, as it is likewise of the amendments thereto, herewith reported,) contained the same provision. They had drawn to some extent on Livingston's Criminal Code. In defending their recommendation they say—"This provision, independently of the high authority of Mr. Livingston, seems to the commissioners to be well sustained, not merely by every consideration of humanity, but by every principle of justice." Mr. Livingston in recommending its introduction in Louisiana observes—"The order in which the case is opened to the jury, and the proof introduced, is the same as that now in use, but a material change is made by giving the closing argument to the defendant. It was thought that this was proper and just, because it is an *advantage*, that is to say, a benefit to one party, that the other does not and can not, from the nature of things, enjoy. To whom shall this be given, to the accuser or the accused, to him who asserts, or him who denies? Humanity and justice seem to dictate the answer. Every address to a judge must be supposed to contain a new allegation of fact, a new argument, or a new answer to rebut those which have been offered on the other side; to close the debate, therefore, without suffering the accused to reply to such allegation or argument, would be in so much as regards it, to decide on his case without hearing him. The same thing may be said of the prosecution. The remedy would be to suffer the argument to go on until both parties declared they had nothing further to say; but this would rarely happen, and never until the discussion had been protracted to a length so highly inconvenient as not to be permitted. It seems, then, as has been said, that the nature of the case imposes the necessity of giving this advantage to one party or the other. To give it to the prosecution, sometimes defeats the ends of justice, by enlisting the feelings of humanity on the side of the accused. There is in human nature, when not perverted, a feeling, repugnant to oppression, which generally supposes power to be wrong, and ascribes innocence to weakness, whenever they come in competition with each other; and few cases give such scope to the imagination to exert itself in this way, as that of a criminal on his trial. Squalid in his appearance, his body debilitated by confinement, his mind weakened by misery or conscious guilt, abandoned by all the world, he stands alone, to contend with the fearful odds that are arrayed against him.

It is true he has counsel assigned him; but here again the same feelings operate to lead the judgment astray. This counsel is generally the youngest counselor at the bar, who is thus made to enter the lists with one of the highest abilities and standing, with a reputation so well established as to have made him the choice of government as the depository of its interests. If you add to all this the decided advantage of the closing argument, given to a practiced advocate, whom long habit has taught to avail himself of every weak argument or suspicious fact, and a zeal in the perform-

1. Offenses of public officers, when a different mode of procedure is prescribed by law.

2. Offenses exclusively within the jurisdiction of justices of the peace, or of police or city courts.

3. Offenses in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger, of which a military court has exclusive jurisdiction.

ance of his duty has taught to believe that it is proper to do so ; do this, and of two opposite effects one must be produced, both injurious to the fair administration of justice ; either the jury will be swayed by the sentiment I have endeavored to describe, and feel an undue bias in favor of the prisoner ; or if this fails to act, the last impression given with the force of eloquence and professional skill, may, in doubtful cases, have injurious consequences to the innocent. But give the last word to the accused, and you will do little more than counterbalance the disadvantages inseparable from his situation ; while, by this show of humanity and disdain of using the power in your hands, you neutralize the sentiment that would otherwise be felt in his favor. The provision here recommended makes part of the French code of criminal procedure, and it is said to have, in practice, the most beneficial effects." Liv. Crim. Code, 232, 233.

The New York commissioners in the same report further say, " In addition to the high authority of Mr. Livingston in its support, the commissioners have been informed that petitions very numerous signed, from the county of Chenango, and other counties, were presented at a recent session of the legislature.

The petitioners among other things well say, " Your petitioners deem it a matter of right to every person accused, to be allowed to *answer* the *arguments* urged, as well as the *proofs* given against him, which often, (and especially in cases of innocence,) affect him more injuriously than the evidence itself. Upon a trial lasting several days, or it may be weeks, where a mass of evidence is given, what man can *anticipate and answer* before hand every mode of reasoning, and all the arguments by which the guilt of the accused may be attempted to be proved and established ? Or all improper inferences which may be ably drawn from each portion of the evidence ? Yet the present law requires this *impossibility* of one on trial upon a charge involving his liberty or life ! Clearly he should have a full opportunity to *answer* every inference and argument relied upon to prove his guilt. But the law closes his mouth before these arguments are made or heard ; and requires the jury to form no opinion until after the trial closes ; the last thing before which, is, that one, two, or more counsel are to reason the jury into a conviction of guilt, and to all that may be thus urged to this most important, and often *decisive* part of the trial, no word of answer of explanation or reply, is permitted ! A change in this respect would never prevent the conviction of the guilty, against whom sufficient evidence was produced to warrant a conviction, but would in a great degree protect the innocent from becoming the victims of the injustice and cruelty of the law, or of the prejudices or mistakes of the jury, a result to which this mode of conducting a trial has so often led.

The circumstances which in all probability gave rise to this petition from a large body of farmers and others in the counties above referred to, are within the knowledge of the commissioners. A reputable citizen of Chenango county was indicted in the city of New York, for the forgery of a draft for 30,000 dollars, which, in a civil action, tried in Otsego county, had been recovered upon him, by the verdict of a jury affirming its genuineness. He was, notwithstanding, brought to trial in New York for forgery. The trial lasted three weeks. On the closing of the evidence, the presiding judge (*Edmonds*,) declared himself convinced of the genuineness of the draft, and advised that the prosecution be abandoned. The counsel for the people, (one of whom was an eminent lawyer, retained by the private prosecutors,) refused to defer to the opinion of the court, and insisted on going to the jury. The cause was summed up at great length, the private counsel referred to closing the argument, and occupying a day and a half. The cause was submitted to the jury, with a renewed expression of the judge's opinion, and the result was that after being out all night, the jury disagreed, and were discharged.

Nor is this feature of private counsel closing the argument in public prosecutions, of unfrequent occurrence. In cases of great importance it happens every day. The argument therefore, that the representative of the public should have this privilege, in practice often fails. It frequently falls into the hands of distinguished lawyers, representing the feelings of private parties, who, though nominally disinterested, are impelled by the strongest feelings of revenge to obtain a conviction. While the practice continues of permitting private counsel in criminal prosecutions, (a right which was seriously questioned in the *Commonwealth v. Knapp*, 9 Pick., 496,) it can

How prevented.

SEC. 4433. The commission of public offenses may be prevented,

1. By the resistance of the party about to be injured, and others, as provided in chapter 182 of this code.

2. By the intervention of the officers of justice, as provided in chapter 183.

hardly be contended that the fate of a person, whose life may perhaps be involved in the controversy, should be exposed to the danger of the closing remarks of able and eloquent counsel." N. Y. Crim. Code Rep., 207, 208, 209.

Mr. Barker seems to urge that we propose to limit the counsel for the state to one argument before the jury. To this we simply say, we had no such intention. We merely intended to prescribe the order of argument, so that the district attorney should commence and the defendant or his counsel should conclude it. See the 5th and 6th subdivisions of the section. But lest these are not deemed sufficiently explicit on this point, let the following be added to the 6th subdivision: "If but one counsel argues the case on either side, he shall not be confined to one argument, and in that case the arguments on each side must be made alternately."

It is true, that "this provision does not prevail, generally, in other states," and that "it has never been the law in this state," but it is also true that it has obtained in some, just as we recommend, and qualifiedly in others. We think that a provision should never be rejected merely because it is comparatively new; nor adhered to because it is old. It ought to be submitted to the test of a strict investigation on its own intrinsic merits. That is all we ask for this.

We are not aware of any condition of society in our state, or of our laws, or of our judicial system, that destroys the force of Mr. Livingston's argument, in favor of this provision, as Mr. Barker assumes. We think it can scarcely be denied, that our humane feelings are generally enlisted on the side of the accused, unless in cases where the defendant is accused of an outrageous or prevalent crime; but has not the present rule of practice which we propose to change, a tendency to induce this state of feeling, sometimes to the defeat of justice, as Mr. Livingston observes. Our observation has been that in cases where counsel are assigned to a defendant by the court, unless in cases of high importance, they are usually the younger members of the bar, while our public prosecutors rank among the highest of the profession, in point of ability and standing. In the highest classes of felonies it is true that experience and able counsel are usually employed or assigned for the defense, but it is also true that in such cases, eminent private counsel are usually, at least not unfrequently, employed to assist the public prosecutor. We are not aware that any material difference exists in these respects in this state, from what existed in Louisiana and in other states, at the time Mr. Livingston prepared his code.

It is urged, again, that there is a difference between our system of criminal procedure, and that of Louisiana; that here the law prohibits the judge from charging upon the facts, while there he may recapitulate any part or all of the testimony, if desired by the jury so to do, and that therefore Mr. Livingston's reasoning is inapplicable, and incorrect when applied to our system. It will be seen by reference to the code of procedure, that Mr. Livingston recommended, (art. 354, page 532,) that it does not differ materially from ours in that respect, except that it is provided by article 353, that the judge "shall keep notes of all the testimony offered on either side." And article 354 contains this provision: "but he (the judge) shall not recapitulate the testimony, unless requested so to do by one or more of the jurors, if there should be any difference of opinion between them as to any part of the testimony, and then he shall confine his information to the part on which information is required, it being the intent of this article, that the jury shall decide all questions of fact, in which is included the credit due to the witnesses who have been sworn, unbiased by the opinion of the court."

3. Mr. Barker thinks that section 380 [4809] should be so modified as to leave it discretionary with the court, to employ a person to reduce the testimony to writing, on the trial, in such cases as it deems necessary.

This section, as reported, requires this to be done, on the trial of every indictment, either by the court, or some person by it appointed for the purpose.

It is alleged that "this will occasion unnecessary delay and much useless expense." We think that no reasonable delay is unnecessary, nor any reasonable expense useless, that is necessary to attain substantial justice. We think it will not occasion any unreasonable delay or expense. Some of our district judges do this now, themselves, we believe, and this section provides that those of them who do not themselves see proper to do it, may appoint some other person.

The trivial cases spoken of, in which it is alleged it would cost the county more than the amount of the fine imposed, and which is urged as another objection to this



SEC. 4434. The proceeding by which a party charged with a public offense is accused and brought to trial and punishment, is known as a criminal action.

SEC. 4435. A criminal action must be prosecuted and conducted in the name and by the authority of "the state of Iowa," as a party, against the party charged with the offense.

section, we think do not come within indictable offenses—and the section is confined to the trial of an indictment.

We can not agree that none but experienced lawyers and stenographers, can keep full and accurate minutes of the evidence on a trial—our experience has been different. We can not agree that this would make an expense equal to that of an additional public officer for each judicial district, unless the compensation of that officer would be very much less than that of any other district officer, and even if it would make some expense, we do not believe that the amount could be better expended.

Governor Grimes, in his message to the extra session of the fifth general assembly, on the 3d day of July, 1856, recommended the passage of a law embracing, substantially, the principle of this section, to be used in cases of applications to the executive for pardons; he says:

"The constitution confers upon the governor of the state, 'the power to grant reprieves and pardons, and commute punishments after convictions,' for offenses against the laws. In a large proportion of cases, the friends of the persons convicted, endeavor to procure the exercise of this power; and as few, if any, of the judges preserve minutes of the testimony taken on the trial of criminal causes, these efforts are, for the most part, based upon *ex parte* statements, made without the sanction of an oath, and obtained without notice to the prosecuting attorney, or other person representing the government. It is frequently alleged that there was error in the trial; that the judge mistook the law; and that there was a mistake of fact by the jury; that there is newly discovered evidence, showing the sentence to be unjust; or that the case, although within the letter of the law, was not within the spirit of it.

The interests of society require that this great power should be exercised with humanity, but at the same time with the greatest discrimination and caution. Justice to the officer who is compelled to investigate each case presented to him, as well as to the parties more immediately interested, require that every fact proved upon the trial, should be accessible to him, to the condemned, and to the prosecutors. I therefore recommend, that the judges of the several district courts, be required to reduce the evidence given in all criminal cases to writing, to be preserved as a permanent record, in the county where the trial was held;—and that before any application shall be made to the governor for pardon, a notice of the time and place, when and where the application will be presented, shall be served upon the prosecuting attorney of the county, where the offense was committed."

We propose to apply it to another equally important purpose, to allow it to be used on an appeal to the supreme court, in order to remedy a mischief universally admitted, we believe, to exist, viz.: the inequality of punishment in cases of conviction in the different judicial districts. There is a great latitude of discretion given by our statutes prescribing the punishment of offenses, to the district court, in pronouncing sentence upon the convict. There are eleven judicial districts; there may be more hereafter. There are, and must be, as many judges. These judges have each, perhaps, their own peculiar views relative to the mildness and severity of punishments. At least, all have not, and it would be vain to expect they should entertain, the same or similar views, in this respect. A punishment which one would regard as mild enough, another would regard as severe. Hence, upon a conviction of any designated felony, where the range of punishment vested in the discretion of the court will allow it, (and this the law allows in almost every offense not capital) in one district, the court will perhaps sentence the defendant to imprisonment in the penitentiary for one year, whilst in another district, another defendant for a similar offense, committed under precisely similar circumstances, and accompanied with similar circumstances of aggravation or alleviation, will be sentenced by the courts for two, three, four, five, or more years—and for this the law as it now stands, provides no remedy, but the pardoning power, vested in the governor. The same mischief exists in cases of misdemeanors punishable by fine, or imprisonment in the county jail, or both such fine and imprisonment. Is this as it ought to be? We think it is not. The remedy proposed will be seen by reference to sections 497 [4925] and 498 [4926] of the Code herewith reported. Sections 380 [4809] and 481, [4909] provide for furnishing the evidence on the trial in the district court, to the supreme court, on appeal, that it may fix the measure of punishment in the particular case. Thus, equality of punishments will be secured, at least, in a great measure. In-

Defendant.	SEC. 4436. The party prosecuted in a criminal action is designated in this code as the defendant.
His rights.	SEC. 4437. In a criminal action the defendant has a right, <ol style="list-style-type: none"> <li>1. To be informed of the accusation against him, and to have a copy of the same when he demands it.</li> <li>2. To have the assistance of counsel in every stage of the proceedings.</li> <li>3. To have a speedy and public trial.</li> <li>4. To have compulsory process for his own witnesses.</li> <li>5. To be tried by an impartial jury, except when the action is prosecuted by impeachment, as provided in chapter 221.</li> <li>6. To be confronted with the witnesses against him.</li> </ol>
Can be tried but once for same offense.	SEC. 4438. No person shall, after his acquittal once, in a criminal action, be tried again for the same public offense; nor shall he be tried again for the same after he has been once legally prosecuted and convicted, except as provided in the constitution.

## CHAPTER 181.

### THE TERMS MAGISTRATE, AND HIS POWERS, PEACE OFFICER AND OFFICERS OF JUSTICE, AS USED IN THIS CODE, DEFINED.

Magistrate, his powers as such.	SECTION 4439. Any judge of the supreme, district, or county courts, and judge of any city court, any justice of the peace, any mayor of any incorporated city, or town, any police, or other special justice of such city, or town, is authorized to receive complaints and preliminary informations, to issue warrants, order arrests, require security to keep the peace, make commitments and take bail in the manner directed by this code. They are designated under the general term, <i>magistrate</i> .
Peace officers.	SEC. 4440. The following persons respectively, are designated in this code under the general term, <i>peace officer</i> . <ol style="list-style-type: none"> <li>1. Sheriffs and their deputies.</li> <li>2. Constables.</li> <li>3. Marshals and policemen of incorporated cities and towns.</li> </ol>
Officers of justice.	SEC. 4441. Magistrates and peace officers are sometimes designated by the term <i>officers of justice</i> .

equality in this respect is injustice. One tribunal can, at least, approximate to equality. Eleven or more different tribunals can not. It will diminish the number of applications to the governor for pardons—or, at least, will have a tendency to do so, whilst proper scope will still, doubtless, be left for the beneficent exercise of executive clemency.

4. Mr. Barker does not approve of chapter 42 [220] of our report, relative to appeals to the supreme court. He proposes a substitute; we have not that before us. We have examined it but once, and that cursorily. We do not like that feature of the substitute which requires an allowance of an appeal by a judge of the supreme or district court. We think an appeal ought to be a matter of right in a criminal case as well as in a civil one. As the law is, in a civil case involving five cents, either party is unrestricted in the right of appeal; so it is as the law now stands in criminal cases—in this feature of our report, no change is introduced. This feature of the substitute is like the provision of the Code of 1851, which was changed by chapter 251 of the acts of the sixth general assembly, session laws of 1857.

CHAPTER 182.

PREVENTION OF PUBLIC OFFENSES BY THE RESISTANCE OF THE PARTY ABOUT TO BE INJURED, AND OTHERS.

[Code—Chapter 152.]

SECTION 4442. (2773.) Lawful resistance to the commission of a public offense may be made by the party about to be injured or by others. Who may resist.

SEC. 4443. (2774.) Resistance sufficient to prevent the offense may be made by the party about to be injured: In what cases.

1. To prevent an offense against his person;

2. To prevent an illegal attempt by force to take or injure property in his lawful possession.

SEC. 4444. (2775.) Any other person in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense. Any person may aid another.

CHAPTER 183.

PREVENTION OF PUBLIC OFFENSES BY THE INTERVENTION OF THE OFFICERS OF JUSTICE.

[Code—Chapter 153.]

SECTION 4445. Public offenses may be prevented by the intervention of the officers of justice, Mode of preventing.

1. By requiring security to keep the peace; and for good behavior.

2. By forming a police in villages, and in incorporated towns and cities, and by requiring their attendance in exposed places.

3. By suppressing riots.

SEC. 4446. Whenever the officers of justice are authorized to intervene for the prevention of public offenses, other persons, who by their command, act in their aid, are justified in so doing. Who may aid officers.

CHAPTER 184.

SECURITY TO KEEP THE PEACE.

[Code—Chapter 154.]

SECTION 4447. Magistrates are conservators of the peace, and have power to cause all laws made for the preservation of the public peace to be kept, and in the exercise of that jurisdiction, to require persons to give security to keep the peace in the manner provided in this chapter: Magistrates, their powers and duties.

1. Judges of the supreme and district courts throughout the state, in any county in which they may be at the time of complaint made.

2. Judges of the county court, judges of city courts, justices of the peace, mayors of incorporated cities and towns, and police and other special justices of such cities and towns within their respective counties.

Complaint and testimony in writing.

SEC. 4448. A complaint may be laid before either of the magistrates mentioned in the preceding section, that a person has threatened to commit a public offense against the person or property of another, which if actually committed where the same is alleged to have been threatened, would have been triable in the county in which such magistrate has jurisdiction, as prescribed in the preceding section; it shall be the duty of the magistrate to examine such complainant and any witnesses he may produce, and reduce such examination to writing, in the form of affidavits, and cause each affidavit to be subscribed and sworn to before him by the person making it.

The complaint.

SEC. 4449. The affidavit of the complainant shall be called the complaint, and it may state the threat upon the information and belief of the complainant generally, or particularly of his own knowledge, as the truth may be; but must state that the complainant fears, that unless the party complained of is prevented, he will carry his threat into execution.

Magistrate to decide as to probable commission of offense.

SEC. 4450. The affidavits must set forth the facts stated by the complainant or his witnesses, tending to show that there is just reason to fear the commission of the offense, where such facts are ascertained on such examination, to exist; leaving the conclusion as to whether there is just reason to fear the commission of the offense, to be drawn by the magistrate.

When warrant to issue.

SEC. 4451. If it appear from such affidavits that there is just reason to fear the commission of the offense alleged to have been threatened by the person complained of, the magistrate must issue a warrant, directed generally to any peace officer in the state, reciting, briefly, the substance of the complaint, and commanding the peace officer forthwith to arrest the person complained of and bring him before the magistrate who issued the warrant; or in case of his absence, or inability to act, before the nearest or most accessible magistrate of the same county.

What warrant must specify.

SEC. 4452. The warrant must specify the name of the person complained of, and if it be unknown to the magistrate, may designate him by any name. It must bear date on the day on which it is issued, and at the county, city, town, village, or township where it is issued, and be signed by the magistrate, with his name of office.

Who may execute warrant.

SEC. 4453. It must be executed by a peace officer. When issued by a judge of the supreme or district court, it may be executed in any county of the state; but when issued by any other magistrate, it must be certified in the manner hereinafter prescribed, for a warrant of arrest, issued on a preliminary information, before it can be executed in any county other than that in which it was issued. When so certified, it may then be executed in any county in the state.

When arrested, before whom taken.

SEC. 4454. When the person complained of is arrested, he must be taken before the magistrate who issued the warrant, or in case of his absence or inability to act, before the nearest or most accessible magistrate of the same county without unnecessary delay.

Proceedings when not taken before magistrate who issued warrant.

SEC. 4455. When the person arrested is taken before a magistrate other than the one who issued the warrant, the peace officer who executed the same, and who has charge of the person arrested, must, at the same time, deliver to the magistrate before whom the person arrested is taken, the warrant with his return indorsed and subscribed by him, and the complaint and other affidavits, if any, on which the

warrant was issued, must be sent to the magistrate before whom the person arrested is taken, and if they can not be procured, the complainant and his witnesses, if any, must be subpoenaed, if necessary, by the magistrate before whom the person arrested is taken, to appear before him and make a new complaint and affidavits.

SEC. 4456. (2781.) When the person complained of is brought before the magistrate, if the charge be controverted the magistrate must take testimony in relation thereto. The evidence must be reduced to writing and subscribed by the witnesses.

Duty of magistrate.

Evidence in writing

SEC. 4457. If it appear that there is no just reason to fear the commission of the offense alleged to have been threatened, the person complained of must be discharged, and the complainant may be ordered to pay the costs of the proceeding, if the magistrate regards the complaint as unfounded, or frivolous, and unless when the proceeding is before a judge of the supreme or district court, may issue execution therefor, and when the proceeding is before a judge of the supreme or district court, he shall transmit the complaint, affidavits, warrant and order, to the clerk of the district court of the county, who shall file the same, make a memorandum thereof in the judgment docket, and issue execution therefor immediately.

Proceedings on examination.

SEC. 4458. If there be just reason to fear the commission of the offense, the person complained of shall be required to enter into an undertaking in such sum as the magistrate may direct, with one or more sufficient sureties, to abide the order of the district court of the county at the next term thereof, and in the mean time to keep the peace towards the people of this state and particularly towards the person against whom or whose property there is reason to fear the offense may be committed.

Same.

SEC. 4459. (2784.) If the undertaking required by the last section be given, the party complained of must be discharged. If he do not give it, the magistrate must commit him to prison specifying in the warrant the requirement to give security, the amount thereof, and the omission to give the same.

Failure to give security.

Commitment.

SEC. 4460. (2785.) If the person complained of be committed for not giving an undertaking he may be discharged by a magistrate upon giving the same.

May be discharged.

SEC. 4461. The undertaking, together with the complaint, affidavits, if any, and other papers in the proceeding, must be returned by the magistrate to the district court of the county by the first day of the next term thereof.

Disposition of papers.

SEC. 4462. Any person, who, in the presence of a court or magistrate shall assault or threaten to assault another, or to commit an offense against the person or property of another, or contends with another with angry words, may be ordered without process, to enter into an undertaking to keep the peace for a period of time not extending beyond the next term of the district court of the county as hereinbefore provided, and in case of his omission to comply with said order, he may be committed accordingly.

Assaulting before magistrate.

SEC. 4463. The district court may, on the conviction of any person for an offense against the person or property of another when necessary for the public good, require the defendant to enter into an undertaking to keep the peace, as hereinbefore provided, and on his omission to do so, may commit him accordingly.

Undertaking to keep the peace.

SEC. 4464. Any person committed for omitting to enter into an undertaking, as provided in this chapter, may be discharged by a magistrate, upon giving the same.

Same

- Of appearance.** SEC. 4465. A person who has entered into an undertaking to keep the peace, when required by a magistrate, as hereinbefore provided, must appear on the first day of the next term of the district court of the county, and if the complainant appear and the person bound by the undertaking does not appear, the court may forfeit his undertaking, and order the same to be prosecuted, unless his default be excused.
- Same.** SEC. 4466. If neither of the parties appear, the court must discharge the undertaking upon the payment of costs by the party bound by the undertaking, unless good cause to the contrary be shown; but if both parties appear, the court shall hear their allegations and proofs respectively, and may either discharge the undertaking, or require a new one for a period of time not exceeding one year.
- Undertaking to keep the peace, when broken.** SEC. 4467. An undertaking to keep the peace is broken by the forfeiture of the same, by the court, as hereinbefore provided, or upon the conviction of the party bound by the undertaking, of a breach of the peace.
- District attorney to prosecute.** SEC. 4468. Upon the district attorney producing evidence of such conviction to the district court to which the undertaking is returned, that court must order the undertaking to be prosecuted, and the district attorney must, thereupon, commence an action upon it.
- Record of conviction.** SEC. 4469. In the action, the offense stated in the record of conviction, must be alleged as the breach of the undertaking, and is conclusive evidence thereof.

DECISIONS. Costs and presumption of right binding over, M., 174; 3 Iowa, 217; nature of proceedings when in district court, 3 Iowa, 217.

## CHAPTER 185.

### VAGRANTS AND INSANE PERSONS.

[Code—Chapter 208.]

- Who are vagrants.** SECTION 4470. (3310.) The following persons are vagrants. All persons who tell fortunes, or where lost or stolen goods may be found; all common prostitutes and all keepers of bawdy houses or houses for the resort of prostitutes; all habitual drunkards, gamblers, or other disorderly persons; all persons wandering about and having no visible calling or business to maintain themselves; all persons begging in public places or from house to house or procuring children so to do; all persons going about as collectors of alms or charitable institutions under any false or fraudulent pretenses; all persons playing or betting in any street or public or open place, at, or with any table or instrument of gaming at any game or pretended game of chance.
- Complaint.** SEC. 4471. Upon complaint made on oath to any magistrate against any person, as being such vagrant within his local jurisdiction, as defined in section 4447, in the last chapter, he shall issue a warrant for the arrest of such person, and his examination, and the complaint, warrant and arrest, shall be governed by the provisions of the last chapter, as nearly as practicable, except as hereinafter provided.
- Warrant Arrest.** SEC. 4472. It shall be the duty of all peace officers to arrest any vagrant whom they may find at large and not in the care of some dis-
- Duty of peace officers.**

cret person, and take him before some magistrate of the county, city or town in which the arrest is made.

SEC. 4473. If the arrests authorized in the last two sections are made during the night, the officer must keep the persons arrested in confinement until the next morning, and if arrests are made within the local jurisdiction of a police, or city court, the persons arrested must be taken before a judge or justice of such court unless he be absent. Time of making arrest.

SEC. 4474. If it appear by the confession of such person or by competent testimony, that such person is a vagrant, the magistrate before whom he is brought, may require of such person, an undertaking, with sufficient surety, for good behavior, for the term of one year, thereafter. Vagrant must give surety for good behavior.

SEC. 4475. The magistrate shall make up, sign, and file with the clerk of the district court of the county a record of conviction of such person, as a vagrant, specifying, generally, the nature and circumstances of the charge, and shall in default of such security being given, by warrant, under his hand, commit such vagrant to the county jail of the county, city, or town, as the case may be, until such security be found, or such vagrant discharged, according to law. In default of security, to be committed.

SEC. 4476. (3313.) The committing of any of the acts which constitute such person so bound a vagrant, shall be deemed a breach of the condition of such undertaking. Breach.

SEC. 4477. (3314.) On a recovery upon any such undertaking the court before which such recovery may be had may, in its discretion, either require new sureties for good behavior, or may commit such vagrant to the common jail of the county for any time not exceeding six months. New security.

SEC. 4478. (3315.) Any person committed to jail for not finding sureties for good behavior may be discharged by any magistrate upon giving such sureties for good behavior as were originally required of such person. Discharge on bail.

SEC. 4479. (3316.) Any district court to which any return of such persons so convicted of being vagrants shall be made shall inquire into the circumstances of each case and hear any proofs that may be offered and shall examine the record of conviction, which shall be deemed presumptive evidence of the facts therein contained until disproved. Hearing in district court.

SEC. 4480. (3317.) The district court may revise such conviction and discharge such vagrant from the undertaking or confinement absolutely, or upon sureties for good behavior, in its discretion. Or such court may in its discretion authorize the judge of the county court of the county to bind out such vagrants as shall be minors in some lawful calling, as servants or apprentices, or otherwise, until they shall be of full age respectively; or to contract for the services of such vagrants as shall be of full age with any suitable person, as laborers or servants, for any time not exceeding one year, which binding out and contracts shall be as valid and effectual as the indenture of any apprentice with his own consent and the consent of his parents, and shall subject the person so bound out or contracted for to the same control of their masters respectively, and of such court, as if they were bound apprentices. Judgment. May be bound out.

SEC. 4481. (3318.) Such district court may in its discretion order any such vagrant to be kept in the common jail for any time not exceeding six months at hard labor. Imprisonment.

SEC. 4482. (3319.) If there be no means provided in such jail for employing offenders at hard labor, such court may direct the keeper Labor in jail.

thereof to furnish such employment as it shall specify, to such vagrant as may be committed thereto either by a justice or any court, and for that purpose to purchase any necessary raw materials and implements not exceeding such amount as the court shall prescribe, and to compel such persons to perform such work as shall be allotted to them.

Expenses.

SEC. 4483. (3320.) The expenses incurred in pursuance of such order shall be audited by the judge of the county court and paid out of the county treasury.

Proceeds of labor.

SEC. 4484. One half of the net proceeds of such labor shall be paid to the person earning the same, upon his discharge from imprisonment, and the other half shall be paid into the county treasury, for the use of the county.

Proceedings in cases of insane persons.

SEC. 4485. Similar proceedings may be had as nearly as practicable except as hereinafter provided, in the cases of insane persons found at large, and not in the care of some discreet person; but the restraint to which they are to be subjected, shall be as mild and gentle as possible, and if the magistrate, on examination, find that a person brought before him under the provisions of this chapter is insane, and that such insane person has no friends to whose custody he can be committed, he shall order him to be taken before the county judge of the county, who shall make all orders necessary to keep him in restraint until he can be sent to the Iowa insane hospital, and may commit him if he has no friends to whose custody he can be promptly intrusted, to the jail of the county, and take proper proceedings, immediately, for having him sent to the hospital.

PRIOR LAWS. 1. An Act for the punishment of idle and disorderly persons, passed April 12, 1827; M. D., 1833, p. 477; repealed Aug. 30, 1840.

2. An Act concerning vagrants, passed Jan. 24, took effect Feb. 24, 1839; I. T., 1st sess., p. 455; also, Reprint, 1843, p. 626.

## CHAPTER 186.

### POLICE IN CITIES AND TOWNS, AND REQUIRING THEIR ATTENDANCE IN EXPOSED PLACES.

[Code—Chapter 155 ]

Police.

SECTION 4486. The organization of the police in incorporated cities and towns is as regulated by law.

To preserve the peace, &c.

SEC. 4487. The mayor or other officer, having the direction of the police in such city or town, must order a force sufficient to preserve the peace, to attend any public meeting when he is satisfied that a breach of the peace is to be apprehended.

Where no police.

SEC. 4488. (2792.) If there be no police in such city or town he may order out such number of able bodied citizens as he may deem necessary for the purpose of keeping the peace, as provided in the last section.



CHAPTER 187.

RESISTANCE OF PROCESS AND SUPPRESSION OF RIOTS.

[Code—Chapter 156.]

SECTION 4489. When a sheriff or other officer authorized to execute process, finds, or has reason to apprehend that resistance will be made to the execution thereof, he may command as many male inhabitants of his county as he may think proper, and any military companies in the county, armed and equipped, to assist him in overcoming the resistance, and if necessary, in seizing, arresting, and confining the resisters, and their aiders and abettors, to be punished by law.

Calling out posse.

SEC. 4490. (2794.) The officer shall certify to the court from which the process issued, the names of the resisters and their aiders and abettors, to the end that they may be punished for a contempt.

Officer to certify court of resisters.

SEC. 4491. (2795.) Every person commanded by a public officer to assist him in the execution of process, as provided in the first section of this chapter, who without lawful cause refuses or neglects to obey such command, is guilty of a misdemeanor.

Refusing to assist.

SEC. 4492. (2796.) If it appear to the governor that the power of any county is not sufficient to enable the sheriff to execute process delivered to him, he may on the application of the sheriff order such power of county not sufficient.

Power of county not sufficient.

SEC. 4493. (2797.) When persons to the number of twelve or more armed with dangerous weapons, or persons to the number of thirty or more whether armed or not, are unlawfully or riotously assembled in any city or town, the judges, sheriff and his deputies if they be present, the mayor, aldermen, marshal, constables, and justices of the peace of such city or town, must go among the persons assembled or as near them as may be safe and command them in the name of the state immediately to disperse.

Unlawful assemblies.

SEC. 4494. (2798.) If the persons assembled do not immediately disperse, the magistrates and officers must arrest them, that they may be punished according to law, and for that purpose may command the aid of all persons present or within the county.

Arrest of the persons.

SEC. 4495. (2799.) If any person commanded to aid the magistrate or officer, without good cause neglect to do so, he is guilty of a misdemeanor.

Refusing to aid officer.

SEC. 4496. (2800.) If a magistrate or officer, having notice of an unlawful or riotous assembly as above provided in this chapter, neglect to proceed to the place of the assembly or as near thereto as he can with safety and to exercise the authority with which he is invested for suppressing the same and arresting the persons, he is guilty of a misdemeanor.

Officer failing to do his duty.

SEC. 4497. (2801.) If the persons so assembled and commanded to disperse, do not immediately disperse, any two of the magistrates or officers before mentioned may command the aid of a sufficient number of persons and may proceed in such manner as in their judgment is necessary to disperse the assembly and arrest the offenders.

If assembly does not disperse.

SEC. 4498. (2802.) When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly or arresting the

When armed force is called out.

offenders, it must obey such orders in relation thereto as have been made by the governor, or by a judge of the supreme, district or county court, a sheriff, or magistrate, as the case may be.

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## CHAPTER 188.

### ORIGINAL CRIMINAL JURISDICTION OF THE COURTS OF THE STATE.

Jurisdiction of courts.

SECTION 4499. The jurisdiction of the various courts of this state, for the trial of offenses, is as follows :

1. The senate has exclusive jurisdiction of impeachments.

2. The district court has exclusive jurisdiction of indictments, and all prosecutions ; except where exclusive or concurrent jurisdiction is given to other courts, by law.

3. Justices of the peace have jurisdiction concurrent with the city police courts, as provided in the next subdivision of this section, and exclusive of the district court of criminal actions, prosecuted by information upon oath, summarily, without the intervention of a grand jury, where the punishment prescribed by law, does not exceed a fine of one hundred dollars, or imprisonment for thirty days ; saving to the defendant the right of appeal.

4. Police and city courts in incorporated cities and towns, have exclusive jurisdiction of all prosecutions for infractions of the by-laws or ordinances of the city or town in which they are located, as provided by law, and concurrent jurisdiction with justices of the peace, of prosecutions for misdemeanors, in the cases provided for in the special statutes, creating or regulating such courts, or legally conferred on them.

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## CHAPTER 189.

### THE LOCAL JURISDICTION OF THE TRIAL OF PUBLIC OFFENSES.

[Code—Chapter 157.]

Persons liable under the laws of this state.

SECTION 4500. (2803.) Every person, whether an inhabitant of this or any other state, or country, or of a territory, or district of the United States, is liable to punishment by the laws of this state for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States.

Jurisdiction of senate.

SEC. 4501. The jurisdiction of the senate, for the trial of impeachments embraces the whole state.

Of district court.

SEC. 4502. The local jurisdiction of the district court, is of offenses committed within the county in which it is held, and of such other cases as are or may be provided by law.

SEC. 4503. The local jurisdiction of justices of the peace, is of offenses committed within their respective counties, and of such other cases as are or may be provided by law. Of justices of the peace.

SEC. 4504. The local jurisdiction of police and city courts, is of offenses committed within the limits of the jurisdiction of such courts, as prescribed by the special statutes creating or regulating them, and of such other cases as are or may be provided by law. Of police and city courts.

SEC. 4505. (2804.) When the commission of a public offense commenced without this state is consummated within the boundaries thereof, the defendant is liable to punishment therefor in this state though he was without the state at the time of the commission of the offense charged: *provided* he consummated the offense through the intervention of an innocent or guilty agent within this state, or any other means proceeding directly from himself; and in such case the jurisdiction is in the county in which the offense is consummated. Offenses commenced without the state, and consummated in it.

SEC. 4506. (2805.) When an inhabitant or resident of this state by previous appointment or engagement, fights a duel or is concerned as second therein without the jurisdiction of this state, and in such duel a wound is inflicted upon any person whereof he die within this state, the jurisdiction of the offense is in the county where the death may happen. Fighting duel without the state.

SEC. 4507. (2806.) When a public offense is committed in part in one county and in part within another, or when the acts or effects constituting, or requisite to the consummation of the offense, occur in two or more counties, jurisdiction is in either county. Offense in part in one county, &c.

SEC. 4508. (2807.) When a public offense is committed on the boundary of two or more counties or within five hundred yards thereof, the jurisdiction is in either county. Committed near boundary of county.

SEC. 4509. When an offense is committed within the *jurisdiction* of this state, on board a boat or vessel navigating a river, lake or canal, or lying therein, in the prosecution of her voyage, the jurisdiction is in any county through which the boat or vessel is navigated in the course of her voyage, or in the county where the voyage shall terminate. Offenses on boats or vessels.

SEC. 4510. (2809.) The jurisdiction of an indictment for the crime of forcibly and without lawful authority seizing and confining another, or kidnapping him with intent against his will to cause him to be confined or imprisoned within the state. or to be sent out of the state; or if taking or enticing away a child under the age of twelve years from the parents, guardian, or other person having the legal charge of her person, with the intent to detain or conceal such child; or of taking or enticing away an unmarried female of previously chaste character under the age of fifteen years, for the purpose of prostitution; or of taking any woman unlawfully and against her will, or by force, menace, or duress compelling her to marry against her will; or of seducing and debauching any unmarried woman of previously chaste character, is in any county in which the offense is committed or into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the offender in instigating, procuring, promoting, aiding in, or being an accessory to, the commission of the offense, or in abetting the parties concerned therein. Jurisdiction in any county, where, &c.

SEC. 4511. (2810.) When the offense of bigamy is committed in one county and the defendant is apprehended in another, the jurisdiction is in either county. Jurisdiction in case of bigamy.

SEC. 4512. When the offense is within the jurisdiction of two or When a bar.

more counties, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment thereof in another.

## CHAPTER 190.

### THE TIME OF COMMENCING CRIMINAL ACTIONS.

[Code—Chapter 158.]

- Murder.** SECTION 4513. (2811.) A prosecution for murder may be commenced at any time after the death of the person killed.
- Limitation with-  
in eighteen  
months.** SEC. 4514. An indictment for a public offense must be found within eighteen months after the commission thereof, in the following cases, and not after:
1. Taking or enticing away an unmarried female, under the age of fifteen years, for the purpose of marriage or prostitution.
  2. Seducing or debauching an unmarried female, of previously chaste character.
  3. For rape and adultery.
  4. For an assault with intent to commit a rape.
- Within three  
years.** SEC. 4515. (2813.) In all other cases an indictment for a public offense must be found within three years after the commission thereof, and not afterward.
- If defendant out  
of the state.** SEC. 4516. (2814.) If when the offense is committed the defendant is out of the state, the indictment or prosecution may be found or commenced within the time herein limited after his coming into the state, and no period during which the party charged was not usually and publicly resident within the state is a part of the limitation.
- When indict-  
ment is found.** SEC. 4517. (2815.) An indictment is found within the meaning of this chapter when it is duly presented by the grand jury in open court and there received and filed.

**PRIOR LAWS.** 1. An act of limitations of criminal prosecutions, passed May 15, 1820; M. D., 1833, p. 569; repealed as to sections 2, 3, 4 and 5, by I. T., 1st sess., p. 109, in force Jan. 1, 1840; repealed Aug. 30, 1840.

2. An act regulating criminal proceedings, passed Jan. 4, 1839, took effect Jan. 1, 1840; I. T., 1st sess., p. 109.

3. An act for limitation of criminal prosecutions, passed Jan. 7, took effect Feb. 7, 1840; I. T., 2d sess., chap. 26, p. 34; also, Reprint, 1843, p. 383.

**DECISION.** Statute of limitations must be plead, 7 Iowa, 409.

CHAPTER 191.

FUGITIVES FROM JUSTICE.

[Code—Chapter 206.]

SECTION 4518. (3282.) The governor of this state may, in any case authorized by the constitution and laws of the United States, appoint agents to demand of the executive authority of any other state or territory, or from the executive authority of any foreign government, any fugitive from justice charged with treason or felony, and the accounts of the agents appointed for that purpose must be audited by the auditor of state and paid out of the state treasury.

Agents appointed and expense.

SEC. 4519. No compensation, fee, or reward of any kind, can be paid to, or received by a public officer of this state, for a service rendered, or expense incurred, in procuring from the governor the demand mentioned in the last section, or the surrender of the fugitive, or for conveying him to this state, or detaining him therein, except as provided by law.

No compensation except as provided by law.

SEC. 4520. A violation of the last section is a misdemeanor.

Misdemeanor.

SEC. 4521. No executive warrant for the arrest and surrender of any person, demanded by the executive authority of any other state or territory, as a fugitive from the justice of such state or territory, and no requisition upon the executive authority of any other state or territory, for the surrender of any person as a fugitive from the justice of this state, shall be issued, unless the requisition from the executive authority of such other state or territory, or the application for such requisition upon the executive authority of such other state or territory, shall be accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, or a duly attested copy of a complaint, made before a court or magistrate authorized to receive the same.

No warrant for arrest of fugitive issued without sworn evidence and copy of indictment.

SEC. 4522. (3283.) Whenever a demand is made upon the governor of this state by the executive of any other state or territory in any case authorized by the constitution and laws of the United States, for the delivery of any person charged in such state or territory with any crime, if such person is not held in custody or under bail to answer for any offense against the laws of the United States or of this state, he shall issue his warrant under the seal of the state authorizing the agent who makes such demand, either forthwith or at such time as may be designated in the warrant, to take and transport such person to the line of this state at the expense of such agent, and may also by such warrant require all peace officers to afford needful assistance in the execution thereof.

Requisition from abroad.

SEC. 4523. (3284.) If any person be found in this state charged with any crime committed in any other state or territory and liable by the constitution and laws of the United States to be delivered over upon the demand of the governor thereof, any magistrate may upon complaint on oath setting forth the offense and such other matters as are necessary to bring the case within the provisions of law issue a warrant to arrest such person.

Warrant of magistrate.

SEC. 4524. (3285.) If upon examination it appear that there is reasonable cause to believe the complaint true and that such person may be lawfully demanded of the governor, he shall, if not charged with

Bail required.

- murder, be required to enter into an undertaking with sufficient surety in a reasonable sum to appear before such magistrate at a future day (allowing reasonable time to obtain the warrant from the governor) and abide the order of such magistrate in the premises.
- Committal.** SEC. 4525. (3286.) If such person does not give bail, or if he is charged with the crime of murder, he must be committed to prison and there detained until such day in like manner as if the offense charged had been committed within this state.
- Forfeiture.** SEC. 4526. (3287.) A failure of such person to attend before the magistrate at the time and place mentioned in the undertaking is a forfeiture thereof.
- Discharge.** SEC. 4527. (3288.) If such person appear before the magistrate upon the day ordered he must be discharged unless he is demanded by some person authorized by the warrant of the governor to receive him, unless the magistrate see good cause to commit him or to require him to enter into a new undertaking for his appearance at some other day to await a warrant from the governor.
- Arrest is discharge of bail.** SEC. 4528. (3289.) Whether the person so charged be bound to appear, be committed or discharged, any person authorized by the warrant of the governor may at any time take him into custody, and the same is a discharge of the undertaking if there be one.
- Expenses.** SEC. 4529. (3290.) The complainant in any such case is answerable for all the costs and charges and for the support in prison of any person so committed, and the magistrate before issuing his warrant or hearing the cause, must require the complainant to give security for the payment of all such costs, or may require them in advance.

PRIOR LAWS. 1. An act to deliver up fugitives from justice, passed March 12, 1827; M. D., 1833, p. 504; repealed Aug. 30, 1840.

2. An act to authorize the arrest and detention of fugitives from justice from other states and territories, passed Jan. 9, 1840; I. T., 2d sess., chap. 33, p. 44; also, Re print, 1843, p. 268.

## CHAPTER 192.

### PRELIMINARY INFORMATION, WHAT, AND HOW TAKEN.

[Code—Chapter 160.]

- Preliminary information.** SECTION 4530. The *preliminary information* is the allegation made to a magistrate that a person is guilty of some designated public offense, triable on indictment, in the county in which such magistrate has local jurisdiction, as defined in section 4447 of this code.
- How taken.** SEC. 4531. When a preliminary information is laid before a magistrate, he must examine the informant or prosecutor, and any witnesses he may produce, and take their affidavits in writing, and cause each affidavit to be subscribed and sworn to, before him, by the person making it.
- What affidavits must show.** SEC. 4532. The affidavits must set forth the facts stated by the informant and his witnesses, tending to establish the commission of the offense, and the guilt of the person charged therewith. They must also show, who is the informant and who are witnesses.

SEC. 4533. If the magistrate be satisfied therefrom, that the offense has been committed, and that there is reasonable ground to believe, that the person alleged to be guilty thereof, has committed it, he shall issue a warrant of arrest. When magistrate must issue warrant.

CHAPTER 193.

WARRANT OF ARREST ON PRELIMINARY INFORMATION.

[Code—Chapter 161.]

SECTION 4534. The warrant of arrest on a preliminary information, must be substantially in the following form: Warrant of arrest.

COUNTY OF

THE STATE OF IOWA.

To any Peace Officer in the State:

Preliminary information upon oath having been this day laid before me that the crime of (designating it,) has been committed, and accusing A. B. thereof:

You are, therefore, commanded forthwith to arrest the said A. B. and bring him before me at (naming the place,) or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 186 —.

C. D., *Justice of the Peace.*  
(or as the case may be.)

Supœna as witnesses E. F. and G. H.

SEC. 4535. The warrant must specify the name of the defendant, and if it be unknown to the magistrate, may designate him by any name. It must also state (by name or general description,) an offense which authorizes the magistrate to issue the warrant, the time of issuing it, and the county, city, town, township, or village, where it was issued, and must be signed by the magistrate with his name of office. What warrant must specify.

SEC. 4536. It must be directed to "any peace officer in the state." To whom directed.

SEC. 4537. If the offense stated in the warrant be a misdemeanor, the magistrate issuing it must make an indorsement on the warrant as follows: "Let the defendant, when arrested, be admitted to bail in the sum of \_\_\_\_\_ dollars, if he desire to give bail," and fix in the indorsement the amount in which bail may be taken. If offense a misdemeanor.

SEC. 4538. The warrant of arrest may be delivered to any peace officer for execution, and executed in any county in the state, if issued by a judge of the supreme or district court. If issued by any other magistrate than a judge of the supreme or district court, it can only be executed in the county in which it is issued, unless it is accompanied by a certificate of the official character of the magistrate issuing it, and that his signature thereto is genuine. If the magistrate issuing it be a judge of the county court, or justice of the peace, the certificate must be by the clerk of the county court, under the seal of that court. If by a mayor of an incorporated city, or town, or by a police or other Warrant, by whom issued and where served.

special justice of such city or town, by the clerk or recorder of such city or town, under the seal of such city or town. When accompanied by such certificate, it may then be executed in any county of the state.

If the offense a felony, before whom taken.

SEC. 4539. If the offense stated in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued it, at the place mentioned in the command thereof, or, in the event of his absence or inability to act, before the nearest or most accessible magistrate, in the county in which it was issued.

If a misdemeanor, must give bail in county where arrested.

SEC. 4540. If the offense stated in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate or the clerk of the district court of the same county in which he was arrested, for the purpose of giving bail and the magistrate or clerk before whom he is taken, in such county, must take bail from him accordingly, for his appearance at the district court of the county in which the warrant was issued, on the first day of the next term thereof.

Order for discharge of defendant.

SEC. 4541. On taking bail in the case provided for in the last preceding section, the magistrate or clerk taking such bail, must make on the warrant an order, signed by him, with his name of office, for the discharge of the defendant, substantially, as follows:

COUNTY OF (here name the county.)

THE STATE OF IOWA.

To (here state the name of the officer who has the defendant in custody, with the addition of his name of office thus, "A. B., sheriff of \_\_\_\_\_ county, according to the truth.)

The defendant named in the within warrant of arrest, in your custody, under the authority thereof, for the offense therein designated, having given sufficient bail to answer the same, by the undertaking herewith delivered to you, you are commanded forthwith to discharge him from custody, and without unnecessary delay, deliver this order, together with the said undertaking of bail, to the clerk of the district court of \_\_\_\_\_ county, on or before the first day of the next term thereof.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ A. D. (or as the case may be.)

\_\_\_\_\_ (*Justice of the Peace.*)  
(or as the case may be.)

And must deliver the warrant with the order thereon, together with the undertaking of bail, to the officer having the defendant in custody, who shall forthwith discharge the defendant from arrest, and without unnecessary delay, and on or before the first day of the next term of the court at which the defendant is required to appear, deliver or transmit by mail, or otherwise, the warrant, with the order thereon, together with the undertaking of bail, to the clerk of the court at which the defendant is required to appear, who shall forthwith file the same in his office, and it shall be the duty of the magistrate who issued the warrant, to return to the clerk the affidavits of the informant and his witnesses, upon which the warrant was issued, on or before the first day of the next term of the court, and the clerk shall, when the affidavits are returned by the magistrate, file the same in his office, with the warrant and undertaking of bail.

If bail be not given how officer must act.

SEC. 4542. If bail be not forthwith given by the defendant as provided in the two last preceding sections, the magistrate or clerk must deliver to the officer the warrant, and the officer must take the defendant before the magistrate who issued it, at the place mentioned in the com-



mand thereof, or if he be absent or unable to act, before the nearest or most accessible magistrate in the county in which the warrant was issued.

SEC. 4543. In all cases when the defendant is arrested, he must be taken before the magistrate or clerk without unnecessary delay, and the officer must at the same time, deliver to the magistrate or clerk the warrant with his return thereon indorsed and subscribed by him, with his name of office. Proceedings after arrest.

SEC. 4544. If the defendant be taken before a magistrate in the county in which the warrant was issued, other than the magistrate who issued it, as hereinbefore provided, the affidavits, on which the warrant was issued, must be sent to such magistrate, or if they can not be procured, the informant and his witnesses, must be subpœnaed, to make new affidavits. Same.

## CHAPTER 194.

### ARREST, BY WHOM AND HOW MADE.

[Code—Chapters 162, 163, 164.]

SECTION 4545. Arrest is the taking of a person into custody, in a case, and in the manner authorized by law. Arrest.

SEC. 4546. An arrest may be made by a peace officer, or by a private person. By whom made.

SEC. 4547. A peace officer may make an arrest in obedience to a warrant delivered to him. By what authority.

SEC. 4548. A peace officer without a warrant may make an arrest: Without warrant.

1. For a public offense committed or attempted in his presence.

2. Where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

SEC. 4549. A private person may make an arrest: By a private person.

1. For a public offense committed or attempted in his presence.

2. When a felony has been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

SEC. 4550. A magistrate may orally order a peace officer, or a private person, to arrest any one committing or attempting to commit a public offense, in the presence of such magistrate, which order shall authorize the arrest. Magistrate may orally order arrest.

SEC. 4551. An arrest may be made on any day, or at any time of the day or night. Time.

SEC. 4552. The person making the arrest must inform the person to be arrested, of the intention to arrest him, of the cause of the arrest, of his authority to make it, and that he is a peace officer, if such be the case, and require him to submit to his custody, except when the person to be arrested is actually engaged in the commission of, or attempt to commit the offense, or flies immediately after its commission, and if acting under the authority of a warrant, he must give information thereof, and show the warrant, if required. How to be made.

SEC. 4553. When the arrest is being made by an officer, under the authority of a warrant, after information of the intention to make the If resisted may use all necessary means to arrest.

- arrest, if the person to be arrested, either flee or forcibly resist, the officer may use all necessary means to effect the arrest.
- Officer may forcibly enter premises.** SEC. 4554. To make an arrest, if the offense be a felony, a private person; if any public offense, a peace officer, acting under the authority of a warrant, or without a warrant, may break open the door or window of a house in which the person to be arrested may be, or in which they have reasonable grounds for believing he is, after having demanded admittance and explained the purpose for which admittance is desired.
- May use force to liberate himself or another person.** SEC. 4555. Any person who has lawfully entered a house for the purpose of making an arrest under the provisions of the last preceding section, may break open the door or window thereof, if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same when necessary for the purpose of liberating a person who, acting in his aid, and by his command, lawfully entered for the purpose of making an arrest, and is detained therein.
- Refusal to aid in making arrest, a misdemeanor.** SEC. 4556. Any person making an arrest, may orally summon as many persons as he deems necessary to aid him in making the arrest, and all persons failing to obey such summons, shall be guilty of a misdemeanor.
- An arrest, how made.** SEC. 4557. An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest.
- No unnecessary force.** SEC. 4558. No unnecessary force or violence shall be used in making an arrest.
- How to be treated.** SEC. 4559. A person arrested, is not to be subjected to any more restraint than is necessary for his detention.
- May take weapons from person arrested.** SEC. 4560. He who makes an arrest, may take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken, to be disposed of according to law.
- Escape.** SEC. 4561. If a person, after being arrested, either by a peace officer without a warrant, or by a private person, escape, or be rescued, the person from whose custody he escaped or was rescued, may immediately pursue and re-take him, in any part of the state, and for that purpose may, if necessary, break open the door or window of a house, in which he may be, or in which he has reasonable ground to believe he is, after having stated his purpose and demanded admittance, and when the person escaping or rescued was in custody under a warrant or commitment, this may be done at any time under the original warrant or commitment.
- Arrest by bystander.** SEC. 4562. A peace officer may take before a magistrate, a person who, being engaged in a breach of the peace, is arrested by a bystander, and delivered to him.
- Duty of a person not an officer arresting another.** SEC. 4563. A private person who has arrested another for the commission of an offense, must, without unnecessary delay, take him before a magistrate or deliver him to a peace officer.
- Same.** SEC. 4564. A private person who makes an arrest and delivers the person arrested to a peace officer, must also accompany the officer before the magistrate.
- Officer arresting with a warrant.** SEC. 4565. An officer making an arrest in obedience to a warrant, shall proceed with the person arrested as commanded by the warrant, or as provided by law.
- After arrest, person to be taken before magistrate.** SEC. 4566. When an arrest is made without a warrant, whether by a peace officer or a private person, the person arrested shall, without unnecessary delay, be taken before the nearest, or most accessible magis-

trate in the county in which the arrest is made, and the grounds on which the arrest was made shall be stated to the magistrate by affidavit subscribed and sworn to by the person making the statement, before the magistrate, in the same manner as upon a preliminary information, as nearly as may be.

SEC. 4567. If, in a case provided for in the last preceding section, the magistrate believes from the statements in the affidavit, that the offense charged is triable in the county in which the arrest was made, and that there is sufficient ground for a trial or preliminary examination, as the case may require, and that it will not be inconvenient for the witnesses on the part of the state that such trial or preliminary examination should be had before him, he shall proceed as if the person arrested had been brought before him on arrest under a warrant, and if the case be one within his jurisdiction, to try and determine, shall order an information to be filed against him. What magistrate may do in case of arrest without a warrant.

SEC. 4568. If, in a case provided for in section 4566, the magistrate believes from the statements in the affidavit, that the offense charged is triable in the county in which the arrest is made, and that there is sufficient ground for a trial or a preliminary examination, and that it will be more convenient for the witnesses on the part of the state, that such trial or examination, should be had before some other magistrate, he shall by a written order, by him signed with his name of office, commit the person arrested to a peace officer, to be by him taken before such magistrate in the same county, who has jurisdiction, to try or examine the charge as the case may require, and as shall be convenient for the witnesses on the part of the state, and deliver the affidavit and the order of commitment to the peace officer, who shall proceed with the person arrested, as directed by the order, and such magistrate, when the person arrested is brought before him, shall proceed as on an arrest under a warrant, and if the case be within his jurisdiction to try and determine, shall order an information to be filed against the person arrested. Same.

SEC. 4569. If, in a case provided for in section 4566, the magistrate believes from the statements in the affidavit that the offense charged is triable in a county different from that in which the arrest is made, and that there is sufficient ground for a trial or preliminary examination, he shall by a written order by him signed with his name of office, commit the person arrested to a peace officer, to be by him taken before a magistrate in the county in which the offense is triable, who has jurisdiction to make either preliminary examination into the charge, or try and determine the same, as the case may require, and if the offense be a misdemeanor only, triable on indictment, shall fix in the order the amount of bail, which the person arrested may give for his appearance at the district court of the county in which the offense is indictable, on the first day of the next term thereof, to answer an indictment. Same.

SEC. 4570. If bail be given, as provided, in the last preceding section, it may be, either before the magistrate making the order or the magistrate in the county in which the offense is triable, before whom he is taken, under the order, or a magistrate of any county through which he passes in going from the county in which the arrest was made to that in which the offense is triable, or the clerk of the district court of either of said counties; and when given it shall be the duty of the magistrate or clerk taking the same, to make on the order of commitment an order for the discharge of the person arrested, from custody, who shall forthwith be discharged accordingly, and to transmit by mail, or otherwise, to the clerk of the district court of the county, at which the person Who may take bail.

arrested is bound to appear, on, or before the first day of the next term thereof, and as soon as it can be conveniently done, after taking the bail, the affidavits, the order of commitment and discharge, together with the undertaking of the bail, who shall file the same together, in his office.

If not bailed, how magistrate must dispose of person arrested.

SEC. 4571. If bail be not given, as provided in the last two preceding sections, before the magistrate in the county in which the arrest was made, or if the offense charged is a felony, or a misdemeanor, triable on information, the magistrate must deliver the affidavits and the order of commitment to a peace officer, who shall proceed with the person arrested as directed by the order, or provided by law; and the magistrate in the county in which the offense is triable, when the person arrested is brought before him, shall proceed as on an arrest under a warrant, and if the case be within his jurisdiction to try and determine, shall order an information to be filed against the person arrested.

Duty of officer having person arrested, in custody.

SEC. 4572. In the cases contemplated in the last three preceding sections, it shall be the duty of the officer having the person arrested in custody, under the order, to take him before the proper magistrate in the county in which the offense is triable, which is most convenient for the witnesses on the part of the state, unless, in case of a misdemeanor triable on indictment, as herein before provided, the person arrested desires to give bail, in which case he shall take him before the most convenient magistrate in the county in which the offense with which he is charged is triable, or any county through which he passes, in going from the county in which the arrest was made, to the county in which the offense is triable, or before the clerk of the district court, of either of said counties, for the purpose of giving bail.

How officer's return is to be made.

SEC. 4573. In all cases the peace officer when he takes a person committed to him under an order as provided in this chapter, before a magistrate, or clerk of the district court, either for the purpose of giving bail, (if bail be taken) or for trial or preliminary examination, must make his return on such order, and sign such return with his name of office, and deliver the same to the magistrate, or clerk.

DECISION. Power to detain arrested person, 4 G., 340.

## CHAPTER 195.

### PRELIMINARY EXAMINATION BY A MAGISTRATE.

[Code—Chapter 165.]

Magistrate's authority.

SECTION 4574. A magistrate in a county in which a public offense, triable on indictment therein, has been committed, having jurisdiction within the local limits of such county, as prescribed by section 4447 of this code, has authority to make preliminary examination into the charge, and to commit to jail, or hold to bail, the person charged with its commission, in the manner provided in this chapter.

Defendant informed of his offense.

SEC. 4575. When the defendant is brought before the magistrate on arrest, either with or without a warrant, the magistrate must immediately inform him of the offense with which he is charged, and of his right to the aid of counsel in every stage of the proceedings.

SEC. 4576. (2853.) The magistrate must allow the defendant a reasonable time to send for counsel, and if necessary must adjourn the examination for that purpose. Time to get counsel

SEC. 4577. (2854.) The magistrate immediately after the appearance of counsel, or, if the defendant require the aid of counsel, after waiting a reasonable time therefor, must proceed to examine the case. Examination.

SEC. 4578. (2855.) The examination must be terminated at one session unless the magistrate for good cause shown adjourn it. Same.

SEC. 4579. (2856.) No examination can be adjourned for a longer period than thirty days. Adjournment.

SEC. 4580. (2857.) If an adjournment be had for any cause, the magistrate shall commit the defendant for examination or require him to give ample security for his appearance at the time and place to which the examination is adjourned. Bail.

SEC. 4581. (2858.) If the defendant is charged with an offense punishable with death he must be committed. Committal.

SEC. 4582. (2859.) If there is no jail in the county the sheriff must retain the defendant in his custody until the time of examination. If no jail.

SEC. 4583. At the examination the magistrate must, in the first place, read to the defendant the affidavits of the informant or prosecutor and his witnesses, made on the taking of the information, or of the person making the arrest, as the case may be; and if the defendant request it, must subpoena the affiants, if they be within the state. He must also issue subpoenas for any additional witnesses, required by the prosecutor or the defendant. Proceedings on examination.

SEC. 4584. The witnesses must be examined in the presence of the defendant, and he may cross-examine those against him. Same.

SEC. 4585. (2861.) When the examination of the witnesses on the part of the state is closed, the magistrate must inform the defendant that it is his right to make a statement explaining the charge made against him, or that he may waive the same, and such waiver can not be used against him on the examination before the magistrate, or on trial. Same.

SEC. 4586. (2862.) If the defendant choose to take a statement, the magistrate shall proceed to take the same in writing without oath, and shall put to the defendant the following questions only: Defendant's statement.

What is your name and age?

Where were you born?

Where do you reside, and how long have you resided there?

What is your business or profession?

Give any explanation you think proper of the circumstances appearing in the testimony against you, and state any facts which you think may tend to your exculpation.

SEC. 4587. (2863.) The answer of the defendant to each of the questions must be read to him as it is taken down, and he may thereupon correct or add to the same until it is made conformable to what he declares is the truth. Same.

SEC. 4588. (2864.) Such answer or statement of the defendant shall be signed by him, or if he refuses to sign it his reasons for such refusal shall be stated by the magistrate. Same.

SEC. 4589. (2865.) After the waiver of the defendant to make a statement or after he has made it, his witnesses, if he produce any, may be sworn and examined. Witnesses called.

SEC. 4590. Neither the witnesses on the part of the state, or of the defendant, shall be present during the time the defendant makes his statement. Witnesses excluded.

Same.	SEC. 4591. (2867.) While a witness is under examination before the magistrate he may exclude all others who have not been examined. He may also cause the witnesses to be kept separate that they may not converse with each other until they are all examined.
Persons excluded.	SEC. 4592. The magistrate must also, upon the request of the defendant, exclude from hearing the examination, all persons except the magistrate, his clerk, the peace officer, who has the custody of the defendant, the attorney or attorneys representing the state, and the defendant and his counsel.
Testimony in writing.	SEC. 4593. The magistrate shall, in the minutes of the examination, write out, or cause to be written out, the substance of what was proved on the examination by each witness; showing the name of the witness, his place of residence, and his business or profession, and the amount to which each witness is entitled for mileage and attendance.
Magistrate's certificate	SEC. 4594. After the examination is closed, the magistrate must attach together the affidavits taken on the taking of the information, or of the person making the arrest, as the case may be; the warrant or order of commitment, if any, under which the defendant was brought before him; the minutes of the examination, including the statement of the defendant, if any was made by him, and annex thereto his certificate, which must set forth in substance, the time and place of the examination, and that the minutes thereof are true—and the certificate must be signed by the magistrate, with his name of office.
Decision	SEC. 4595. If after hearing the testimony and statement, it appear to the magistrate, either, that a public offense has not been committed, or that there is no sufficient reason for believing the defendant guilty thereof, he must order the defendant to be discharged; and such order must be indorsed on the minutes of the examination, or annexed thereto, and signed by the magistrate, to the following effect: "There being no sufficient cause for believing the defendant guilty of the offense herein mentioned, or of any other offense, I order him to be discharged."
Discharge.	
Same	SEC. 4596. If it appear from the examination, that a public offense, triable on indictment, has been committed, and that there is sufficient reason for believing the defendant guilty thereof, the magistrate shall in like manner indorse on or annex to the minutes of the examination, an order signed by him, to the following effect: "It appearing to me by the within minutes and statement, (if any,) that the offense therein mentioned, (or any other offense triable on indictment, according to the fact, stating generally the nature thereof,) has been committed, and there is sufficient cause for believing the defendant guilty thereof, I order that
Held to answer.	he be held to answer the same."
Same	SEC. 4597. If the offense be not bailable, the following words, or words to the same effect, must be added to the order mentioned in the last section: "and that he be committed to the jail of the county of," (here name the county.)
Committed	
Same.	SEC. 4598. If the offense be bailable, and bail be taken by the magistrate, the following words in substance, must be added to the order mentioned in section 4596—"and I have admitted him to bail to answer thereto, by the undertaking hereto annexed,"—and the undertaking of bail must be annexed thereto.
Bail	
Same	SEC. 4599. If the offense be bailable, and bail be not given by the defendant, then the magistrate must add to the order mentioned in section 4596, the following words in substance: "And that he be admitted to bail in the sum of (here state the amount,) and that he be committed

to the jail of the county of (here name the county,) until he give such No bail. bail."

SEC. 4600. (2875.) If the magistrate order the defendant to be Mittimus. committed, he shall make out a warrant of commitment signed by him with his name of office, and deliver it with the defendant to the officer to whom he is committed, or, if the officer be not present, to a peace officer who shall deliver the defendant into the proper custody, together with the warrant of commitment, which warrant may be in form following:

"The state of Iowa:

To the sheriff of \_\_\_\_\_ county.

An order having been this day made by me, that A— B—, (the name of the defendant) be held to answer upon a charge of (state the offense), you are commanded to receive him into your custody and detain him in the jail of the county until he be legally discharged.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ A. D. —."

SEC. 4601. (2876.) On holding the defendant to answer the magis- Witnesses to ap-trate must take from each material witness examined by him on the pear. part of the state, a written undertaking, to the effect that he will appear and testify at the court to which the defendant is bound to answer, or that he will forfeit the sum of one hundred dollars.

SEC. 4602. (2877.) Whenever the magistrate is satisfied by oath To give security. or otherwise, that there is reason to believe that any such witness will not fulfill his undertaking to appear and testify unless surety be required, he may order the witness to enter into a written undertaking with sureties, and in such sum as he may deem proper for his appearance.

SEC. 4603. (2878.) Infants and married women who are material Minors and mar-witnesses against the defendant may in like manner be required to ried. procure sureties for their appearance as provided in the preceding section.

SEC. 4604. (2879.) If a witness, required to enter into an under- Committal oftaking to appear and testify, either with or without sureties, refuse witness. compliance with the order for that purpose, the magistrate must commit him until he comply, or be legally discharged.

SEC. 4605. When a magistrate has discharged a defendant, or held Return of pa-him to answer an indictment, he must return to the district court of the pers. county, on or before its opening, on the first day of the next term thereof, and as soon after the closing of the examination as practicable, all the papers mentioned in section 4594, together with the undertaking of bail for the appearance of the defendant, and the undertakings of the witnesses, or for them, taken by him.

SEC. 4606. Neither the magistrate nor his clerk, before the return Same. of the papers mentioned in the last section, to the district court, nor the clerk of the district court, when they are so returned, and until after the defendant is either discharged from custody, or his bail exonerated, or until after the trial of the defendant on the indictment, shall permit Who may exam-any person except the judge of the district court, the attorney or attor- ine papers.neys on behalf of the state, or his or their clerk, and the defendant and his counsel, or the clerk or clerks, of such counsel, to inspect the affidavits, or substance of the testimony of the witnesses, and the statement, if any, or to take a copy of the same, except in laying the same before the grand jury, or in permitting either party to inspect the same, upon the trial of the indictment. And either the magistrate or the clerk of the district court must, within two days after demand made, whilst the papers remain in their possession, respectively, furnish the defendant or

his counsel, a copy thereof, or of such part thereof as may be demanded, upon the payment of the legal fee therefor, or permit such counsel or his clerk to take a copy without charge. A violation of either of the provisions of this section is a misdemeanor.

In what case  
magistrate to re-  
tain papers, and  
file order against  
defendant.

SEC. 4607. If it appear from the examination that a public offense has been committed, which is not triable, on indictment, but on information only, and that there is sufficient reason for believing the defendant guilty thereof, the magistrate shall retain all the papers, and forthwith order an information to be filed against the defendant, before him, if he have jurisdiction to try and determine the same, he shall indorse on, or annex to the minutes of the examination an order signed by him to the following effect: "It appearing to me by the within minutes and statement, (if any) that the offense of (here state its name, or nature generally) has been committed, and that there is sufficient reason for believing the defendant guilty thereof. I order that an information be filed against him therefor before (here name some magistrate who is the nearest and most accessible in the same county, and who has jurisdiction, giving his name of office,) and that the defendant be committed to any peace officer to be taken before such magistrate." And the magistrate shall thereupon cause each material witness on the part of the state to enter into a written undertaking, to the effect that he will appear forthwith before the magistrate, before whom the defendant is to be taken, or that he will forfeit the sum of fifty dollars, and deliver the same with all the other papers to a peace officer, who shall forthwith, proceed, as directed by the order, and take the defendant before such magistrate, and deliver all the papers with the undertakings of the witnesses to the magistrate directed in the order, and make his return thereto, and sign the same with his name of office, and the magistrate before whom he is taken shall thereupon proceed accordingly.

Order.

Material witness  
to give bond for  
his appearance.

DECISION. Information which follows the statute is enough, 4 Iowa, 443.

## CHAPTER 196.

### SELECTING, DRAWING, SUMMONING, AND IMPANNELING OF THE GRAND JURY.

[Code—Chapter 166.]

Civil code, chap-  
ter 115.

SECTION 4608. The selecting, drawing, and summoning of the grand jury, is as prescribed in chapter 115 of the code of civil practice.

Grand jurors.

SEC. 4609. At the time of a term of court at which grand jurors are required to appear, the panel shall be called, and the names of grand jurors who appear, shall be entered on the record. If fifteen grand jurors do not appear, or if the number appearing be reduced from any cause, either then or afterwards, to less than fifteen, the court may order the sheriff of the county to summon a sufficient number of qualified persons, to complete the panel.

Same.

SEC. 4610. Persons summoned by the sheriff to supply a deficiency



in the requisite number of grand jurors, serve only during the term at which they are summoned.

SEC. 4611. (2882.) A defendant held to answer for a public offense may challenge the panel of the grand jury or any individual juror. Challenge.

SEC. 4612. (2883.) A challenge to the panel can be interposed only for the reason that they were not appointed, drawn, or summoned as prescribed by law. To panel.

SEC. 4613. (2884.) A challenge to an individual juror may be made for one or more of the following causes only: To the person

1. That he is a minor, insane, or not competent by law to serve as such juror;

2. That he is the prosecutor upon a charge against the defendant;

3. That he has formed or expressed an unqualified opinion that the defendant is guilty of the offense for which he is held to answer.

SEC. 4614. (2885.) Challenges to the panel must be in writing specifically stating the grounds thereof, but challenges to individual jurors may be oral. When in writing.

SEC. 4615. (2886.) Challenges to the panel or to an individual juror must be decided by the court. Tried by court.

SEC. 4616. (2887.) If a challenge to the panel be allowed, the grand jury is prohibited from inquiring into the charge against the defendant by whom it was interposed. If the jury does so and finds an indictment, the court must set it aside. Challenge allowed.

SEC. 4617. (2888.) If a challenge to an individual juror be allowed he shall not be present at or take any part in the consideration of the charge against the defendant. Same.

SEC. 4618. (2889.) The grand jury must inform the court of a violation of the last section, that it may be punished as a contempt. Same.

SEC. 4619. (2890.) When several persons are held to answer for one and the same offense no challenge to the panel can be made unless they all join in such challenge, nor can any objection be interposed by a defendant to the grand jury or to an individual juror for any cause of challenge after they are sworn. Challenge by co-defendant.

SEC. 4620. From the persons summoned to serve as grand jurors, the court must appoint a foreman; the court must also appoint a foreman when the person already appointed is discharged, excused, or from any cause becomes unable to act, before the grand jury is finally discharged. Foreman.

SEC. 4621. (2892.) The following oath must be administered to the foreman of the grand jury: "You, as foreman of the grand jury, shall diligently inquire, and true presentment make of all public offenses against the people of this state, committed or triable within this county, of which you have, or can obtain legal evidence; you shall present no person through malice, hatred, or ill will, nor leave any unrepresented, through fear, favor, or affection, or for any reward, or the promise or hope thereof, but in all your presentments you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding. So help you God."

SEC. 4622. (2893.) The following oath must thereupon be administered to the other grand jurors present: "The same oath which your foreman has now taken before you on his part, you and each of you shall well and truly observe on your part. So help you God." Oath.

SEC. 4623. (2894.) The grand jury being impaneled and sworn, may be charged by the court. In doing so the court shall give them Charge.

- such information as it may deem proper as to the nature of their duties, and any charges for public offenses returned to the court or likely to come before the grand jury.
- Clerk of jury. SEC. 4624. (2895.) The grand jury must appoint one of its number as clerk, who must preserve minutes of the proceedings and of the evidence given before them, except the votes of the individual members on indictments.
- Discharge. SEC. 4625. (2896.) The grand jury, on the completion of its business shall be discharged by the court. But whether its business be completed or not, it is discharged by the final adjournment thereof.

DECISIONS. When a party must challenge the array before indictment found, 6 Iowa, 370-383; 3 *ibid.*, 416; 3 G., 513; who may select a grand jury, 4 G., 125, and *State v. Howard*, Dec., 1859; M., 190, 169, 332; the presumption drawn from "true bill," M., 332; [sec. 2738 of this revision] defined, 8 Iowa, 231; the right to challenge the grand jury or a member is confined to the defendant, 4 G., 291; unqualified defined, 6 Iowa, 380; 7 *ibid.*, 287; when a defendant is committed or held, he must object to grand jury before indictment found, 3 Iowa, 416; 3 G., 513; 4 G., 125; court can not change grand jury except as by law, 4 G., 291; appointment of foreman, 4 G., 291; 3 G., 513; "fifteen" to make jury, 3 G., 513; 4 G., 73; a grand jury of a special or continued term may indict, 2 Iowa, 454; 7 Iowa, 365; opinion in grand juror must be unqualified, 6 Iowa, 380.

## CHAPTER 197.

### POWERS AND DUTIES OF THE GRAND JURY.

[Code—Chapter 167.]

- Proceedings secret. SECTION 4626. (2897.) The grand jury has power, and it is made its duty, to inquire into all indictable offenses committed or which may be tried within the county, and present them to the court by indictment.
- How indictment must be found. SEC. 4627. The indictment must, in all cases, be found only upon evidence given by witnesses, produced, sworn, and examined before the grand jury, or furnished by legal documentary proof.
- Oath. SEC. 4628. The grand jury has power, by its foreman, to administer the oath to all witnesses produced and examined before it.
- Powers and duties of grand jury. SEC. 4629. It is the duty of the grand jury to appoint one of its number, who is not foreman, clerk thereof, who must take and preserve the minutes of the proceedings and of the evidence given before it, except the votes of the individual members thereof, on indictments.
- Same. SEC. 4630. (2900.) The grand jury is not bound to hear evidence for the defendant, but it is its duty to weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it may order such evidence to be produced.
- Of a member SEC. 4631. (2901.) If a member of the grand jury knows, or has reason to believe, that a public offense has been committed, triable in the county, he must declare the same to his fellow jurors and be sworn as a witness upon the investigation before them.
- Special duty of jury. SEC. 4632. (2902.) It is made the special duty of the grand jury to inquire:

1. Into the case of every person imprisoned in the jail of the county on a criminal charge and not indicted.

2. Into the condition and management of the public prisons within the county.

3. Into the willful and corrupt misconduct in office of all county officers.

4. Into the obstruction of roads and highways.

SEC. 4633. The clerk of the court must, whenever required by the foreman of the grand jury, or district attorney issue subpoenas for witnesses to appear before the grand jury. Subpoenas.

SEC. 4634. (2904.) The jury is entitled to free access at all reasonable times to the county jails, and to the examination without charge, of all public records within the county. Offices and jails.

SEC. 4635. The grand jury may, at all reasonable times, ask the advice of the district attorney, or the court, and the district attorney may attend before it for the purpose of examining witnesses when the grand jury deems it necessary. District attorney.

SEC. 4636. (2906.) Such attorney shall be allowed at all times to appear before the grand jury on his own request for the purpose of giving information relative to any matter cognizable by it, but no such attorney nor any other officer or person except the grand jury must be present when the question is taken upon the finding of an indictment. Same.

SEC. 4637. The grand jury should find an indictment, when all the evidence before it, taken together, is such as in its own judgment would, if unexplained, warrant a conviction by the trial jury. When the evidence is not such, it should not. Indictment.

SEC. 4638. (2907.) Every member of the grand jury must keep secret the proceedings of that body, and the testimony given before them, except as hereinafter required. Nor shall any grand juror or officer of the court disclose the fact that an indictment for a felony has been found against any person not in custody or under bail, otherwise than by presenting the same in court, or issuing, or executing process thereon, until such person has been arrested. A violation of this section is a misdemeanor. Proceedings secret.

SEC. 4639. (2908.) A member of the grand jury may be required by the court to disclose the testimony of a witness examined before them, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any witness upon a charge against him for perjury. Exception.

SEC. 4640. (2909.) No grand juror shall be questioned for anything he may say or any vote he may give in the grand jury, relative to a matter legally pending before them, except for perjury of which he may have been guilty in making an accusation or in giving testimony to his fellow jurors. Juror not to be questioned.

SEC. 4641. When a witness, under examination before the grand jury, refuses to testify, or to answer a question put to him by the grand jury, the grand jury shall proceed with the witness into the presence of the court, and the foreman shall then distinctly state to the court, the refusal of the witness, and if the court, upon hearing the witness, shall decide that he is bound to testify, or answer the question propounded, he shall inquire of the witness if he persists in his refusal, and if he does, shall proceed with him as in cases of similar refusal in open court. When witness refuses to testify.

SEC. 4642. If a witness fail to attend before the grand jury in obedience to a subpoena issued for that purpose, and duly served, the court Or fails to obey subpoena.

shall, upon the application of the district attorney, or foreman of the grand jury, proceed and coerce the attendance of the witness, and may punish his disobedience as in the case of a witness failing to attend on the trial.

Papers before grand jury.

SEC. 4643. All the papers and other matters of evidence relating to the arrest, and preliminary examination of the charge against defendants who have been held to answer, returned to the court by magistrates, shall be laid before the grand jury, and if upon investigation, it refuses to find an indictment, they must be returned to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed, and thereupon the court must order the discharge of the defendant from custody, if in jail, or the exoneration of the bail, if bail be given, unless the court should, upon good cause shown, be of opinion that the charge should again be submitted to the grand jury, in which case the defendant may be continued in custody, or on bail, until the next term of the court.

Dismissal of charge.

Same.

SEC. 4644. Such dismissal of the charge does not prevent the same from being again submitted to a grand jury, as often as the court may direct, but without such direction, it can not again be submitted.

DECISION. Powers of grand jury, 2 Iowa, 454.

## CHAPTER 198.

### FINDING AND PRESENTMENT OF INDICTMENT.

[Code—Chapter 168.]

By twelve jurors.

SECTION 4645. (2910.) An indictment can not be found without the concurrence of twelve grand jurors; and when so found it must be indorsed "A true bill," and the indorsement must be signed by the foreman of the grand jury.

Private prosecutor.

SEC. 4646. When an indictment is found, at the instance of a private prosecutor, the following must be added to the indorsement required by the last preceding section, "found at the instance of" (here state the name of the person,) and in such case, if the prosecution fails, the court trying the cause may award costs against the private prosecutor, if satisfied from all the circumstances, that the prosecution was malicious or without probable cause.

Names of witnesses indorsed on indictment.

SEC. 4647. When an indictment is found, the names of all the witnesses examined before the grand jury, must be indorsed thereon, before it is presented to the court, and the minutes of the evidence of each witness examined before the grand jury, taken by the clerk of the grand jury, must be presented with the indictment to the court, and filed by the clerk of the court, and remain in his office as a record, but the minutes of the evidence shall not be open to the inspection of any person, except the judge of the court, the district attorney, or his clerk, and the defendant and his counsel, or the clerk of such counsel, and the clerk of the court must, within two days after demand made, furnish the defendant or his counsel a copy thereof, without charge, or permit the defendant's

counsel or the clerk of such counsel, to take a copy. A violation of either of the provisions of this section is a misdemeanor.

SEC. 4648. The indictment when found and indorsed, as prescribed by this chapter, must be presented by the foreman, in the presence of the grand jury, to the court, and marked filed, by the clerk of the court, and remain in his office, as a record. Presented to the court.

## CHAPTER 199.

### INDICTMENT, ITS FORM AND REQUISITES.

[Code—Chapter 169.]

SECTION 4649. An indictment is an accusation in writing found and presented by a grand jury, legally convoked and sworn, to the court in which it is impanelled, charging, that a person therein named, has done some act, or been guilty of some omission, which by law, is a public offense, punishable on indictment. Indictment.

SEC. 4650. The indictment must contain: Must contain.

1. The title of the action, specifying the name of the court to which it is presented, and the name of the parties.

2. A statement of the facts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.

SEC. 4651. It may be substantially in the following form: Form.

District court of the county of \_\_\_\_\_

The state of Iowa }  
 against            }  
 A. B.                }

The grand jury of the county of \_\_\_\_\_, in the name and by the authority of the state of Iowa, accuse A. B. of the crime of (here insert the name of the offense, if it have one, such as treason, murder, manslaughter, robbery, larceny, or the like, or if it have no general name, then a brief general description of it as given by law, such as "mingling poison with food, with intent to kill a human being") committed as follows:

The said A. B. on the 1st day of January, A. D. 18—, in the county aforesaid, (here insert the act or omission constituting the offense.)

\_\_\_\_\_, District Attorney,  
 of the \_\_\_\_\_ judicial district.

SEC. 4652. The indictment must be direct and certain as regards: Must be specific.

1. The party charged.

2. The offense charged.

3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense.

SEC. 4653. When a defendant is indicted by a fictitious or erroneous name, and in any subsequent stage of the proceedings, before execution, his true name is discovered, an entry shall be made in the record of the proceedings, of his true name, referring to the fact of his being indicted by the name mentioned in the indictment, and the subsequent proceedings shall be in the true name, substantially, as follows: Defendant's name.

The state of Iowa,  
                  against  
A. B. indicted by the name of C. D. }

Must charge but  
one offense.

SEC. 4654. The indictment must charge but one offense, but it may be charged in different forms to meet the testimony, and if it may have been committed in different modes, and by different means, the indictment may allege the modes and means in the alternative: *provided*, that, in case of compound offenses, where, in the same transaction, more than one offense has been committed, the indictment may charge the several offenses, and the defendant may be convicted of any offense included therein: *provided further*, that this section shall in no manner, affect, any provision of the act, entitled an act "for the suppression of intemperance," approved, January 22, 1855, or of the act supplementary and amendatory thereto.

Precise time.

SEC. 4655. The precise time at which the offense was committed, need not be stated in the indictment, but it is sufficient if it allege that the offense was committed at any time prior to the time of the finding thereof, except, where the time is a material ingredient in the offense.

Sufficient cer-  
tainty.

SEC. 4656. When an offense involves the commission, or an attempt to commit an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the name of person injured, or attempted to be injured, is not material.

Construction.

SEC. 4657. The words used in an indictment must be construed in their usual acceptance, in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

Same.

SEC. 4658. Words used in a statute to define a public offense, need not be strictly pursued in an indictment, but other words conveying the same meaning may be used.

Indictment,  
when sufficient.

SEC. 4659. The indictment is sufficient if it can be understood therefrom:

1. That it was found by a grand jury of the county impaneled in the court having authority to receive it, though the name of the court is not accurately stated.

2. That the defendant is named, or, if his true name is unknown to the grand jury, that fact be stated, and that he be described by a fictitious name.

3. That the offense was committed within the jurisdiction of the court, or is triable therein.

4. That the offense was committed at some time prior to the time of the finding of the indictment.

5. That the act or omission charged as the offense, is stated with such a degree of certainty, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and the court to pronounce judgment upon a conviction according to the law of the case.

6. That when material, the name of the person injured, or attempted to be injured, be set forth, when known to the grand jury, or if not known to it, that it be so stated in the indictment.

When not insuffi-  
cient.

SEC. 4660. No indictment is insufficient nor can the trial, judgment, or other proceedings thereon, be affected by reason of any of the following matters, which were formerly deemed defects or imperfections:

1. For the want of an allegation of the time or place of any material fact, when the time and place have once been stated.

2. For the omission of any of the following allegations, namely: "with force and arms," "contrary to the form of the statute, or of the statutes," or "against the peace and dignity of the state."

3. For the omission to allege that the grand jury was impaneled, sworn or charged.

4. For any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged; nor,

5. For any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits.

SEC. 4661. (2921.) Neither presumptions of law nor matters of fact which judicial notice is taken need be stated in an indictment. What not stated.

SEC. 4662. (2922.) In pleading a judgment or other determination of, or proceeding, before, a court or officer of special jurisdiction, the facts conferring jurisdiction need not be stated in the indictment, but it is sufficient to state that the judgment or determination was duly made or the proceedings duly had before such court or officer; but the facts constituting the jurisdiction must be established on the trial. Pleading judicial Proceeding.

SEC. 4663. (2923.) In pleading a private statute or right derived therefrom, it is sufficient to refer to the same by its title and the day of its approval, and the court must thereupon take judicial notice thereof. Private statute.

SEC. 4664. (2924.) An indictment for a libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled of the defamatory matter upon which the indictment is founded, but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published must be established on trial. For libel.

SEC. 4665. (2925.) When an instrument which is the subject of an indictment has been destroyed or withheld by the act of procurement of the defendant, and the fact of such destruction or withholding is alleged in the indictment and established on the trial, the misdescription of the instrument is immaterial. Instrument destroyed, &c.

SEC. 4666. (2926.) In an indictment for perjury, or subornation of perjury it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer the same, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need not set forth the pleadings, record, or proceedings with which the oath is connected, nor the commission or the authority of the court or person before whom the perjury was committed. For perjury.

SEC. 4667. (2927.) In any case where an intent to defraud is required to constitute the offense of forgery or any other offense that may be prosecuted, it shall be sufficient to allege in the indictment an intent to defraud without naming the particular person or body corporate intended to be defrauded, and on the trial of such indictment it is sufficient if there appear to be an intent to defraud the United States, or any state, county, city, or township, or any body corporate, or any public officer in his official capacity, or any co-partnership or member thereof, or any particular person. Intent to defraud.

SEC. 4668. (2928.) The distinction between an accessory before the fact, and a principal is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the act Accessories.

- constituting the offense or aid and abet its commission though not present, must hereafter be indicted, tried and punished as principals.
- Same.** SEC. 4669. (2929.) An accessory after the fact to the commission of a public offense may be indicted, tried, and punished, though the principal be neither tried nor convicted.
- Compounding offense.** SEC. 4670. (2930.) A person may be indicted for having, with the knowledge of the commission of a public offense, taken money or property of another or a gratuity or reward, or engagement or promise therefor, upon agreement or understanding express or implied to compound or conceal the offense, or to abstain from a prosecution therefor, or to withhold any evidence thereof though the person guilty of the original offense has not been indicted or tried.
- Embezzlement.** SEC. 4671. In an indictment for the embezzlement or fraudulent conversion of money, it shall be sufficient to allege the embezzlement or fraudulent conversion to have been of money generally, without designating its particular species, and proof that the defendant embezzled, or fraudulently converted any money, or bank note, will be sufficient to support the averment, although the particular species be not proved.

**DECISIONS.** How to state the crime in the indictment, 1 G., 418; 2 G., 308, 162, 286; 3 G., 276, 339; 4 G., 137; 7 Iowa, 443; 4 G., 172, 500, 506, 483; M., 412; "state of Iowa" is legally the same as "the state of Iowa," 2 G., 270; and that term is the authoritative one of the state, 1 Iowa, 167; as to the need of such term in an indictment, see 1 Iowa, 374; as to duplicity, see 4 Iowa, 443; *State v. McPherson*, June, 1859, and 8 Iowa, 536; 7 Iowa, 252; 4 Iowa, 477; 6 Iowa, 117; 5 Iowa, 369; 4 G., 526, 172; 5 Iowa, 507; as to statement of venue, see 4 Iowa, 443; M., 489; 2 G., 286; 4 G., 526; as to statement of time, see 6 Iowa, 535; 4 Iowa, 477; as to names, see M., 141; 5 Iowa, 484; certainty of price for which liquor was sold, 5 Iowa, 509; description of defendant, 5 Iowa 484; of prosecuting attorney, 1 Iowa, 167; in case of a misdemeanor when the fact charged in the indictment appears to be unlawful (how appears?) it is unnecessary to allege the act to have been unlawfully done, 4 Iowa, 503; on or about a day stated is a sufficient specification of time, 4 Iowa, 479; pleading to, and contesting by trial an indictment not indorsed a true bill nor marked filed with the clerk, and making no motion in arrest, is a waiver of such objections, 4 Iowa, 556; accessory before the fact indicted as principal, 1 G., 111; under the sixth section of liquor law, any number of violations may be charged in one indictment, 5 Iowa, 508; no modes of objecting to the sufficiency of an indictment except upon motion, demurrer, or in arrest, 7 Iowa, 255; the battery attendant on an assault is only aggravation and does not make the charge double, 4 Iowa, 479; "did keep and was concerned, engaged and employed in vending and keeping intoxicating liquors to sell," charges but one offense, 5 Iowa, 369; the indictors should aver that the defendant's name can not be discovered before they can indict him by a fictitious name and description, and such description should identify him, 5 Iowa, 486; as to certainty, description of road, see 4 Iowa, 503.

## CHAPTER 200.

### PROCESS UPON AN INDICTMENT.

- Bench warrant.** SECTION 4672. The process upon an indictment for the arrest of the defendant, shall be a bench warrant.
- Non-appearance.** SEC. 4673. When an indictment is filed by the clerk of the court, against a defendant, not in custody, or under bail, or who has not deposited money instead of bail, the judge of the court shall make an order on the indictment, which shall be signed by him, with his name of office,



that a bench warrant issue for the arrest of the defendant, and, if the offense charged in the indictment be bailable, fix the amount in which bail may be taken.

SEC. 4674. The clerk, on the application of the district attorney, shall accordingly, at any time after the making of the order by the judge, whether the court be in session or not, issue a bench warrant, into one or more counties. Clerk to issue bench warrant.

SEC. 4675. A bench warrant, if the offense be a felony, may be substantially, in the following form: Form, in case of felony

County of \_\_\_\_\_

The state of Iowa.

*To any peace officer in the state:*

An indictment having been found in the district court of said county, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D., 18—, (the day on which the indictment is marked filed, by the clerk of the court,) charging A. B. with the crime of (here designate the offense by the name, if it have one, or by a brief general description of it, as given by law, substantially, as in the indictment.)

You are, therefore, hereby commanded to arrest the said A. B., and bring him before said court to answer said indictment, if the said court be then in session in said county, or, if the said court be not then in session in said county, that you deliver him into the custody of the sheriff of said county.

Given under my hand, and the seal of said court, at my [SEAL.] office in \_\_\_\_\_, in the county aforesaid, this \_\_\_\_\_ day of \_\_\_\_\_, A. D., 18—.

By order of the judge of the court.

\_\_\_\_\_, clerk.

SEC. 4676. If the offense be a misdemeanor, the bench warrant may be in a similar form, adding to the body thereof, a direction, substantially to the following effect: If a misdemeanor or.

“Or, if the said A. B. require it, that you take him before a magistrate, or the clerk of the district court, in said county, or, in the county in which you arrest him, that he may give bail to answer the said indictment.

SEC. 4677. If the offense charged be bailable, the clerk must make an indorsement on the bench warrant, to the following effect: “The defendant is to be admitted to bail in the sum of \_\_\_\_\_ dollars.” (The amount fixed by the judge and indorsed on the indictment. If offense bailable.)

SEC. 4678. The bench warrant may be served in any county in the state. Where served.

SEC. 4679. If the defendant, when arrested, be brought before a magistrate, or the clerk of the district court, of the same county in which it was issued, or another county, for the purpose of giving bail, the same proceedings must be had, in all respects, as if he had been arrested on a warrant of arrest, issued by a magistrate, on a preliminary information, as nearly as may be. Proceedings.

## CHAPTER 201.

## ARRAIGNMENT OF THE DEFENDANT.

[Code—Chapter 170.]

- Defendant arraigned**      **SECTION 4680.** As soon as practicable, after an indictment is found, the defendant must be arraigned thereon, unless he waive the same.
- If for a felony or misdemeanor.**      **SEC. 4681. (2932.)** If the indictment be for a felony the defendant must be personally present, but if for a misdemeanor only, his personal appearance is unnecessary and he may appear upon arraignment by counsel.
- If in custody.**      **SEC. 4682.** When he is in custody, the court must direct the officer in whose custody he is, to bring him before it, to be arraigned, and the officer must do so accordingly.
- If on bail**      **SEC. 4683.** If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear for arraignment, when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or of the money deposited, may on motion of the district attorney, make an order directing the clerk to issue a bench warrant for his arrest, and fix the amount, in which bail may be taken, if the offense be bailable.
- Bench warrant.**      **SEC. 4684. (2934.)** The clerk on the application of the prosecuting attorney may accordingly at any time after the order, whether the court be in session or not, issue a bench warrant into one or more counties of this state for the arrest of the defendant.
- Same.**      **SEC. 4685.** If the defendant appear for arraignment without counsel, he must be informed by the court, that it is his right to have counsel before being arraigned, and must be asked if he desire the aid of counsel, and if he does, and is unable to employ any, must allow him to select, or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours.
- Defendant's right to counsel.**      **SEC. 4686.** The arraignment may be made by the court, or by the clerk, or district attorney, under its direction, and consists in reading the indictment to the defendant, and unless previously done, delivering to him a copy of the indictment, and the indorsements thereon, and informing him, that if the name by which he is indicted, is not his true name, he must then declare what his true name is, or be proceeded against by the name in the indictment, and asking him what he answers to the indictment.
- Arraignment, what.**      **SEC. 4687. (2939.)** If he give no other name or give his true name, he is thereafter precluded from objecting to the indictment upon the ground of being therein improperly named.
- Same**      **SEC. 4688. (2940.)** If he allege that another name is his true name the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted.
- Same.**      **SEC. 4689. (2941.)** If on the arraignment the defendant require it, he may be allowed until the next day, or such farther time may be given him as the court may deem reasonable, to answer the indictment.
- Time to answer.**      **SEC. 4690. (2942.)** If the defendant require time as provided in the last section, then on the next day or at such farther day as the court may have allowed him, he may, in answer to the arraignment, either move the court to set aside the indictment, or may demur or plead thereto.
- Same**

DECISIONS. Record should show an arraignment, M., 17; but it will be implied from a showing of personal appearance, 2 G., 270; motion must point out the objections specifically, 7 Iowa, 406.

CHAPTER 202.

SETTING ASIDE THE INDICTMENT.

[Code—Chapter 171.]

SECTION 4691. The motion to set aside the indictment can be made by the defendant on one or more of the following grounds, and must be sustained: Motion to set aside indictment.

1. When it is not indorsed "a true bill," and the indorsement signed by the foremen of the grand jury as prescribed in section 4645.

2. When the names of all the witnesses examined before the grand jury are not indorsed thereon.

3. When it has not been presented and marked "filed," as prescribed in section 4648.

4. When any person other than the grand jurors was present before the grand jury, when the question was taken upon the finding of the indictment, as prohibited in section 4636, or, when any person other than the grand jurors was present before the grand jury during the investigation of the charge, except, as required, or permitted by law.

5. That the grand jury were not selected, drawn, summoned, impaneled, or sworn, as prescribed by law.

SEC. 4692. A motion to set aside the indictment, on the ground that the names of all the witnesses examined before the grand jury are not indorsed thereon; or, that the name of any other witness than those so examined, is indorsed thereon, as prescribed in the second sub-division of section 4691, shall not be sustained, if the indorsement is corrected by the insertion, or striking out of such names, or name, by the district attorney, or the clerk of the court, under the direction of the court, so as to correspond with the minutes required to be kept by the clerk of the grand jury, and returned and presented with the indictment to the court. When motion to set aside, not sustained.

SEC. 4693. The ground of the motion to set aside the indictment, mentioned in the fifth sub-division of section 4691, is not allowed to a defendant who has been held to answer before indictment. What ground of motion not allowed.

SEC. 4694. (2944.) If the motion to set aside the indictment be not made before demurring or pleading, the defendant is precluded from afterward taking the objections mentioned in section 4691. Motion waived.

SEC. 4695. (2945.) The motion must be heard when it is made, unless for good cause the court postpone the hearing to another time. Hearing of.

SEC. 4696. (2946.) If the motion be denied, the defendant must immediately answer the indictment either by demurring or pleading thereto. Answer.

SEC. 4697. (2947.) If the motion be granted, the court must order the defendant, if in custody, to be discharged, or if admitted to bail that his bail be exonerated, or if he has deposited money instead of bail that the money deposited be refunded to him, unless the court direct that the case be re-submitted to the same or another grand jury. Set aside.

Case re-submitted to jury.

SEC. 4698. (2948.) If the court direct that the case be re-submitted, the defendant, if already in custody, must so remain unless he be admitted to bail; or if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment.

No bar.

SEC. 4699. (2949.) An order to set aside the indictment as provided in this chapter shall be no bar to a future prosecution for the same offense.

DECISIONS. Naming the witnesses on the back of the indictment, 6 Iowa, 117; 1 G., 316; 4 G., 189, 437; 2 G., 272; 8 Iowa, 203, 231; filing by the clerk and indorsement, 4 G., 381; 4 Iowa, 554; 1 Iowa, 167, 205; 7 Iowa, 15; 2 Iowa, 454; 4 Iowa, 381; 6 Iowa, 511; M., 332; 3 G., 249.

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## CHAPTER 203.

### PLEADINGS BY THE DEFENDANT.

Pleadings.

SECTION 4700. (2950.) The only pleading on the part of the defendant is either a demurrer or plea.

When put in.

SEC. 4701. The demurrer and plea must be put in in open court, and may be oral, but an entry thereof must be made on the record.

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## CHAPTER 204.

### MODE OF TRIAL.

Issues, by whom tried.

SECTION 4702. Issues of law shall be tried by the court. Issues of fact shall be tried by a jury.

Issue of law.

SEC. 4703. An issue of law arises upon a demurrer to the indictment. No joinder in demurrer is necessary.

Of fact.

SEC. 4704. An issue of fact arises on a plea of not guilty, or of former conviction or acquittal of the same offense. No replication or further pleading is necessary.

Same.

SEC. 4705. An issue of fact must be tried by a jury of the county in which the indictment is found, unless a change of venue has been awarded.

Of the indictment.

SEC. 4706. If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel; but, if for a felony, he must be personally present.

CHAPTER 205.

DEMURRER.

[Code—Chapter 172.]

SECTION 4707. The defendant may demur to the indictment, when it appears upon its face, either : Ground of demurrer.

1. That it does not substantially conform to the requirements of chapter 199.

2. That the indictment contains any matter, which, if true, would constitute a legal defense, or bar, to the prosecution.

SEC. 4708. The entry on the record of a demurrer, may be substantially, in the following form : “The defendant demurs to the indictment.” Entry.

SEC. 4709. When the demurrer is put in, the objection thereby presented, must be heard immediately, or at such time as the court may appoint. When put in.

SEC. 4710. If the demurrer is sustained, on the ground that the offense charged, was within the exclusive jurisdiction of another county in this state, the same proceedings shall be had, as are provided in sections 4795, 4796, 4797, and 4798 of this code. When sustained.

SEC. 4711. If the demurrer is sustained, because the indictment contains matter which is a legal defense, or bar, to the indictment, the judgment shall be final, and the defendant must be discharged. Same.

SEC. 4712. If the demurrer is sustained on any other ground than that mentioned in the last two sections, the defendant must be dealt with as provided in section 4697, unless the court is of opinion, on good cause shown, that the objection can be remedied or avoided, in another indictment ; in which case the court may order the cause to be re-submitted to the same or another grand jury, and the defendant may be dealt with as provided in section 4698. Same

SEC. 4713. If the demurrer is overruled, the defendant has a right to put in a plea. If he fails to do so, final judgment may be rendered against him, on the demurrer, and if necessary, a jury may be impaneled to inquire and ascertain the degree of the offense. When overruled.

DECISIONS. Must specify the grounds of demurrer or be disregarded, 5 Iowa, 370 ; the certainty of statement of objections in a demurrer, 1 Iowa, 542.

CHAPTER 206.

PLEAS TO THE INDICTMENT.

[Code—Chapter 173.]

SECTION 4714. There are but three pleas to an indictment. A plea of— A Number of pleas.

1. Guilty.
2. Not guilty.

	<p>3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty.</p> <p>SEC. 4715. The plea may be entered on the record, substantially, in the following form :</p> <p>1. A plea of <i>guilty</i>. "The defendant pleads that he is <i>guilty</i> of the offense charged in the indictment."</p> <p>2. A plea of <i>not guilty</i>. "The defendant pleads that he is <i>not guilty</i> of the offense charged in the indictment."</p> <p>3. A plea of <i>former conviction or acquittal</i>. "The defendant pleads that he has formerly been convicted or acquitted, (as the case may be,) of the offense charged in the indictment, by the judgment of the court of _____ (naming it,) rendered on the _____ day of _____ A. D. 18—, (naming the time.)"</p>
Form of entry.	
Plea of guilty.	SEC. 4716. The plea of guilty can only be put in by the defendant himself, in open court.
Same.	SEC. 4717. At any time before judgment, the court may permit the plea of guilty to be withdrawn, and another plea or pleas substituted.
Plea of not guilty.	SEC. 4718. The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact may be given in evidence, under it, except a former conviction or acquittal.
Judgment, when a bar.	SEC. 4719. A conviction or acquittal by a judgment upon a verdict, shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment, on which the conviction or acquittal took place.
Bar to what.	SEC. 4720. (2962.) When the defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former or for any lower degree of that offense, or for an offense necessarily included therein.
Same.	SEC. 4721. The judgment for the defendant, on a demurrer, except where it is otherwise provided, or for an objection to its form or substance taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense.
Plea by court.	SEC. 4722. If the defendant fail, or refuse to answer the indictment by demurrer or plea, a plea of not guilty must be entered by the court.

DECISIONS. Former acquittal or conviction, 8 Iowa, 288; M., 142; conviction of owner no bar in case *v. the liquors themselves*, 2 Iowa, 230; a plea of abatement to an indictment should be sworn to if it recites facts not of record, 6 Iowa, 383; a pending indictment for the same offense not pleadable, 4 G., 137.

## CHAPTER 207.

### TIME OF TRIAL.

Day of trial fixed by court.	SECTION 4723. If the defendant is in custody, or on bail, or has deposited money instead of bail when the indictment is found, the trial may take place at the same term of the court, on a day to be fixed by the court.
Same.	SEC. 4724. If not tried at the same term, all indictments, together with all other criminal prosecutions, shall be docketed for the first day

of the next term of the court, unless a different day be fixed by the order of the court; but no indictment for a felony shall be docketed until after the defendant has been arrested or given bail, or deposited money instead thereof.

SEC. 4725. All prosecutions by indictment, in the same court in <sup>Same.</sup> which the indictment was found, and on appeal or change of venue, shall stand for trial on the day for which they are docketed, if the defendant has been arrested, and the papers returned or transmitted to the clerk, and received by him, and filed in his office, ten days before the first day of the term for which they are so docketed, subject to the provisions of section 3006 of the code of civil practice.

SEC. 4726. After plea put in to an indictment, the defendant is <sup>Three clear days</sup> entitled to three clear days, at least, to prepare for his trial, if he require it.

## CHAPTER 208.

### CHANGE OF VENUE IN CRIMINAL CASES.

#### ARTICLE I.

[Code—Chapter 204.]

SECTION 4727. (3270.) In all criminal cases which may be pending in any of the district courts of this state, any defendant therein may <sup>Who may have charge.</sup> petition the court for a change of venue to another county.

SEC. 4728. (3271.) Such petition must set forth the nature of the <sup>Petition.</sup> prosecution, the court where the same is pending, and that such defendant can not receive a fair and impartial trial owing to the prejudice of the judge, or to excitement and prejudice against him in such county, and must verify the same by his affidavit stating the same to be true as he verily believes.

SEC. 4729. When the ground alleged in the petition, is excitement <sup>Verified.</sup> and prejudice against him, in the county, it must be verified by three disinterested persons, in addition to the petitioner himself.

SEC. 4730. The petition need not state the facts upon which the <sup>What it may state.</sup> belief of the petitioner, or other person, verifying the same, is founded, but may allege the belief of the particular ground thereof, in general terms.

SEC. 4731. The court may receive additional testimony by affidavits <sup>Additional testi-</sup> only, either on the part of the defendant, or the state, when the alleged <sup>mony.</sup> ground in the petition, is excitement and prejudice, in the county, against the petitioner.

SEC. 4732. The petition and affidavits, if any, must be filed with <sup>Same.</sup> the clerk, and are parts of the record.

SEC. 4733. The court, in the exercise of a sound discretion, <sup>Court to decide.</sup> must decide the matter of the petition, when fully advised, according to the very right of it.

SEC. 4734. If sustained, the court must, if the ground alleged be <sup>Same</sup>

- the prejudice of the judge, order the change of venue to the most convenient county, in an adjoining district, to which no objection exists.
- Same. SEC. 4735. If sustained on the ground of excitement and prejudice in the county, it must be awarded to such county in the same district, in which no such objection exists.
- Duty of clerk of the court. SEC. 4736. Upon the making of the order, if there be but one defendant in the case, unless all have joined in the petition, the clerk must make out and certify a transcript of all papers on file in the case, including the indictment, and file the same in his office, and a certified copy of all record entries, and all the original papers on file must be, without unnecessary delay, transmitted to the clerk of the court to which the change of venue is ordered.
- Same. SEC. 4737. If there be more than one defendant in the case, and all the defendants have not joined in the petition, the clerk, upon the making of such order, must, without unnecessary delay, make out and certify a transcript of all entries appearing on the record, and of all the papers on file in the case, including the indictment, and transmit the transcript so certified to the clerk of the court to which the change of venue is ordered, retaining the originals.
- Same. SEC. 4738. If a defendant, who has applied for a change of venue, which has been ordered, be in custody, the sheriff of the county from which the venue is changed, must, on the order of the court, transfer and deliver such defendant to the sheriff of the county to which such change is allowed, and upon such transfer and delivery with a certified copy of such order, the sheriff last mentioned must receive and detain the defendant in his custody, until legally discharged therefrom, and give a certificate of such delivery.
- Court to which venue is changed. SEC. 4739. (3275.) The court to which such change of venue is granted must take cognizance of the cause and proceed therein to trial, judgment and execution, in all respects as if the indictment had been found by the grand jury impaneled in such court.
- Costs of the change. SEC. 4740. (3276.) In all changes of venue under the provisions of this chapter, the county from which the change of venue was taken shall pay the expenses and charges of removing, delivering and keeping the defendant, and all other expenses necessary and consequent upon such change of venue and the trial of such defendant, which shall be audited and allowed by the court trying such case.
- Fees allowed sheriff. SEC. 4741. (3277.) Sheriffs, for delivering prisoners under the provisions of this chapter, are entitled to the same fees therefor as are allowed for the conveyance of convicts to the penitentiary.

## ARTICLE 2.

An Act authorizing the District Court or the Judge thereof to change the venue in criminal prosecutions in certain cases.

[Passed Feb. 7, 1860, took effect July 4, 1860; Laws of Eighth General Assembly, Chapter 11.]

District judge may transfer prosecutions from one county to another.

SECTION 4742. *Be it enacted by the General Assembly of the State of Iowa,* That when any district judge in this state is satisfied from his own knowledge or otherwise that any organized county in his district does not contain a sufficient number of inhabitants possessing the qualifications of jurors to compose grand and petit juries for the presentment and trial of any person or persons charged with the commission of an offense in said county requiring the intervention of a grand



jury, it shall be the duty of said judge to make an order transferring all prosecutions for such offenses committed in said county, to the next nearest county in the same judicial district possessing the requisite number of inhabitants qualified to serve as jurors.

SEC. 4743. Said order may be made by the judge in vacation or by the court, and the district court of the county to which said prosecution may be transferred shall have full and complete jurisdiction of the offense, and the person or persons charged with committing the offense may be indicted and tried in the county to which the prosecution is so transferred in the same manner as though the offense had been committed in said county. Order to transfer may be made in vacation.

SEC. 4744. When any prosecution has been transferred by the court or judge under the provisions of this act, the person charged with committing the offense shall be required to appear at the next succeeding term of the district court of the county to which the prosecution is transferred, and shall give bond accordingly, and the court or judge may require all material witnesses in behalf of the prosecution to enter into recognizance for their appearance at the district court of the county to which the prosecution is transferred. Person charged, to appear and give bond.  
Witnesses, &c.

SEC. 4745. The county in which the offense was committed and from which the prosecution was transferred shall pay all the costs attending the prosecution. Costs of prosecution, how paid.

SEC. 4746. No appeal or writ of error shall lie from any order for the transfer of prosecutions made under the provisions of this act. No appeal from order.

SEC. 4747. The provisions of this act apply to prosecutions or charges now pending or that may hereafter be instituted for offenses heretofore or hereafter committed. This act, to what applicable.

SEC. 4748. So much of chapter 157 of the code and all other acts and parts of acts conflicting with the provisions of this act are hereby repealed. Repeal.

PRIOR LAWS. 1. An Act to provide for changing venue in criminal cases, &c., passed Jan. 18, took effect Feb. 18, 1839; I. T., 1st sess., p. 457; repealed by No. 2 hereof.

2. An act to provide for changing the venue in civil and criminal cases, passed Feb. 13, took effect July 4, 1843; also, Reprint, chap. 156, p. 638.

3. An act amending same, passed June 10, took effect July 1, 1845; I. T., 7th sess., chap. 20, p. 38.

DECISIONS. Change of venue was a matter of right under statute of 1845, 2 G., 353; section 3273 considered as to what must be sent to the other court, 2 Iowa, 454; 8 Iowa, 477; as to change of venue, see also M., 486; 3 Iowa, 410; 8 Iowa, 536; 7 Iowa, 347.

## CHAPTER 209.

### POSTPONEMENT OF TRIAL.

SECTION 4749. When an indictment is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party, direct the trial to be postponed to another day in the same term, or, until another term. Postponement.

Continuance,  
see chap. 123,  
Code of civil  
practice.

SEC. 4750. The provisions of chapter 123, of the code of civil practice, relative to the continuances of the trial of civil causes, shall apply to the continuance of criminal actions, except that no judgment for costs, shall be rendered against a defendant, in a criminal action, on account of such continuance, and except as in this code otherwise provided.

## CHAPTER 210.

### FORMATION OF TRIAL JURY.

[Code—Chapter 174.]

- Code of civil practice, ch. 115.** SECTION 4751. The jury for the trial of criminal actions, is selected, drawn and summoned, as provided in chapter 115 of the code of civil practice.
- Jurors' names.** SEC. 4752. (2964.) At the opening of the court the clerk shall prepare separate ballots containing the names of the persons returned as jurors, which shall be folded each in the same manner as near as may be and so that the name thereon shall not be visible and must deposit them in a box to be kept for that purpose.
- Panel full.** SEC. 4753. (2965.) When the indictment is called for trial and before drawing the jury, either party may require the names of all the jurors in the panel to be called, and that an attachment issue against those who are absent; but the court may in its discretion wait, or not, for the return of the attachment.
- Drawing jurors.** SEC. 4754. (2966.) Before the name of any juror is drawn the box must be closed and shaken so as to intermingle the ballots therein, and the clerk shall draw such ballots, without seeing the names written on them, from the box through the top or lid thereof.
- Disposition of ballots.** SEC. 4755. (2967.) When the jury is completed the ballots containing the names of the jurors sworn must be laid aside and kept apart from the ballots containing the names of the other jurors until the jury so sworn is discharged.
- Same.** SEC. 4756. (2968.) After the jury is so discharged the ballots containing their names must be again folded and returned to the box, and so on as often as a trial is had.
- Juror absent.** SEC. 4757. (2969.) If a juror be absent when his name is drawn or be set aside or excused from serving on that trial, the ballot containing his name must be folded and returned to the box as soon as the jury is sworn.
- alesmen,** SEC. 4758. (2970.) If by reason of there being one or more juries impanelled or for any other reason there should not remain any ballots undrawn, or if in consequence of jurors being set aside no jury can be obtained from the list of those returned by the sheriff for the trial of issues, the court may order the sheriff, or if he be a party to, or interested in the cause, some other person, to summon jurors from the bystanders, or other persons, who shall be returned for the trial of the indictment.
- A jury.** SEC. 4759. (2971.) The jury consists of twelve men accepted and sworn to try the issue.

DECISIONS. Sections 2964 and 2965 are directory, 7 Iowa, 287; case of prejudice of sheriff, 2 G., 270; number of jury, 4 Iowa, 349; affidavits of jurors, 4 Iowa, 461; 1 G., 225; 2 Iowa, 571; right of jury trial, 1 Iowa, 374.

CHAPTER 211.

CHALLENGING THE JURY.

[Code—Chapter 175.]

SECTION 4760. (2972.) A challenge is an objection made to the trial jurors, and is of two kinds: Challenge, what.

1. To the panel;
2. To an individual juror.

SEC. 4761. (2973.) When several defendants are tried together, they are not allowed to sever their challenges, but must join therein. Severance in trial.

SEC. 4762. A challenge to the panel can be interposed, only on the ground that they were not selected, drawn or summoned, as prescribed by law. To panel.

SEC. 4763. A challenge to the panel must be taken before a challenge to any individual juror, and must be in writing, specifying distinctly and plainly, the facts constituting the ground of challenge. When and how.

SEC. 4764. (2976.) A challenge to the panel may be taken by either party, and upon the trial thereof the officers whether judicial or ministerial whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge. Trial of challenge.

SEC. 4765. (2977.) If the facts of the challenge be allowed by the court the jury must be discharged so far as the trial of the indictment in question is concerned. If it be disallowed the court shall direct the jury to be impaneled. Challenge allowed.

SEC. 4766. A challenge to an individual juror, may be taken orally, and is either, To the person.

1. For cause;
2. Peremptory.

SEC. 4767. A challenge for cause may be taken, either by the state, or by the defendant, and must distinctly specify the facts constituting the causes of challenge. For cause.

SEC. 4768. (2983.) It is an objection to a particular juror, and is either: General or particular.

1. General, that the juror is disqualified from serving in any case;
- or,

2. Particular, that he is disqualified in the case on trial.

SEC. 4769. (2984.) General causes of challenge are: General.

1. A conviction for felony;
2. A want of any of the qualifications prescribed by statute to render a person a competent juror;
3. Unsoundness of mind, or such defects in the faculties of the mind or the organs of the body, as render him incapable of performing the duties of a juror.

Particular.	SEC. 4770. (2985.) Particular causes of challenge are of two kinds:
Bias.	<p>1. For such a bias as, when the existence of the fact is ascertained, in judgment of law disqualifies the juror, and which is known in this chapter as implied bias;</p> <p>2. For the existence of a state of mind on the part of the juror in reference to the case which, in the exercise of a sound discretion, leads to the inference that he will not act with entire impartiality, and which is actual bias.</p>
Implied bias.	<p>SEC. 4771. A challenge for implied bias may be taken for any of the following causes:</p> <p>1. Affinity, or consanguinity within the ninth degree, to the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance, the prosecution was instituted, or to the defendant, to be computed according to the rule of the civil law.</p> <p>2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose preliminary information, or at whose instance, the prosecution was instituted, or in his employ on wages.</p> <p>3. Being a party adverse to the defendant, in a civil action, or having been the prosecutor against, or accused by him, in a criminal prosecution.</p> <p>4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person, whose death is the subject of the indictment.</p> <p>5. Having served on a trial jury, which has tried another defendant, for the offense charged in the indictment.</p> <p>6. Having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside, or, which was discharged without a verdict, after the cause was submitted to it.</p> <p>7. Having served as a juror, in a civil action brought against the defendant, for the act charged as an offense.</p> <p>8. Having formed or expressed an unqualified opinion, or belief, that the prisoner is guilty or not guilty of the offense charged.</p> <p>9. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror.</p>
Exemption.	SEC. 4772. (2987.) An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted.
Trial of challenge.	SEC. 4773. (2988.) Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness to prove or disprove the challenge and must answer every question pertinent to the inquiry thereon.
Witnesses and evidence.	SEC. 4774. (2989.) Other witnesses may also be examined on either side; and the rules of evidence applicable to the trial of other issues shall govern the admission or exclusion of testimony on the trial of the challenge.
Trial by court.	SEC. 4775. (2990.) In all challenges the court shall determine the law and the fact and must either allow or disallow the challenge.
Challenges for cause by state.	SEC. 4776. The state shall first complete its challenges for cause, and the defendant, afterwards.
Peremptory challenges.	SEC. 4777. After twelve jurors have been obtained, against whom no cause of challenge has been found to exist, peremptory challenges may be made.

SEC. 4778. A peremptory challenge, is an objection to a juror for Same. which no reason need be given, but upon which, the court must exclude him.

SEC. 4779. If the offense charged in the indictment is punishable Same. with death, or imprisonment in the penitentiary for life, or may be so punishable in the discretion of the court, the state is entitled to eight peremptory challenges, and the defendant to twenty, if any other felony, the state to six, and the defendant to sixteen, and if a misdemeanor, the state to two, and the defendant to six.

SEC. 4780. The state shall first exhaust its peremptory challenges, Same. or waive the same, and the defendant afterwards.

SEC. 4781. The challenges of either party need not be all taken at Order of chal- once, but separately, in the following order, including in each challenge, lence all the causes of challenge belonging to the same class :

1. To the panel.
2. To an individual juror, for general cause.
3. To an individual juror, for implied bias.
4. To an individual juror, for actual bias.
5. To an individual juror, peremptorily.

SEC. 4782. After each challenge, which is allowed, the vacancy Vacancy, how occasioned thereby, shall, if required, be filled before any further chal- filled. lence is made, and any new juror thus introduced may be challenged for cause, as well as peremptorily, if the peremptory challenges are not exhausted.

SEC. 4783. No juror shall be sworn to try the issue, until twelve Jurors, when jurors are accepted. sworn.

SEC. 4784. Bias in a juror, against either party, is no cause of chal- Bias. lence by the other. It may be waived by the party against whom it exists.

DECISIONS. Disqualifying opinion, 8 Iowa, 477; *State v. Thompson*, June, 1859; 6 Iowa, 380; 8 Iowa, 420; challenging jury—opinion, M., 332; 2 G., 404; 4 G., 189; “unqualified” defined, 6 Iowa, 380; 7 *ibid.*, 287; implied bias, 6 Iowa, 407; the order of peremptory challenges, 8 Iowa, 231, 477; oath of jury, 1 Iowa, 167, 173; 2 G., 270; 4 G., 381; 1 G., 106.

## CHAPTER 212.

### THE TRIAL OF THE ISSUE OF FACT ON AN INDICTMENT.

[Code—Chapter 176.]

SECTION 4785. The jury having been empaneled and sworn, the Order of trial. trial must proceed in the following order:

1. The clerk or district attorney must, if the indictment be for a felony, read it, and state the defendant's plea to the jury. In all other cases, this formality may be dispensed with.

2. The district attorney must then offer the evidence in support of the indictment.

3. The defendant or his counsel, may then offer his evidence in support of his defense.

4. The parties may then, respectively, offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

5. When the evidence is concluded unless the case is submitted to the jury on either side, or both sides, without argument, the district attorney must commence, the defendant follow, by one or two counsel at his option, unless the court should permit him to be heard by a larger number, and the district attorney conclude, confining himself to a response to the arguments of the defendant's counsel, provided that where two or more defendants are on trial for the same offense, they may be heard by one counsel each, and provided further that the court, when the affirmative of the issue is with the defendant, may in its discretion award to the defendant the last argument.

6. The court shall then charge the jury in writing without oral explanation or qualification.

Notice of testimony.

SEC. 4786. The district attorney, in offering the evidence in support of the indictment, in pursuance of the order prescribed in the last preceding section, under the second sub-division thereof, shall not be permitted to introduce any witness who was not examined before the grand jury, and the minutes of whose testimony was not taken by the clerk of the grand jury and presented with the indictment to the court, unless he shall have given to the defendant a notice in writing, stating the name, place of residence, and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least three clear days before the commencement of such trial.

Defendant's plea.

SEC. 4787. When the defendant's only plea is a former conviction or acquittal, the order prescribed in the second and third sub-divisions of the section immediately preceding the last, shall be reversed, and the defendant shall first offer his evidence in support of his defense.

Time.

SEC. 4788. The court shall not restrict counsel, as to time, in their argument.

Separate trials.

SEC. 4789. (2992.) When two or more defendants are jointly indicted for felony, any defendant requiring it may be tried separately. In other cases, defendants jointly indicted may be tried separately or jointly in the discretion of the court.

Overt acts.

SEC. 4790. (2996.) Upon a trial for a conspiracy in a case where an overt act is required by law to constitute the offense, the defendant can not be convicted unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved; but other overt acts not alleged in the indictment may be given in evidence.

Higher offense proved.

SEC. 4791. (3000.) If it appear by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment, the court may direct the jury to be discharged and all proceedings on the indictment to be suspended, and may order the defendant to be committed or continued on bail to answer any new indictment which may be found against him for the higher offense.

Same.

SEC. 4792. (3001.) If the indictment for the higher offense be dismissed by the grand jury or be not found at the next term, the court must proceed to try the defendant on the original indictment.

Want of jurisdiction.

SEC. 4793. (3002.) The court may also discharge the jury where it appears that it has not jurisdiction of the offense or that the facts as charged in the indictment do not constitute an offense punishable by law.

Same.

SEC. 4794. If the jury be discharged because the court has not ju-

risdiction of the offense charged in the indictment, and it appear that it was committed out of the jurisdiction of this state, the defendant must be discharged, or ordered to be retained in custody a reasonable time, until the district attorney shall have a reasonable opportunity to inform the chief executive of the state, in which the offense was committed, of the facts, and for said officer to require the delivery of the offender.

SEC. 4795. (3004.) If the offense was committed within the exclusive jurisdiction of another county of this state, the court must direct the defendant to be committed for such time as shall be deemed reasonable to await a warrant from the proper county for his arrest; or if the offense be bailable he may be admitted to bail, in an undertaking with sufficient sureties, that he will within such time as the court may appoint, render himself amenable to a warrant for his arrest from the proper county, and if not sooner arrested thereon will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly designated in the undertaking, to surrender himself upon the warrant, if issued, or that the bail will forfeit such sum as the court may fix, to be mentioned in the undertaking.

Order to await  
new indictment.

SEC. 4796. In the case provided for in the last section, the clerk must transmit, forthwith, a certified copy of the indictment and all the papers in the action, filed with him, except the undertaking mentioned in the last section, to the district attorney of the proper county.

Papers certified.

SEC. 4797. (3006.) If the defendant be not arrested on a warrant from the proper county he shall be discharged from custody, or his bail in the action shall be exonerated, or money deposited instead of bail shall be refunded, as the case may be, and the sureties in the undertaking must be discharged.

Defendant dis-  
charged.

SEC. 4798. (3007.) If he be arrested, the same proceedings must be had thereon, as upon the arrest of a defendant in another county on a warrant of arrest issued by a magistrate.

New arrest.

SEC. 4799. (3008.) If the jury be discharged because the facts set forth do not constitute an offense punishable by law, the court must order that the defendant, if in custody, be discharged therefrom, or if admitted to bail, that his bail be exonerated, or if he has deposited money instead of bail, that the money deposited be refunded, unless in its opinion a new indictment can be framed upon which the defendant can be legally convicted, in which case the court may direct that the case be submitted to the same or another grand jury.

Defendant dis-  
charged.

SEC. 4800. Whenever, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which shall be shown them by a person appointed by the court for that purpose. The officers must be sworn to suffer no person to speak to or communicate with the jury, on any subject connected with the trial, nor to do so themselves, except the person appointed by the court for that purpose, and that only to show the place to be viewed, and to return them into court without unnecessary delay, at a specified time.

View by jury

SEC. 4801. If a juror have any personal knowledge, respecting a fact in controversy, in a cause, he must declare the same in open court, during the trial, and if during the retirement of the jury a juror declare any fact which could be evidence in the cause, as of his own knowledge, the jury must return into court and the juror must be sworn as a witness, and examined in the presence of the parties, if his evidence be admissible.

Juror a witness.

- Separation of jury.** SEC. 4802. The jurors sworn to try an indictment, may, at any time before the final submission of the cause to them, in the discretion of the court, be permitted to separate, or be kept together in charge of proper officers. The officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak to or communicate with them, on any subject connected with the trial, nor do so themselves, and to return them into court at the time to which it adjourns.
- Not to converse.** SEC. 4803. The jury, whether permitted to separate, or kept together, in charge of sworn officers, must be admonished by the court, that it is their duty not to permit any person to speak to, or communicate with them, on any subject connected with the trial, and that any and all attempts to do so, should be immediately reported by them to the court, and that they should not converse among themselves on any subject connected with the trial, or form or express any opinion thereon, until the cause is finally submitted to them. This admonition must be given or referred to by the court, at each adjournment, during the progress of the trial, previous to the final submission of the cause to the jury.
- Juror sick.** SEC. 4804. (3013.) If before the conclusion of a trial a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged, and in such case a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or afterward be impaneled.
- Evidence.** SEC. 4805. The rules of evidence in civil cases, are applicable, also, to criminal cases, except as otherwise provided.
- Confession.** SEC. 4806. The confession of a defendant, unless made in open court will not warrant a conviction unless accompanied with other proof that the offense was committed.
- Doubt.** SEC. 4807. Where there is a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal.
- Same.** SEC. 4808. Where there is a reasonable doubt of the degree of the offense, of which the defendant is proven to be guilty, he shall only be convicted of the lower degree.
- Minutes of testimony.** SEC. 4809. The court shall, on the trial of every indictment, when requested by either party, keep, or cause to be kept, by some person for that purpose by it appointed, full and accurate minutes of the testimony of each witness examined on the trial, showing the name of the witness, his place of residence, and his occupation, as well as of any oral evidence introduced, either by the state or defendant, after a plea or verdict of guilty, to be considered by the court in aggravation or alleviation of the punishment in pronouncing sentence against the defendant, which shall be certified to be full and accurate by the judge, and signed by him, and filed with the clerk, and so marked by him, which shall be deemed a part of the record of the cause.
- One may be convicted.** SEC. 4810. (3014.) Upon an indictment against several defendants any one or more may be convicted or acquitted.
- Trial of libel.** SEC. 4811. (3015.) On the trial of an indictment for a libel the jury have the right to determine the law and the fact.
- Law and fact who to try.** SEC. 4812. (3016.) On the trial of an indictment for any other offense than libel, questions of law are to be decided by the court; saving the right of the defendant and the state to except. Questions of fact are to be tried by the jury. And although the jury have the power to find a general verdict which includes questions of law as well as fact, they are bound nevertheless to receive as law what is laid down as such by the court.



SEC. 4813. The court shall, on motion of either party, instruct the jury on the law applicable to the case, which must always be in writing, signed by the judge and filed with the clerk, and so marked by him, and it is to be deemed a part of the record of the cause, and no oral qualification thereof shall be permitted. Instructions in writing.

SEC. 4814. Any instruction asked by either party to be given by the court must be in writing, and must be either given or refused, and so marked and signed by the judge, and filed with the clerk, and so marked by him, and is to be deemed a part of the record. It may be qualified in writing, by the court, but not orally, and the qualification must be distinguished, intelligibly, from the instruction as originally asked by the party, and signed by the judge. Same.

SEC. 4815. After hearing the charge the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together, in some private and convenient place, without meat or drink, (water excepted,) and not to suffer any person to speak to, or communicate with them, nor speak to, or communicate with them themselves, unless it be to ask them whether they have agreed upon their verdict, and not to communicate to any one the state of their deliberation or the verdict agreed upon, until after the same shall have been declared in open court, and received by the court, and to return them into court when they shall have so agreed upon their verdict, unless by permission, or order of the court, or they be sooner discharged. Officer's duty with jury.

SEC. 4816. (3020.) When a defendant, having given bail, appears for trial, the court may in its discretion at any time after his appearance for trial order him to be committed to the custody of the proper officer to abide the judgment or farther order of the court; and he shall be committed and held in custody accordingly. Defendant under bail appearing for trial.

DECISIONS. Confessions, M., 260; 8 Iowa, 407; dying declarations, 7 Iowa, 347, 287; declarations made by the defendant, or others to him, or when part of the transaction, 7 Iowa, 287, 347, 409; case of conspiracy, 7 Iowa, 347; presumption of innocence, 5 Iowa, 433; reasonable doubt, 5 Iowa, 433-7; *ibid.*, 347; burden of proof, 5 Iowa, 433; wife's testimony, 6 Iowa, 263; 8 Iowa, 355; cross-examination as to feeling in the witness, 4 Iowa, 443; the extent of the cross-examination, 4 Iowa, 477; conversation, 3 Iowa, 88; *State v. McPherson*, June, 1859; separate trial, 7 Iowa, 347, 435; co-defendant may testify for co-defendant, *State v. Nash & Redout*, Dec., 1859; conviction of a part only of these indicted jointly, 8 Iowa, 203; the corroborative testimony for seducing and debauching, need not go to the debauching alone, but may consist of any fact tending to connect the defendant with any part of the whole offense, 5 Iowa, 399; right of continuance, 7 Iowa, 347; 4 Iowa, 141; 8 Iowa, 536, 420; as to power to discharge jury after commencement of trial and try again, 8 Iowa, 288; the supreme court will presume that the court legally admonished the jury at each separation, unless the record show the contrary, 8 Iowa, 477; what constitutes a defense on the ground of insanity, 4 G., 500; a distinction drawn between defense of insanity, which is said not to be necessarily connected with the transaction, and other defenses which are, 7 Iowa, 347; value of the evidence of non-professional witnesses unaccompanied by the facts basing opinion, *Pelamourges v. Clark*, June, 1859; the corroboration of an accomplice must go to the guilt of the defendant, 5 Iowa, 468; credibility of an accomplice and kind of corroboration, 1 G., 316, 321; 5 Iowa, 465, 389; *State v. Willis*, December Term, 1859; 4 G., 65.

## CHAPTER 213.

## CONDUCT OF JURY AFTER THE CAUSE IS SUBMITTED TO IT.

[Code—Chapter 177.]

- Jury may take papers.** SECTION 4817. (3021.) Upon retiring for deliberation the jury may take with it all papers which have been received as evidence in the case, except depositions and copies of such parts of public records or private documents as ought not, in the opinion of the court, to be taken from the person having them in possession.
- And notes of testimony.** SEC. 4818. (3022.) The jury 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.
- Coming into court.** SEC. 4819. After the jury have retired for deliberation, if there be any disagreement between them, as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court, and upon their being brought in, the information required must be given in the presence of, or after oral notice to, the district attorney and the defendant, or his counsel.
- Juror sick.** SEC. 4820. (3024.) If, after the retirement of the jury one of them be taken sick so as to prevent the continuance of his duty, or any other accident or cause occur to prevent their being kept together for deliberation, the court may discharge them.
- When discharged.** SEC. 4821. (3025.) Except as provided in the last section, the jury can not be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by the consent of both parties entered upon the record, or unless at the expiration of such time as the court may deem proper it satisfactorily appear that there is no reasonable probability that the jury can agree.
- New trial.** SEC. 4822. (3026.) In all cases where a jury is discharged or prevented from giving a verdict by reason of any accident or other cause, except where the defendant is discharged from the indictment, during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term of the court.
- Adjournment of court.** SEC. 4823. (3027.) While the jury is absent the court may adjourn from time to time as to other business, but it shall nevertheless be deemed open for every purpose connected with the cause submitted to the jury until a verdict be rendered or the jury is discharged.
- Same.** SEC. 4824. (3028.) A final adjournment of the court discharges the jury.

CHAPTER 214.

VERDICT.

[Code—Chapter 178.]

SECTION 4825. (3029.) When the jury has agreed upon its verdict <sup>Return of jury.</sup> it must be conducted into court by the officer having it in charge. The names of the jurors must then be called, and if all do not appear the rest must be discharged without giving a verdict. In such case the cause may be again tried at the same or another term.

SEC. 4826. (3030.) If the indictment be for a felony the defendant <sup>Defendant's presence</sup> must be present at the rendition of the verdict. If it be for a misdemeanor the verdict may be rendered in his absence.

SEC. 4827. (3031.) When the jury have answered to their names <sup>Verdict rendered</sup> the court or the clerk shall ask them whether they have agreed upon the verdict, and if the foreman answers in the affirmative they must on being required declare the same.

SEC. 4828. (3032.) The jury may either render a general verdict, <sup>General or special.</sup> or where they are in doubt as to the legal effect of the facts proven, they may, except upon an indictment for libel, find a special verdict.

SEC. 4829. (3033.) A general verdict upon a plea of not guilty is <sup>General.</sup> either "guilty," or "not guilty," which imports a conviction or acquittal on every material allegation in the indictment. Upon a plea of a former conviction or acquittal of the same offense it is either "for the state" or "for the defendant."

SEC. 4830. (3034.) A special verdict is that by which the jury finds <sup>Special.</sup> the facts only, leaving the judgment to the court. It must present the conclusions of fact as established by the evidence and not the evidence to prove them, and these conclusions of fact must be so presented as that nothing remains to the court but to draw conclusions of law upon them.

SEC. 4831. (3035.) The special verdict must be reduced to writing <sup>Same</sup> by the jury or in their presence, entered upon the minutes of the court, read to the jury and agreed to by them, before they are discharged.

SEC. 4832. (3036.) The special verdict need not be in any particu- <sup>Same</sup> lar form but shall be sufficient if it present intelligibly the facts found by the jury.

SEC. 4833. (3037.) The court must give judgment upon the special <sup>Judgment</sup> verdict as follows :

1. If the plea be not guilty and the facts prove the defendant guilty of the offense charged in the indictment or of any other offense of which he could be convicted in law, under that indictment, judgment shall be given accordingly. But if the facts found do not prove the defendant guilty of the offense charged or of any offense of which he could be so convicted under the indictment, judgment of acquittal must be rendered.

2. If the plea be a former conviction or acquittal of the same offense, the court must give judgment of conviction or acquittal according as the facts prove or fail to prove the former conviction or acquittal.

SEC. 4834. (3038.) If the jury do not, in a special verdict, pro- <sup>Verdict necessary</sup> nounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact from the evidence as established to their satisfaction, the court may order them to retire for farther deliberation.

- Degrees of offense.** SEC. 4835. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense, if punishable by indictment.
- Other offense than charged.** SEC. 4836. (3039.) In all other cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment.
- May agree as to part.** SEC. 4837. (3040.) On an indictment against several, if the jury can not agree upon a verdict as to all they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly and the case as to the rest may be tried by another jury.
- Verdict insufficient.** SEC. 4838. (3041.) If the jury render a verdict which is neither a general nor special verdict, the court may direct them to reconsider it and it shall not be recorded until it be rendered in some form from which it can be clearly understood what is the intent of the jury, whether to render a general verdict, or to find the facts specially and to leave the judgment to the court.
- Informal.** SEC. 4839. (3042.) If the jury persist in finding an informal verdict, from which however it can be understood that their intention is to find for the defendant upon the issue, it shall be entered in the terms in which it is found, and the court must give judgment of acquittal. But no judgment of conviction can be given unless the jury expressly find against the defendant upon the issue, or judgment be given against him upon a special verdict.
- Jury polled.** SEC. 4840. (3043.) When a verdict is rendered and before it is recorded, the jury may be polled on the requirement of either party; in which case they shall be severally asked whether it be their verdict, and if any one answer in the negative, the jury must be sent out for further deliberation.
- When juror disagrees.** SEC. 4841. When the verdict is given, and is such as the court may receive, the clerk may immediately enter it in full upon the record, and must read it to the jury, and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the record, and the jury again sent out; but if no disagreement be expressed, the verdict is complete, and the jury must be discharged from the case.
- Insanity of defendant.** SEC. 4842. If the defense be the insanity of the defendant, the jury must be instructed, if they acquit him on that ground, to state that fact in their verdict. The court may thereupon, if the defendant be in custody, and his discharge is deemed dangerous to the public peace and safety, order him to be committed to the Iowa insane hospital, or retained in custody until he becomes sane.
- Discharge of defendant.** SEC. 4843. (3045.) If judgment of acquittal be given on a general verdict and the defendant be not detained for any other legal cause, he must be discharged as soon as the judgment is given.

**DECISIONS.** The degree in murder must be determined by the verdict, 7 Iowa, 236; general verdict of guilty and many counts, 8 Iowa, 477; form of verdict, 8 Iowa, 533; 1 G., 550; correcting verdict, 4 G., 140; 2 G., 191; presence of prisoner when verdict is pronounced for felony, 2 G., 270; sec. 3029 is directory, 7 Iowa, 255.

CHAPTER 215.

BILLS OF EXCEPTION.

[Code—Chapter 179.]

SECTION 4844. On the trial of an indictment, exceptions may be taken by the state, or by the defendant, to any decision of the court upon matters of law, in any of the following cases: Exceptions.

1. In disallowing a challenge to an individual juror.

2. In admitting or rejecting witnesses or evidence on the trial of any challenge.

3. In admitting or rejecting witnesses or evidence, or in deciding any matter of law, not purely discretionary, on the trial of the issue.

SEC. 4845. Nothing herein contained is to be construed, so as to deprive either party of the right of excepting to any action or decision of the court, which affects any other material or substantial right of either party, whether before or after the trial of the indictment, or on such trial. How to be construed.

SEC. 4846. The office of a bill of exceptions is to make a part of the proceedings or evidence appear of record, which would not otherwise so appear. Office of bill of exceptions.

SEC. 4847. All papers pertaining to the cause and filed with the clerk, and all entries made by the clerk in the record book, pertaining to them, and showing the action or decision of the court upon them, or any part of them, are to be deemed parts of the record, and it is not necessary to except to any action or decision of the court, so appearing of record. Papers parts of record.

SEC. 4848. Either party may allege an exception to any decision or action of the court, on any application of either party, which may be, and is made orally to the court, in any stage of the proceedings upon which the decision or action of the court is not required to be, and is not entered in the record book, and reduce the same to writing, and tender the same to the judge, whose duty it is to sign it; and if he sign the same, it shall be filed with the clerk, and thereupon become a part of the record of the cause; but if the judge refuse to sign it, such refusal must be stated at the end thereof, and it may then be signed by two or more attorneys or officers of the court or disinterested bystanders, and sworn to by the persons so signing the same, and filed with the clerk, and it shall thereupon become a part of the record of the cause. Either party may except to decision of court.

SEC. 4849. The judge shall be allowed one clear day to examine the bill of exceptions, and the party excepting shall be allowed three clear days thereafter, to procure the signatures and file the same. Time allowed to examine bills of exception.

SEC. 4850. If the judge and the party excepting, can agree in modifying the bill of exceptions, it shall be modified accordingly. May be modified.

SEC. 4851. Time must be given to prepare the bill of exceptions when it is necessary. When it can reasonably be done, it shall be settled at the time of taking the exception. Time allowed to prepare bills of exception.

## CHAPTER 216.

## NEW TRIAL.

[Code—Chapter 180.]

Definition	SECTION 4852. (3050.) A new trial is a re-examination of the issue in the same court before another jury, after a verdict has been given.
Effect.	SEC. 4853. (3051.) The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew and the former verdict can not be used or referred to either in the evidence or in argument.
Causes for.	SEC. 4854. The court may grant a new trial for the following causes, or any of them: <ol style="list-style-type: none"> <li>1. When the trial has been had in the absence of the defendant, if the indictment be for a felony.</li> <li>2. When the jury has received any evidence, paper, or document out of court not authorized by the court.</li> <li>3. When the jury have separated without leave of the court after retiring to deliberate upon their verdict, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case.</li> <li>4. When the verdict has been decided by lot or by means other than a fair expression of opinion on the part of all the jurors.</li> <li>5. When the court has misdirected the jury in a material matter of law.</li> <li>6. When the verdict is contrary to law or evidence. But no more than two new trials shall be granted for this cause alone.</li> <li>7. When the court has refused properly to instruct the jury.</li> <li>8. When from any other cause the defendant has not received a fair and impartial trial.</li> <li>9. When by reason of any other matter the defendant is legally entitled to a new trial.</li> </ol>
Application when made.	SEC. 4855. The application for a new trial can be made only by the defendant, and must be made before judgment.

DECISIONS. Affidavits of jurors, 1 G., 225; 7 Iowa, 413; 4 Iowa, 461; 2 Iowa, 571; 3 Iowa, 484; objections after verdict, 4 G., 483; M., 332; 2 Iowa, 454; newly discovered evidence, 1 G., 105; 2 G., 451; 7 Iowa, 255; see generally, 1 G., 316; 4 G., 65; bias and prejudice, 8 Iowa, 477; misconduct of jury, 2 Iowa, 230; 2 G., 559; 4 Iowa, 461; 2 Iowa, 571.

## CHAPTER 217.

## ARREST OF JUDGMENT.

[Code—Chapter 181.]

Motion in arrest of judgment, what.	SECTION 4856. A motion in arrest of judgment, is an application to the court in which the trial was had, on the part of the defendant, that no judgment be rendered upon a verdict against him, or on a plea of guilty, and shall be granted:
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1. Upon any ground which would have been ground of demurrer.

2. When upon the whole record no legal judgment can be pronounced.

SEC. 4857. The court may also, upon its own observation, of any of Court may arrest judgment. these grounds, arrest the judgment on its own motion.

SEC. 4858. If the court is of opinion, from the evidence, on the Defendant held to answer in certain cases. trial, that the defendant is guilty of a public offense, of which no legal conviction can be had on the indictment, he may be held to answer the offense, in like manner, as upon a preliminary examination.

SEC. 4859. The motion may be made at any time before judgment, Motion when to be made. or after judgment, during the same term.

CHAPTER 218.

JUDGMENT.

[Code—Chapter 182.]

SECTION 4860. Upon a verdict of not guilty, for the defendant, or When. a special verdict upon which a judgment of acquittal must be given, the court must render judgment of acquittal immediately.

SEC. 4861. Upon a plea of guilty, upon a verdict of guilty, or a Time. special verdict upon which a judgment of conviction must be rendered, the court must appoint a time for pronouncing judgment.

SEC. 4862. The time appointed for pronouncing judgment, must be Same at least three clear days after the verdict is recorded, if the court remains in session so long, or if not, as remote a time as can reasonably be allowed, but in no case can the judgment be pronounced, in less than six hours after the verdict is recorded.

SEC. 4863. (3059.) For the purpose of judgment, if the conviction Defendant's presence. be for a felony, the defendant must be personally present; if it be for a misdemeanor, judgment may be pronounced in his absence.

SEC. 4864. When the defendant is in custody, the court must direct Same. the proper officer to bring him before it for judgment.

SEC. 4865. If the defendant has been discharged on bail, or has de- Defendant brought up. posited money instead thereof, and do not appear for judgment, when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or money deposited, may make an order directing the clerk to issue a bench warrant for his arrest.

SEC. 4866. The clerk, on the application of the district attorney, Bench warrant. may accordingly, at any time after the order, whether the court be in session or not, issue a bench warrant, into one or more counties, for his arrest.

SEC. 4867. The bench warrant may be substantially, in the follow- Form. ing form:

COUNTY OF \_\_\_\_\_

THE STATE OF IOWA.

*To any peace officer in the state:*

A. B. having been duly convicted on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, in the district court of \_\_\_\_\_ county, of the crime of (here designate it generally, as in the indictment.)

You are therefore hereby commanded to arrest the said A. B. and

bring him before said court for judgment, if it be then in session, or if it be not then in session, that you deliver him into the custody of the sheriff of said county.

Given under my hand and the seal of said court, at my  
[SEAL.] office, in \_\_\_\_\_ in said county, this \_\_\_\_ day of \_\_\_\_\_,  
A. D. 18—.

By order of the court.

\_\_\_\_\_ clerk.

- When served.** SEC. 4868. The bench warrant may be served in any county in the state.
- Same.** SEC. 4869. (3064.) Whether the bench warrant be served in the county where it was issued or in another county, the officer must arrest the defendant and bring him before the court or commit him to the officer mentioned in the warrant according to the command thereof.
- Judgment.** SEC. 4870. (3065.) When the defendant appears for judgment he shall be informed by the court, or by the clerk under its direction, of the nature of the indictment and of his plea, and the verdict, if any thereon, and must be asked whether he have any legal cause to show why judgment should not be pronounced against him.
- Same.** SEC. 4871. He may show for cause against the judgment, that he is insane, or any sufficient ground for a new trial, or in arrest of judgment.
- Insanity, how determined.** SEC. 4872. If the court is of opinion that there is reasonable ground for believing him insane, the question of his insanity shall be determined as provided in chapter 238 of this code, and if he is found to be insane, such proceedings shall be had as are therein directed.
- New trial.** SEC. 4873. If he move for a new trial, or in arrest of judgment, the court shall defer the judgment, and proceed to hear and decide the motions.
- Judgment rendered.** SEC. 4874. (3066.) If no sufficient cause be alleged or appear to the court why judgment should not be pronounced, it shall thereupon be rendered.
- Punishment.** SEC. 4875. In a case where there is a discretion conferred upon the court as to the extent of the punishment, the following, and such other circumstances as are proper, are to be considered in aggravation:
1. If the person committing the offense was, by the duties of his office, or by his condition, obliged to prevent the particular offense committed, or to bring offenders committing it to justice.
  2. If he hold any other public office, although not one requiring the suppression of the particular offense.
  3. Although holding no office, if his education, fortune, profession, or reputation, placed him in a situation in which his example would probably influence the conduct of others.
  4. When the offense was committed with premeditation, in consequence of a plan formed with others.
  5. When the defendant attempted to induce others to join in committing the offense.
  6. When the condition of the offender created a trust, which was broken by the offense, or, when it afforded him easier means of committing the offense.
  7. When in the commission of the offense, any other injury was offered, than that necessarily suffered by the offense itself, such as wanton cruelty, or humiliating language, in case of personal injury.
  8. When the offense was attended with a breach of any other moral



duty than that necessarily broken in committing it, such as personal injury accompanied by ingratitude.

9. When the injury was offered to one whose age, sex, office, conduct, or condition, entitled him to respect, from the offender.

10. When the injury was offered to one whose age, sex, or infirmity rendered him incapable of resistance.

11. When the general character of the defendant is marked by those passions or vices, which generally lead to the commission of the offense of which he has been convicted.

SEC. 4876. The following and such other circumstances as are prop- Alleviation of punishment.

1. The minority of the offender, if so young as to justify a supposition that he was ignorant of the law, or that he acted under the influence of another.

2. If the offender was so old, as to render it probable that the faculties of his mind were weakened.

3. Those conditions which suppose the party to have been influenced in committing the offense, by another, standing in a correlative superior situation to him.

4. The order of a superior officer, is no justification for committing a public offense, but under circumstances of misapprehension of the duty of obedience, may be shown in extenuation of the offense.

5. When the offense has been caused by great provocation, or other cause sufficient to excite in men of ordinary tempers, such passions as require unusual strength of mind to restrain.

SEC. 4877. All circumstances of aggravation and alleviation, which Same. have not necessarily or incidentally, been proved or shown on the trial, may be shown by the examination of witnesses in open court, or by their affidavit, as the court may deem most conducive to justice in each particular case; but the opposite party must, in all cases, have an opportunity of cross-examining the witnesses, or of producing counter affidavits, or evidence, if he require it.

SEC. 4878. No affidavit, testimony, or representation of any kind, Same. oral or written, can be offered to, or received by the court, of any circumstance of aggravation, or alleviation of the punishment except as provided in the last section.

SEC. 4879. A violation of the last section is a misdemeanor, and the Misdemeanor. person offering such affidavit, testimony, or representation, may, in addi- Contempt. tion, be punished by the court for a contempt.

SEC. 4880. If the defendant is convicted of two or more offenses, When convicted of more than one offense. before judgment on either, the punishment of each of which is, or may be, imprisonment, the judgment shall be so rendered that the imprisonment upon any one, shall commence at the expiration of the imprisonment upon any other of the offenses.

SEC. 4881. A judgment that the defendant pay a fine, may also di- Judgment of fine. rect that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which shall not exceed one day for every three and one-third dollars of the fine.

SEC. 4882. When judgment of death is pronounced, the day of the Of death. execution thereof shall be fixed in the judgment, and shall not be in less than forty days after the day on which the judgment is rendered.

SEC. 4883. Immediately after the entry of a judgment of death, Same. the court rendering such judgment must transmit by mail, to the governor, a copy of the indictment, plea, verdict, and judgment, and of the testimony in the case.

Committed to  
jail of another  
county.

SEC. 4884. (3073.) When a person is in any event to be committed to jail, if there be no jail or no sufficient one in the county where the party would be committed under the ordinary provisions of law, the court or magistrate committing may order him to be committed to the jail of some other county, which shall be one which is the most convenient and safe, and the county to which the cause originally belonged shall be holden for all the expenses thereof.

Appeal.

SEC. 4885. In all cases bailable on appeal to the supreme court, when the judgment is imprisonment, the court rendering such judgment must make an order fixing the amount in which bail must be taken, and there shall be no execution of the judgment until such order be made.

DECISIONS. Judgment in liquor case, 1 Iowa, 167; 1 *ibid.*, 374; may be rendered in defendant's absence if for misdemeanor only, 4 Iowa, 554; supreme court may render, 4 G., 500; district court no jurisdiction in a case triable before justice, 6 Iowa, 535.

## CHAPTER 219.

### EXECUTION.

[Code—Chapter 183.]

Copy of judgment.

SECTION 4886. When a judgment of death or imprisonment, either in the penitentiary or county jail, is pronounced, a certified copy of the entry thereof in the record book, must be forthwith furnished to the officer whose duty it is to execute the same, who shall proceed and execute it accordingly, and no other warrant or authority is necessary to justify or require its execution.

Who may suspend execution.

SEC. 4887. The only officers who shall have the power of reprieving or suspending the execution of a judgment of death, are the governor, the sheriff, as provided in the next section, unless, in case of an appeal to the supreme court, as provided in section 4913 of this code.

Defendant insane or pregnant.

SEC. 4888. When the sheriff is satisfied that there are reasonable grounds for believing that the defendant is insane or pregnant, he may summon a jury of twelve persons on the jury list, to be drawn by the clerk, who shall be sworn by the sheriff, well and truly to inquire into the insanity or pregnancy of the defendant, and a true inquisition return; and they shall examine the defendant, and hear any evidence that may be presented; and by a written inquisition, signed by each of them, find as to the insanity or pregnancy. And unless the inquisition find the defendant insane or pregnant, the sheriff shall not suspend the execution; but if the inquisition find the defendant insane or pregnant, he shall suspend the execution, and immediately transmit the inquisition to the governor.

If prevented, governor to fix day of execution.

SEC. 4889. Whenever a judgment of death has not been executed on the day appointed therefor, by the court, from any cause whatever, the governor, by a warrant under his hand and the seal of the state, shall fix the day of execution, which warrant shall be obeyed by the sheriff, and no one but the governor can then suspend its execution.

How inflicted.

SEC. 4890. A judgment of death must be executed by the sheriff,

on the day fixed in the judgment, between sunrise and sunset, by hanging the defendant by the neck, until he is dead.

SEC. 4891. A judgment of death must be executed within the walls Where inflicted. of the jail of the county in which the judgment was rendered, or, within a yard or inclosure, adjoining thereto, unless, as provided, in the next two sections.

SEC. 4892. If there be no jail in the county in which the judgment If no jail. was rendered, or if it becomes unfit or unsafe for the confinement of prisoners, or be destroyed by fire or otherwise, and the jail of another county has been legally designated for the imprisonment of the defendant, until the day fixed for his execution, the judgment must be executed within the walls of the jail of the county so designated, or within a yard or inclosure, adjoining the same, and by the sheriff of such county.

SEC. 4893. If there be two or more jails or prisons in the same In either jail. county, a judgment of death shall be executed within the walls of either of such jails or prisons, or within an inclosure adjoining thereto, as the court rendering such judgment, shall therein direct.

SEC. 4894. The sheriff executing a judgment of death, must, at Who to attend. least three clear days before inflicting the punishment of death, notify the judge of the district court of his county, the district attorney, the county judge, the clerk of the district court, together with two physicians, and twelve reputable citizens of his county, to be selected by him, and the sheriff of the county in which the trial was had, and the offense committed, (if it be in a different county,) to be present as witnesses of such execution. He must also at the request of the defendant, permit one or more ministers of the gospel, whom the defendant shall name, and any of his relatives to attend the execution, and also such magistrates, peace officers, and guards as the sheriff shall deem proper. But no person other than those mentioned in this section, can be present at the execution, nor shall any person under age be permitted to witness the same.

SEC. 4895. The sheriff or his deputy, executing the judgment of death, and the judges attending the execution, must prepare and sign with their name of office, a certificate, setting forth the time and place of the execution, and that judgment was executed upon the defendant, according to the foregoing provisions, and must cause the certificate to be signed by the public officers, and at least twelve persons, not relatives of the defendant, who witnessed the execution. Sheriff's certificate.

SEC. 4896. The sheriff, or his deputy, executing such judgment of death, must cause the certificate to be filed in the office of the clerk of the district court of the county in which the judgment was rendered, and a copy thereof to be published in a newspaper printed at the capital of the state, and in one, if any, published in his county. Same. Filed.

SEC. 4897. (3075.) If the judgment be imprisonment, or a fine and imprisonment until it be satisfied, the defendant must forthwith be committed to the custody of the proper officer and by him detained until the judgment be complied with or the defendant discharged by due course of law. Committal.

SEC. 4898. When the judgment is imprisonment in the county jail of the county in which the trial is had, or a fine, and that the defendant be imprisoned in such county jail until it be satisfied, the judgment must be executed by the sheriff of that county. In all other cases, when the judgment is imprisonment, the sheriff of the county in which the trial was had, must deliver the defendant to the proper officer, in execution of the judgment. By whom executed.

- Same. SEC. 4899. If the judgment be imprisonment, or a fine and imprisonment until it be satisfied, except in the county jail of the county in which the trial was had, the sheriff of the county in which the trial was had, shall deliver a certified copy of the entry of the judgment, together with the body of the defendant, to the keeper of the jail, or prison, in which the defendant is to be imprisoned, and take his receipt therefor, on a duplicate copy of such entry, which he must forthwith, return to the clerk of the court in which the judgment was rendered, with his return thereon.
- Officer's authority in committing. SEC. 4900. (3078.) The sheriff or his deputy while conveying the defendant to the proper prison has the same authority to require the assistance of any citizen of the state in securing the defendant and in retaking him if he escape as if the sheriff were in his own county; and every person who neglects or refuses to assist the sheriff when so required shall be punishable as if the sheriff were in his own county.
- Written return. SEC. 4901. An officer executing a judgment of imprisonment, shall make a written return of the execution of such judgment, forthwith after such execution, and file the same with the clerk of the court, by which the judgment was rendered.
- Fine as in civil case. SEC. 4902. Upon a judgment for a fine, a writ of execution may be issued, as upon a judgment, in a civil case.
- When certified copy, authority to sheriff. SEC. 4903. When the judgment is for the abatement or removal of a nuisance, or for anything, other than the payment of money by the defendant, a certified copy of the entry of such judgment, delivered to the sheriff of the proper county, shall authorize, and require him, to execute such judgment, and he shall return the same with his doings under the same, thereon indorsed, to the clerk of the court in which the judgment was rendered, within seventy days after the date of the certificate of such certified copy, unless it be a judgment of death, or imprisonment, which are hereinbefore provided for.

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## CHAPTER 220.

### APPEALS.

[Code—Chapter 184.]

- Appeal. SECTION 4904. The mode of reviewing in the supreme court, any judgment, action, or decision of the district court, in a criminal case, is by an appeal.
- Who may appeal. SEC. 4905. Either the defendant, or the state, may take an appeal.
- When it may be taken. SEC. 4906. No appeal can be taken until after judgment, and then only within one year thereafter.
- How taken. SEC. 4907. An appeal is taken, by the party taking it, or the attorney of such party, serving on the adverse party, or the attorney of the adverse party, who acted as attorney of record in the district court, at the time of the rendition of the judgment, and also on the clerk of the district court, by which the judgment was rendered, a notice in writing of the taking of the appeal from the judgment.
- When deemed taken. SEC. 4908. The appeal is deemed to be taken, when the notices

thereof, required by the last section, are filed in the office of the clerk of the court in which the judgment was rendered, with evidence of the service thereof indorsed thereon, or annexed thereto.

SEC. 4909. When an appeal is taken, it is the duty of the clerk of the court, in which the judgment was rendered, without unnecessary delay, to make out two full and perfect transcripts of all papers in the case on file, in his office, (except the papers returned by the examining magistrate, on the preliminary examination, where there has been one, and the minutes of the evidence of the witnesses examined before the grand jury,) and of all entries made in the record book, and certify the same under his hand and the seal of the court, and deliver, or transmit by mail, one to the defendant, his agent or attorney, who acted for him at the time of the rendition of the judgment, or the taking of the appeal, and the other, to the district attorney, whose duty it shall be, after examination of the same, to make such suggestions, as he may deem proper, in writing, or otherwise, and deliver or transmit by mail to the attorney-general, the transcript, received by him, with his suggestions. The clerk shall in his certificate to the transcripts, state the true day of his certifying the same, and shall on the same day, mentioned in the certificate, transmit, or deliver the same, as hereinbefore provided.

Duty of clerk

SEC. 4910. If bail be put in by a defendant, after taking an appeal in a bailable case, and before the transcripts are made out, and forwarded, or delivered by the clerk, as provided in the last section, two transcripts of the undertaking and justification of the bail, shall in like manner, be made out, certified, and delivered, or forwarded, as provided in the last section.

Bail.

SEC. 4911. An appeal taken by the state, in no case, stays the operation of a judgment, in favor of the defendant.

Appeal by the state.

SEC. 4912. An appeal by the defendant from a judgment of death, stays the infliction of that punishment, but the defendant is to be detained in custody, to abide the judgment on the appeal.

By the defendant.

SEC. 4913. When an appeal is taken from a judgment of death, it is the duty of the clerk of the district court, in which the judgment was rendered, to give forthwith, to the defendant, his agent or attorney, a certificate under his hand and the seal of the court, stating that an appeal has been taken in the case, and the sheriff or other officer having the custody of the defendant, must, upon the delivery of such certificate to him, refrain from the infliction of the punishment of death on the defendant, but retain him in his custody, to abide the judgment, on the appeal.

Same.

SEC. 4914. An appeal taken by the defendant, in a bailable case, does not stay the execution of the judgment, unless bail be put in, except, as provided, in the next section.

Appeal in bailable case.

SEC. 4915. In a bailable case, where the judgment is imprisonment in the penitentiary, and an appeal is taken during the term at which the judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, it may in its discretion, order the sheriff or officer having the defendant in custody, to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desire it.

Same

SEC. 4916. When an appeal is taken by the defendant, in a bailable case, and bail is put in, it is the duty of the clerk to give forthwith, to the defendant, his agent or attorney, a certificate under his hand and the seal of the court, stating that an appeal has been taken and bail put in, and the sheriff or other officer having the defendant in custody, must,

Same.

upon the delivery of such certificate to him, discharge the defendant from custody, where imprisonment forms any part of the judgment, and cease all further proceedings in execution of the judgment, and return forthwith to the clerk of the court, who issued it, the execution or certified copy of the entry of judgment, under which he acted, with his return thereto, if such execution or certified copy has been issued, and if such execution or certified copy has not been issued, it shall not be issued, but shall abide the judgment, on the appeal.

Several defendants may join in taking an appeal.

SEC. 4917. When several defendants are indicted and tried jointly, and one or more of them may join in taking the appeal, but those of their co-defendants who do not join, shall take no benefit therefrom, yet they may appeal, afterwards.

Appellant.  
Appellee.

SEC. 4918. The party taking the appeal, is known as the appellant, the adverse party as the appellee, but the title of action is not changed in consequence of the appeal; it shall be docketed in the supreme court, as it was in the district court.

Appeals in criminal cases, how docketed in supreme court.

SEC. 4919. Appeals, in criminal cases, shall be docketed in the supreme court for trial, at the commencement of that portion of the term which has been assigned for trying causes from the judicial district, from which the appeal comes, which is twenty days after the date of the certificate of the transcripts from the clerk of the district court, and if the appellant does not file his transcript by that time with the clerk of the supreme court, the appellee may file his, and have the case docketed. They shall take precedence of all other business, and shall be tried at the term at which the transcript is filed, unless, continued for cause, or by consent of the parties, and shall be decided, if practicable, at the same term.

Appearance of defendant not necessary.

SEC. 4920. The personal appearance of the defendant in the supreme court, on the trial of an appeal, is in no case necessary.

Appeal not dismissed for informality.

SEC. 4921. An appeal shall not be dismissed for any informality or defect in taking the appeal, if the same be corrected within a reasonable time, and the supreme court must direct how it shall be corrected.

What necessary.

SEC. 4922. No assignment of error, or joinder in error, shall be necessary.

Defendant may close.

SEC. 4923. The defendant shall be entitled to close the argument.

Opinion in writing.

SEC. 4924. The opinion of the supreme court, must be in writing, filed with its clerk, and recorded.

If appeal taken by defendant.

SEC. 4925. If the appeal was taken by the defendant, from a judgment against him, the supreme court must examine the record and without regard to technical errors or defects, which do not affect the substantial rights of the parties, render such judgment on the record as the law demands. It may affirm, reverse, or modify the judgment, and render such judgment as the district court should have rendered, and may, if necessary, or proper, order a new trial. It may reduce the punishment, but can not increase it.

If by the state.

SEC. 4926. If the appeal was taken by the state, the supreme court can not reverse the judgment, or modify it, so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings, or in the measure of punishment, and its decision shall be obligatory on the district court, as the correct exposition of the law.

If judgment against defendant reversed.

SEC. 4927. If a judgment against the defendant be reversed, without ordering a new trial, the supreme court must direct, if the defendant be in custody, that he be discharged, or if he be admitted to bail, that his bail be exonerated, or if money be deposited instead of bail, that it be refunded to him.

SEC. 4928. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution, as the supreme court shall direct, except as hereinafter provided. If judgment affirmed.

SEC. 4929. When a judgment of the supreme court is rendered it must be recorded, and a certified copy of the judgment, must be forthwith remitted to the clerk of the district court in which judgment appealed from was rendered, with proper instructions, and a copy of the opinion, in such time, and in such manner, as the supreme court may, by rule, prescribe. Judgment rendered by supreme court, remitted to clerk of district court.

SEC. 4930. After the certified copy of the entry of the judgment of the supreme court, and its instructions have been remitted, as provided in the preceding section, the supreme court has no farther jurisdiction of the proceedings therein, and all proceedings which may be necessary to carry the judgment of the supreme court into effect, must be had in the court to which it is remitted, or by the clerk thereof, except, as provided, in the next two sections. Same.

SEC. 4931. Unless, where some proceedings in the district court are directed by the supreme court, a copy of the certified copy of the judgment of the supreme court, with its directions certified by the clerk of the district court, to whom the same has been transmitted, delivered to the sheriff, or other proper officer, shall authorize him to execute the judgment of the supreme court, or take any steps to bring the proceedings to a conclusion, except, as provided in the next section. Same.

SEC. 4932. When a judgment of death has been affirmed, the supreme court must cause a copy of the entry of judgment, to be remitted to the governor, to the end, that a warrant for the execution may be issued by the governor. The governor shall send his warrant of execution by a special messenger, or by mail, to the proper officer, and shall name therein the day and time of execution, but shall not appoint an earlier day than that fixed in the judgment of the district court. The officer receiving the same, shall execute the warrant of the governor, as therein directed, and shall report his action, both to the governor and the district court which rendered the original judgment. If, for any cause, the execution does not take place on the day appointed by the governor, the governor may, from time to time, appoint another day for execution, until the judgment is carried into effect. Judgment of death affirmed, copy of, to be remitted to governor.

SEC. 4933. If a defendant, who has been imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court, shall be again convicted, the period of his former imprisonment, shall be deducted by the district court, from the period of imprisonment to be fixed, on the last verdict of conviction. Time of imprisonment deducted.

CHAPTER 221.

IMPEACHMENTS.

[Code—Chapter 188.]

SECTION 4934. The governor, judges of the supreme and district courts, and other state officers, are liable to impeachment for any misdemeanor or malfeasance in office. Who liable.

Sole power.	SEC. 4935. The house of representatives has the sole power of impeachment.
The senate.	SEC. 4936. The senate tries all impeachments.
What an impeachment.	SEC. 4937. An impeachment is the written accusation of a state officer, by the house of representatives, before the senate, of any misdemeanor or malfeasance in office.
By whom found.	SEC. 4938. (3157.) A majority of all the members of the house of representatives elected must concur in an impeachment.
Requisites.	SEC. 4939. (3158.) The impeachment must specify the offenses charged with the same precision as is requisite in an indictment, and the accused must be allowed counsel as in cases of other prosecutions.
How stated.	SEC. 4940. If the impeachment charge more than one misdemeanor or act of malfeasance, they shall be stated separately and distinctly.
Senate.	SEC. 4941. (3159.) When possessed of an impeachment the senate must forthwith cause the person accused to be brought before it.
Process.	SEC. 4942. (3160.) All writs and process must be issued by the secretary of the senate and tested in his name, and may be served by any person thereto authorized by the senate or its president.
Time to answer.	SEC. 4943. (3161.) Upon the appearance of the person impeached, he is entitled to a copy of the impeachment, and to a reasonable time in which to answer the same.
Oath.	SEC. 4944. (3162.) Before proceeding to the trial, an oath truly and impartially to try and determine the charge in question according to the evidence shall be administered by the secretary of the senate to the president, and by him to each of the members of that body.
Two third vote.	SEC. 4945. (3163.) The person impeached shall be declared acquitted unless two thirds of the members present assent to his conviction.
Judgment.	SEC. 4946. Upon conviction, the judgment can not extend beyond removal from office, and a disqualification to hold any office of honor, trust, or profit, under this state.
To what liable.	SEC. 4947. The party impeached, whether convicted or acquitted, is nevertheless liable to indictment, trial and punishment, according to law.
Suspended.	SEC. 4948. (3165.) Every officer impeached shall be suspended from the exercise of his official duties until his acquittal.
When president of senate impeached.	SEC. 4949. (3167.) If the president of the senate be impeached notice thereof must immediately be given to the senate; which shall thereupon choose another president to hold his office until the result of the trial is determined.

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## CHAPTER 222.

### COMPELLING THE ATTENDANCE OF WITNESSES.

[Code—Chapter 189.]

Who may compel.	SECTION 4950. A magistrate in any criminal proceeding before him, may issue subpoenas, subscribed by him, with his name of office, for witnesses within the state, on behalf of either party thereto.
Clerk of court	SEC. 4951. The clerk of the court in which any criminal case is



pending, must, at all times, upon the application of the defendant or his attorney, issue as many blank subpoenas, under the seal of the court, subscribed by him, for witnesses within the state, as may be required by the defendant. He must also issue subpoenas, on the part of the state, when required. must issue subpoenas.

SEC. 4952. (3171.) A peace officer must serve within his town, or county, as the case may be, any subpoena delivered to him for service on the part of either the state or defendant, and must make a written return of the service subscribed by him and stating the time and place of service, without delay. A subpoena may, however, be served by any other person. Who to serve.

SEC. 4953. (3172.) The service of a subpoena must be by delivering a copy and showing the original to the witness personally. How.

SEC. 4954. (3176.) If a witness conceal himself to avoid the service of a subpoena, the officer may break open doors or windows for the purpose of making service. Breaking doors.

SEC. 4955. (3174.) Disobedience to a subpoena, or a refusal to be sworn or to answer as a witness, may be punished by the court or magistrate as a contempt. Disobedience.

SEC. 4956. A witness, willfully disobeying a subpoena, in a criminal case, without good cause, shall be liable to the party injured, for the amount of the damages sustained by such party. Witness, when liable.

SEC. 4957. The undertakings of witnesses, in criminal cases, may be forfeited and enforced, like the undertaking of bail. May be forfeited.

SEC. 4958. A subpoena in a criminal case runs into any part of the state. Subpoena.

SEC. 4959. In cases of impeachment, subpoenas may be issued on behalf of either party, by the secretary of the senate. Impeachment

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## CHAPTER 223.

### EXAMINATION OF WITNESSES, CONDITIONALLY OR ON COMMISSION.

[Code—Chapter 190.]

SECTION 4960. A defendant in a criminal case, either after preliminary information, indictment, or information, may examine witnesses conditionally or on commission, in the same manner and with like effect as in civil actions. Defendant may examine witnesses as in civil actions.

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## CHAPTER 224.

### PERPETUATING TESTIMONY.

SECTION 4961. A person apprehensive of a criminal prosecution, may perpetuate testimony in his favor, in the same manner, and with like effect, as it may be done in apprehension of any civil action. How testimony may be perpetuated.

## CHAPTER 225.

## BAILABLE OFFENSES.

**Bailable, when.** SECTION 4962. All defendants are bailable both before and after conviction, by sufficient surety, except for capital offenses, where the proof is evident, and the presumption great.

## CHAPTER 226.

## ADMISSION TO BAIL.

[Code—Chapter 192.]

**Definition.** SECTION 4963. Admission to bail is the order of a competent court, officer, or magistrate, that the defendant be discharged from actual custody, upon the taking of bail.

**How taken.** SEC. 4964. The taking of bail consists in the acceptance by a competent court, officer, or magistrate, of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking, or that the bail will pay to the state a specified sum.

**Before conviction, how.** SEC. 4965. Before conviction, a defendant must be admitted to bail :

1. For his appearance before the magistrate on the preliminary examination of the charge, before being held to answer.

2. For his appearance before the court to which the magistrate is required to return the papers, upon the defendant being held to answer, after preliminary examination.

3. After indictment, either upon his arrest upon a bench warrant, or upon the order of the court committing him, or enlarging the amount of his bail, or upon his being surrendered by his bail to answer the indictment, in the court in which it is found, or to which the case may be removed.

**After conviction, how.** SEC. 4966. After conviction upon an appeal to the supreme court, the defendant must be admitted to bail as follows :

1. If the appeal be from a judgment imposing a fine, upon the undertaking of bail, that he will pay the same, or such part of it, as the supreme court may direct, and in all respects abide the orders and judgment of the supreme court, upon the appeal.

2. If the appeal be from a judgment of imprisonment, upon the undertaking of bail, that he will surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgment of the supreme court, upon the appeal.

**DECISIONS.** An assumed recognizance not bearing evidence of its taking and acceptance by competent authority, is not part of the record and judgment thereon, can not be rendered against the obligors, 4 Iowa, 290; in proceedings against bail, on *scire facia*, the onus is on the respondent, 4 Iowa, 290; defines a valid undertaking, M., 444; record should show call and default, 2 Iowa, 52; 4 G., 280; and is an entirety, 4 G., 280.

CHAPTER 227.

BAIL, UPON BEING HELD TO ANSWER, BEFORE INDICTMENT.

[Code—Chapter 193.]

SECTION 4967. When the defendant has been held to answer for any bailable offense, bail must be taken by the magistrate who held him to answer, or by any judge of the supreme, district, or county courts, or by the court to which the papers on the preliminary examination are to be returned by the magistrate who held him to answer, or by the clerk of such court, or by any magistrate of the county in which the offense is triable. Admitted by whom.

SEC. 4968. Bail is put in by a written undertaking, executed by one or more sufficient sureties, (with or without the defendant, in the discretion of the court, clerk, or magistrate,) acknowledged before, and accepted by, the court, clerk, or magistrate, taking the same, and may be substantially, in the following form: How given.

County of \_\_\_\_\_

An order having been made on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, by A. B., a justice of the peace of the township of \_\_\_\_\_, (or as the case may be) that C. D. be held to answer upon a charge of (stating briefly the nature of the offense,) upon which he has been duly admitted to bail, in the sum of \_\_\_\_\_ dollars.

We, E. F., of (stating his place of residence and occupation,) and G. H., of (stating his place of residence and occupation,) hereby undertake that the said C. D. shall appear at the district court of the county of \_\_\_\_\_, at the next term thereof, and answer said charge, and abide the orders and judgment of said court, and not depart without leave of the same, or if he fail to perform either of these conditions, that we will pay to the state of Iowa the sum of \_\_\_\_\_ dollars, (inserting the sum in which the defendant is admitted to bail.)

E. F.  
G. H.

Acknowledged before, and accepted by me, at \_\_\_\_\_, in the township of \_\_\_\_\_, in the county of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

I. J., justice of the peace.  
(Or, as the case may be.)

SEC. 4969. The qualifications of bail are as follows:

1. Such bail must be a resident and house-holder, or free-holder, within the state. Qualifications of bail.

2. Such bail must be worth the amount specified in the undertaking, exclusive of property exempt from execution, but the court, clerk or magistrate taking the bail, may allow more than one bail to justify severally in amounts less than that expressed in the undertaking, if the whole justification be equivalent to one sufficient bail.

SEC. 4970. The bail must in all cases justify, by affidavit taken before the court, clerk, or magistrate, as the case may be, taking such bail, and the affidavit must state that they each possess the qualifications prescribed in the last section. Justification.

SEC. 4971. The district attorney, or the court, clerk, or magistrate, Same.

- as the case may be, may thereupon, further examine the bail upon oath, concerning their sufficiency, in such manner as may be deemed proper.
- Same. SEC. 4972. The court, clerk or magistrate, may also receive other testimony, either for or against the sufficiency of the bail.
- Determination. SEC. 4973. When the examination is closed, the court, clerk, or magistrate, must make an order, either allowing or disallowing the bail, and must, forthwith, cause the same, with the affidavits of justification, and the undertaking of bail, to be filed with the clerk of the court, to which the papers on the preliminary examination are required to be sent.
- Order of discharge. SEC. 4974. Upon the allowance of the bail, and the execution of the undertaking, the court, clerk, or magistrate, must make an order, signed with his name of office, for the discharge of the defendant, to the following effect :
- The state of Iowa.  
*To the sheriff of the county of \_\_\_\_\_.*  
 C. D., who is detained by you on commitment, to answer a charge for the offense of, (here designate it generally,) having given sufficient bail, to answer the same, you are commanded, forthwith, to discharge him from custody.  
 Dated at \_\_\_\_\_, in the township of \_\_\_\_\_ in the county of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18\_\_\_\_,
- K. L, justice of the peace.  
 (Or, as the case may-be.)
- Disallowed. SEC. 4975. (3226.) If the bail be disallowed the defendant must be detained in custody until other bail be put in and justify.

## CHAPTER 228.

### BAIL, UPON AN INDICTMENT, BEFORE CONVICTION.

[Code—Chapter 194.]

- In case of misdemeanor. SECTION 4976. When the offense charged in the indictment is a misdemeanor, the officer serving the bench warrant, if therein required, must take the defendant before a magistrate in the county in which it was issued, or in which he is arrested, or before the clerk of the district court of either of such counties, for the purpose of giving bail.
- Felony. SEC. 4977. (3228.) If the offense charged in the indictment be a felony, the officer arresting the defendant must deliver him into custody according to the command of the warrant.
- By whom taken. SEC. 4978. When the defendant is so delivered into custody, if the felony charged beailable, bail must be taken by that court, or the clerk of that court, or by any magistrate in the same county.
- How put in. SEC. 4979. The bail must be put in by a written undertaking, executed by one sufficient surety, (with or without the defendant, in the discretion of the court, clerk, or magistrate,) acknowledged before and accepted by the court, clerk or magistrate, taking the same, and may be substantially in the following form :

COUNTY OF \_\_\_\_\_,  
 "An indictment having been found in the district court of the county

of ———, on the ——— day of ——— A. D. 18—, charging A. B. with the crime of (designating it as in the bench warrant,) and he having been duly admitted to bail in the sum of ——— dollars;

We, A. B., of (stating his place of residence and occupation,) C. D., of (stating his place of residence and occupation,) and E. F., of (stating his place of residence and occupation,) hereby undertake that the said A. B. shall appear and answer the said indictment, and abide the orders and judgment of said court, and not depart without leave of the same, or if he fail to perform either of these conditions, that we will pay to the state of Iowa, the sum of ——— dollars, (inserting the sum in which the defendant is admitted to bail.)

A. B.,  
C. D.,  
E. F.

Acknowledged before, and accepted by me, at ——— in the township of ——— in the county of ———, this ——— day of ———, A. D. 18—.

G. H., justice of the peace.  
(Or, as the case may be.)

SEC. 4980. The provisions of the last preceding chapter, subsequent Application. to the form of the undertaking relative to the qualifications of bail, the justification, the examination, receiving other testimony against the sufficiency, and the order of allowance or disallowance thereof, and the filing of the undertaking with the affidavits, and all proceedings incidental thereto, in the cases therein provided for, apply also to the cases provided for in this chapter.

## CHAPTER 229.

### BAIL, UPON AN APPEAL TO THE SUPREME COURT, AFTER CONVICTION.

[Code—Chapter 195.]

SECTION 4981. In the cases in which the defendant must be admitted to bail, upon an appeal to the supreme court after conviction, as provided in section 4966 of this code, the bail may be taken, either by the court where the judgment was rendered, or the judge thereof, or the district court of the county in which he is imprisoned, or the judge thereof, or the judge of the county court of either of such counties, or by the supreme court, or a judge thereof, or by the clerk of either of such courts. Bail, after conviction.

SEC. 4982. The bail must possess the qualifications, must justify, and must be put in and taken, in the manner prescribed in chapter 227 of this code, and the same proceedings had in all respects, as nearly as applicable, varying to suit the case, and the undertaking of the bail must be, in effect, as prescribed by section 4966; but no order shall be made by the court, clerk, or magistrate taking the bail, for the discharge of the defendant, as provided in section 4974. And the clerk of the district court in which the judgment was rendered, must, upon the filing of the order of allowance of the bail, the affidavits of justification, and the undertaking, in his office, give the certificate prescribed by section 4916 of this code. Same.

## CHAPTER 230.

## DEPOSIT OF MONEY INSTEAD OF BAIL.

[Code—Chapter 196.]

With whom, and effect.

SECTION 4983. The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the clerk of the district court, to which the undertaking, in case of bail, is required to be sent, the sum mentioned in the order, and upon delivering to the officer in whose custody he is, a certificate under seal from said clerk of the deposit, he must be discharged from custody.

After giving bail.

SEC. 4984. (3233.) If the defendant have given bail he may at any time before the forfeiture of the undertaking in like manner deposit the sum mentioned in the undertaking, and upon the deposit being made the bail shall be exonerated.

Bail after deposit

SEC. 4985. (3234.) If money be deposited as provided in the last section, bail may be given in the same manner as if it had been originally given upon the order for admission to bail at any time before the forfeiture of the deposit. The court or magistrate before whom the bail is taken shall thereupon direct in the order of allowance, that the money deposited be refunded by the clerk to the defendant and it shall be refunded accordingly.

Money applied to judgment.

SEC. 4986. Where money has been deposited, if it remain on deposit at the time of a judgment against the defendant, the clerk shall, under the direction of the court, apply the money in satisfaction of so much of the judgment as requires the payment of money, and after paying the same, shall refund the surplus, if any, to the defendant, unless an appeal be taken to the supreme court, and bail put in, in which case the deposit shall be returned to the defendant.

## CHAPTER 231.

## SURRENDER OF THE DEFENDANT.

[Code—Chapter 197.]

When and how defendant surrenders.

SECTION 4987. At any time before the forfeiture of their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the officer to whose custody he was committed at the time of giving bail, in the following manner:

1. A certified copy of the undertaking of bail must be delivered to the officer, who shall detain the defendant in his custody thereon as upon a commitment, and must by a certificate in writing, acknowledge the surrender.

2. Upon the undertaking and the certificate of the officer, the district court in which the indictment is pending, or was tried, at the next term after the surrender, or if during term time, at the same term, and upon three clear days' notice thereof to the district attorney, with a copy of the undertaking and certificate, may order the bail to be exonerated.

SEC. 4988. (3237.) For the purpose of surrendering the defendant, Arrest by bail. the bail, at any time before they are finally charged and at any place within the state, may themselves arrest him, or by a written authority indorsed on a certified copy of the undertaking may empower any person of suitable age and discretion to do so.

SEC. 4989. If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, shall surrender himself to the officer to whom the commitment was made, or directed in the manner prescribed in this chapter, the court in which the indictment is pending, or was tried, at the next term after the surrender, or if during the term, at the same term, must order a return of the deposit to the defendant, upon producing the certificate of the officer, showing the surrender, and upon three clear days' notice to the district attorney, with a copy of the certificate. On surrender, deposit returned.

CHAPTER 232.

FORFEITURE OF THE UNDERTAKING OF BAIL, OR THE DEPOSIT OF MONEY.

[Code—Chapter 193.]

SECTION 4990. If the defendant fail to appear for arraignment, trial or judgment, or at any other time when his personal appearance in court may be lawfully required, or to surrender himself in execution of the judgment, the court must direct an entry of such failure to be made on the record, and the undertaking of his bail or the money deposited instead of bail, as the case may be, is thereupon forfeited. How forfeited.

SEC. 4991. If, before the final adjournment of the court for the term, the defendant appear and satisfactorily excuse his failure, the court may direct an entry to be made on the record, that the forfeiture of the undertaking, or deposit be discharged. How forfeiture discharged.

SEC. 4992. If the forfeiture is not discharged, the district attorney may at any time after the adjournment of the court for the term, proceed by civil action only, upon the undertaking. When forfeiture not discharged.

SEC. 4993. The action on the undertaking must be in the court in which the defendant was, or would have been, required to appear by the undertaking. Action, in what court.

SEC. 4994. If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may in its discretion, remit the whole, or any part, of the sum specified in the undertaking. Before judgment, court may remit.

DECISIONS. The order of the supreme court, if not conformed to, works a breach of recognizance and is condition precedent of suit on such bond, 4 Iowa, 499; admissibility of record in *sci. fa.* on bond, 4 G., 278; petition in such case, 4 G., 302; 4 G., 278; 2 Iowa, 559; an action lies on the recognizance also, 2 Iowa, 52; record as to forfeiture a verity, 2 Iowa, 52; *State v. Clemens*, Dec. term, 1859; presumption of execution of recognizance and burden of proof, 4 Iowa, 289; see 6 Iowa, 72; a recognizance can not operate as a supersedeas unless allowed by a supreme judge, 4 Iowa, 499.

## CHAPTER 233.

RE-COMMITMENT OF THE DEFENDANT, AFTER GIVING BAIL, OR  
DEPOSITING MONEY.

[Code—Chapter 199.]

- Re-commitment.** SECTION 4995. The district court in which a criminal action is pending, or during the pendency of an appeal from its judgment in such action, or in which a judgment is to be carried into effect; may by an order entered on the record, direct the defendant to be arrested and committed to jail until legally discharged, after he has given bail, or deposited money instead thereof in the following cases:
1. When by reason of his failure to appear, he has incurred a forfeiture of his bail, or money deposited instead thereof.
  2. When it satisfactorily appears to the court, that his bail, either by reason of the death of one, or more of them, or from any other cause, is insufficient, or have removed from the state.
  3. When upon the finding of an indictment, the court deems the bail taken by the committing magistrate insufficient.
- Order, its requisites.** SEC. 4996. (3244.) The order for the re-commitment of the defendant must recite generally the facts upon which it is founded, and must direct that the defendant be arrested and committed to the custody of the sheriff of the county where the depositions and statement were returned, or the indictment was found, or the conviction was had, as the case may be, to be detained until legally discharged.
- Arrest.** SEC. 4997. (3245.) The defendant may be arrested pursuant to the order upon a certified copy thereof, in any county in the state.
- Committal.** SEC. 4998. (3246.) If the order recite as the ground on which it is made, the failure of the defendant to appear for judgment upon conviction, the defendant must be committed according to the requirement of the order.
- New bail.** SEC. 4999. (3247.) If the order be made for any other cause and the offense be bailable, the court may fix the amount of bail and may cause a direction to be inserted in the order that the defendant be admitted to bail in the sum fixed, which must be specified in the order.

## CHAPTER 234.

## UNDERTAKINGS OF BAIL WHEN LIENS.

- Bail, when a lien upon real estate.** SECTION 5000. Undertakings of bail, from the time of filing the same in the office of the clerk of the district court in which they are required to be filed, shall be, and may be made, liens upon the real estate of the persons acknowledging the same, in the same manner, to the same extent, and with like effect, as judgments in civil actions.
- Same.** SEC. 5001. They shall, when filed, be immediately docketed, and indexed, by the clerk of the court in which they are filed, as judgments in civil actions are required to be docketed and indexed.
- Same.** SEC. 5002. Attested copies of such undertakings, may be filed in



the office of the clerk of the district court of the county in which the real estate is situated, in the same manner, and with like effect, as attested copies of judgments, and shall be immediately docketed and indexed, in the same manner.

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## CHAPTER 235.

### JUDGMENTS FOR FINES, WHEN LIENS, AND HOW EXECUTIONS THEREON STAYED.

SECTION 5003. Judgment for fines, in all criminal actions rendered, <sup>Fines, when liens upon real estate.</sup> are, and may be made, liens upon the real estate of the defendant, in the same manner, and with like effect, as judgment in civil actions.

SEC. 5004. The defendant may have a stay of execution for the <sup>Stay of execution, when.</sup> same length of time, and in the same manner, as provided by law in civil actions, and with like effect, and the same proceedings may be had therein.

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## CHAPTER 236.

### LIBERATION OF POOR CONVICTS.

[Code—Chapter 203.]

SECTION 5005. (3268.) When any person convicted of a criminal <sup>When and on what terms.</sup> offense is sentenced to pay a fine and costs only, and stand committed until sentence be performed, if the sentence be not complied with by payment of the sum due within thirty days next following, the sheriff may liberate him from prison, if committed for no other cause and if he be unable to pay such fine and costs, upon his giving his promissory note for the amount due payable to the treasurer of the county where he was committed, on demand with interest, accompanied with a written schedule containing a true account of all his property, of every kind, by him signed and sworn to; which note and schedule must be by such sheriff delivered without delay to the treasurer for the use of the county.

SEC. 5006. (3269.) If such convict knowingly and willfully make <sup>False schedule.</sup> any false schedule, on oath relating to the amount or nature of his property, he is guilty of perjury.

## CHAPTER 237.

DISMISSAL OF CRIMINAL ACTIONS, BEFORE AND AFTER INDICTMENT,  
FOR WANT OF PROSECUTION OR OTHERWISE.

[Code—Chapter 200.]

- Prosecution, when.** SECTION 5007. (3248.) When a person has been held to answer for a public offense, if an indictment be not found against him at the next regular term of the court at which he is held to answer, the court must order the prosecution to be dismissed unless good cause to the contrary be shown.
- Dismissed.** SEC. 5008. (3249.) If a defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial at the next regular term of the court in which the indictment is triable after the same is found, the court must order it to be dismissed unless good cause to the contrary be shown.
- Defendant on his own undertaking.** SEC. 5009. (3250.) If the defendant be not indicted or tried as provided in the last two sections, and sufficient reason therefor shown, the court may order the action to be continued from term to term, and in the mean time may discharge the defendant from custody on his own undertaking or on the undertaking of bail for his appearance to answer the charge at the time to which the action is continued, but no such continuance can be extended beyond three terms of the court.
- Defendant discharged.** SEC. 5010. If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or if admitted to bail, his bail must be exonerated, and if money has been deposited instead of bail, it must be refunded to him.
- Nolle prosequi.** SEC. 5011. The court may, either upon its own motion, or upon the application of the district attorney, and in furtherance of justice order an action, after an indictment, to be dismissed, but in such case, the reason of the dismissal must be set forth in the order, which must be entered upon the record.
- Same.** SEC. 5012. The entry of a *nolle prosequi* is abolished, and neither the attorney general, nor the district attorney, shall hereafter discontinue, or abandon, a prosecution for a public offense, except as provided in the last section.
- Bar.** SEC. 5013. An order for the dismissal of the action, as provided in this chapter, is a bar to another prosecution for the same offense, if it be a misdemeanor; but it is not a bar, if the offense charged be a felony.

## CHAPTER 238.

INQUIRY INTO THE INSANITY OF THE DEFENDANT, BEFORE TRIAL, OR  
AFTER CONVICTION.

[Code—Chapter 202.]

- Insanity of defendant.** SECTION 5014. An act done by a person in a state of insanity, can not be punished as a public offense, nor can a person be arraigned, tried,

adjudged to punishment, or punished, for a public offense, whilst he is insane.

SEC. 5015. When a defendant appears for arraignment, trial, judgment, or on any other occasion, when he is required, if a reasonable doubt arise as to his sanity, the court must order a jury to be impaneled from the petit jurors in attendance, at the term, or who may be summoned by the direction of the court, as provided in chapter 210 of this code, to inquire into the fact. Trial of.

SEC. 5016. The arraignment, trial, judgment, or other proceedings, as the case may be, must be suspended until the question of insanity is determined by the verdict of the jury. Suspended until.

SEC. 5017. The trial of the question of insanity must proceed in the following order: Order of procedure

1. The counsel for the defendant must offer the evidence in support of the allegation of insanity.

2. The district attorney must then offer the evidence in support of the case on the part of the state.

3. The parties may then respectively offer rebutting evidence only, unless the court for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

4. When the evidence is concluded, unless the case is submitted, on either side or both sides, without argument, the district attorney must commence, and the defendant's counsel conclude the argument to the jury.

5. If more than one counsel on each side argue the case to the jury, they must do so alternately.

6. The court shall then, on motion of either party, charge the jury. The provisions of chapter 212 of this code, and of the other chapters incidental thereto, so far as the same are applicable, and not herein changed, shall regulate the trial of the question of insanity.

SEC. 5018. If the jury find that the defendant is sane, the proceedings on the indictment shall be resumed. If sane.

SEC. 5019. If the jury find the defendant insane, the proceedings on the indictment shall be suspended, until he becomes sane, and the court, if it deem his discharge dangerous to the public peace or safety, may order that he be, in the meantime, committed by the sheriff to the Iowa Insane Hospital, and that upon his becoming sane, he be delivered by the superintendent of the hospital to the sheriff. If insane.

SEC. 5020. The commitment of the defendant, as provided in the last section, exonerates his bail, or entitles a person authorized to receive the property of the defendant, to a return of the money he may have deposited instead of bail. Exonerates bail.

SEC. 5021. If the defendant be received into the hospital, he must be detained there until he becomes sane. When he becomes sane, the superintendent of the hospital must give notice of that fact to the sheriff, and to the district attorney of the proper district. The sheriff must thereupon, without delay, bring the defendant from the hospital, and place him in the proper custody, until he be brought to trial, or judgment, as the case may be, or be legally discharged. Detained in hospital.

SEC. 5022. The expenses of sending the defendant to the hospital, bringing him back, and any other expenses incurred, are to be paid in the first instance by the county from which he was sent, but the county may recover from the estate of the defendant, if he have any, or from a relative, or another county, town, township, or city, bound to provide for or maintain him elsewhere. Expenses.

Sheriff's fees.

SEC. 5023. Sheriffs for delivering persons found to be insane, under the provisions of this chapter, are entitled to the same fees therefor, as are allowed for conveying convicts to the penitentiary.

## CHAPTER 239.

### SEARCH WARRANTS, AND PROCEEDINGS THEREON.

[Code—Chapter 207.]

- Definition.** SECTION 5024. (3291.) A search warrant is an order in writing, in the name of the state, signed by a magistrate, directed to a peace officer, commanding him to search for personal property and bring it before the magistrate.
- When issued.** SEC. 5025. (3292.) It may be issued upon either of the following grounds:
1. When the property was stolen or embezzled, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or of any other person in whose possession it may be.
  2. When it was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense or of any other person in whose possession it may be.
  3. When it is in the possession of any person with the intent to use it as the means of committing a public offense, or in the possession of another to which he may have delivered it for the purpose of concealing it or preventing its being discovered; in which case it may be taken on the warrant, from such person, from a house or other place occupied by him or under his control, or from the possession of the person to whom he may have so delivered it.
- Affidavit.** SEC. 5026. (3293.) No search warrant can be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property, and the place to be searched.
- Complainant examined.** SEC. 5027. The magistrate must, before issuing a warrant, examine on oath the applicant therefor, and any witnesses he may produce, and take their affidavits in writing, and cause each affidavit to be subscribed and sworn to before him, by the person making it.
- Affidavits must set forth.** SEC. 5028. The affidavits must set forth the facts, tending to establish the grounds of the application, or probable cause for believing that they exist.
- Same.** SEC. 5029. If the magistrate be thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he shall issue a search warrant, signed by him with his name of office, directed to any peace officer in the county, commanding him forthwith to search the person or place named, for the property specified, and bring it before him.
- Jurisdiction.** SEC. 5030. The local jurisdiction of magistrates, in exercising the

powers conferred on them by this chapter, is as defined in section 4447 of this code.

SEC. 5031. The warrant may be, substantially, in the following Warrant form:

“COUNTY OF \_\_\_\_\_,  
THE STATE OF IOWA:

“To any peace officer of said county—

“Proof, by affidavit, having been this day made before me by (naming every person whose affidavit has been taken) that (stating the particular grounds of the application according to section 5025; or, if the affidavit be not positive, “that there is probable cause for believing that”—(stating the ground of the application in the same manner); you are therefore commanded, in the day time, (or “at any time of the day or night,” as the case may be according to section 5035) to make immediate search *on the person* of C. D., (or, “in the house situated”—describing it or any other place to be searched, with reasonable particularity, as the case may be,) for the following property (describing it with reasonable particularity): and if you find the same, or any part thereof, to bring it forthwith before me, at, (stating the place.)

“Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 18—.

E. F., justice of the peace.”

(Or, as the case may be.)

SEC. 5032. (3297.) A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer, on his requisition, he being present and acting in its execution. Service by whom.

SEC. 5033. (3298.) The officer may break open any outer or inner door or window of a house, or any part of the house, or anything therein to execute the warrant, if, after notice of his authority and purpose, he be refused admittance. Breaking doors, &c.

SEC. 5034. He may break open any outer or inner door or window of a house, for the purpose of liberating a person, who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation. Same.

SEC. 5035. The magistrate must insert a direction in the warrant, that it be served in the day time, unless the affidavit be positive that the property is on the person, or in the place to be searched; in which case, he may insert a direction, that it be served at any time of the day or night. Warrant, when served.

SEC. 5036. (3299.) A search warrant must be executed and returned to the magistrate by whom it was issued within ten days after its date. After the expiration of such time, the warrant, unless executed, is void. Return.

SEC. 5037. (3300.) When the officer takes any property under the warrant he must give a receipt for the property taken, (specifying it in detail) to the person from whom it was taken or in whose possession it was found, or in the absence of the person he must leave it in the place where he found the property. Receipt for property.

SEC. 5038. (3301.) The officer must forthwith return the warrant to the magistrate and at the same time deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken and of the applicant for the warrant if they be present, verified by the affidavit of the officer at the foot of the inventory and taken before the magistrate, to the following Return and inventory.

- effect: "I, the officer by whom the annexed warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."
- Copy of inventory.** SEC. 5039. (3302.) The magistrate, if required, must deliver a copy of the inventory to the person from whose possession the property was taken and to the applicant for the warrant.
- Trial.** SEC. 5040. (3303.) If the grounds on which the warrant was issued, be controverted, the magistrate must proceed to take testimony in relation thereto.
- Testimony.** SEC. 5041. (3304.) The testimony given by each witness must be reduced to writing and authenticated by the magistrate.
- Property restored.** SEC. 5042. (3305.) If it appear that the property taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate shall cause it to be restored to the person from whom it was taken.
- Property delivered to owner or retained.** SEC. 5043. If the property taken by virtue of a search warrant, was stolen or embezzled, it must be restored to the owner, upon his making satisfactory proof to the magistrate, of his ownership thereof, or of his right of possession thereto, as provided in the next chapter. If it was taken on a warrant issued on the grounds stated in the second and third subdivisions of section 5025 of this code, the magistrate must retain it in his possession, subject to the order of the court, to which he is required to return the proceedings before him, or of any other court in which the offense which the property taken was used as a means of committing, or so intended to be, is triable.
- Disposition of papers.** SEC. 5044. The magistrate must annex together the affidavits taken before the issuing of the warrant; the warrant, the return, and the inventory, and return them to the next district court of the county, at or before its opening, on the first day of the next term thereof.
- Malicious suing out.** SEC. 5045. (3308.) Whoever maliciously, and without probable cause procures a search warrant to be issued and executed, is guilty of a misdemeanor.
- Excess of authority.** SEC. 5046. A peace officer who, in executing a search warrant, willfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor.
- Searching person charged with felony.** SEC. 5047. (3309.) When a person charged with a felony is supposed by the magistrate before whom he is brought, to have upon his person a dangerous weapon or any thing which may be used as evidence of the commission of the offense, the magistrate may direct him to be searched in his presence, and the weapon or other thing to be retained, subject to his order, or the order of the court in which the defendant may be tried.
- Keep things for evidence.** SEC. 5048. When any officer, in the execution of a search warrant, shall find any stolen or embezzled property, or shall seize any other things, for which a search is allowed by this chapter, all the property and things so seized, shall be safely kept by the direction of the court or magistrate, so long as shall be necessary for the purpose of being produced as evidence on any trial; and as soon as may be afterwards, all such stolen and embezzled property shall be restored to the owner thereof, and all other things seized by virtue of such warrant shall be destroyed, under the direction of the court or magistrate.

## CHAPTER 240.

## DISPOSAL OF PROPERTY STOLEN OR EMBEZZLED.

[Code—Chapter 201.]

SECTION 5049. (3253.) When property alleged to have been stolen <sup>Held by officer.</sup> or embezzled comes into the custody of a peace officer, he must hold the same subject to the order of the magistrate authorized by the next section to direct the disposal thereof.

SEC. 5050. On satisfactory proof of title by the owner of the prop- <sup>Delivered to</sup> erty, the magistrate before whom the information is laid, or who shall <sup>owner.</sup> examine the charge against the person accused of stealing or embezzling the same, may order it to be delivered to the owner, on his paying the reasonable and necessary expenses incurred in the preservation and keeping thereof, to be certified by the magistrate. The order shall entitle the owner to demand and receive the property.

SEC. 5051. (3255.) If the property stolen or embezzled come into <sup>Same.</sup> the custody of a magistrate, it must be delivered to the owner on satisfactory proof of his title and on his paying the necessary expenses incurred in its preservation, to be certified as before provided.

SEC. 5052. (3256.) If the property stolen or embezzled has not <sup>Same.</sup> been delivered to the owner, the court before which a conviction is had, may on proof of his title, order its restoration.

SEC. 5053. (3257.) If property stolen or embezzled be not claimed <sup>Not claimed.</sup> by the owner before the expiration of six months from the conviction of the person for stealing or embezzling it, the magistrate or other officer having it in his custody, must, on payment of the necessary expenses incurred for its preservation, deliver it to the clerk of the county court to be applied under the direction of the judge thereof for the benefit of the poor of the county.

SEC. 5054. (3258.) When the money or other property is taken <sup>Receipts there-</sup> from the defendant arrested upon a charge of a public offense, the officer <sup>for.</sup> taking it shall at the time give duplicate receipts therefor, specifying particularly the amount of money and the kind of property taken; one of which receipts he must deliver to the defendant, and the other he must forthwith file with the clerk of the district court of the county where the depositions and statement are to be sent by the magistrate.

## CHAPTER 241.

## PROCEEDINGS AND TRIAL, BEFORE JUSTICES OF THE PEACE.

[Code—Chapter 209.]

SECTION 5055. Justices of the peace in their respective counties <sup>Jurisdiction of</sup> have jurisdiction of, and must hear, try and determine, all public of- <sup>justices.</sup> fenses less than felony, in which the punishment prescribed by law, does not exceed a fine of one hundred dollars, or imprisonment thirty

	days, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal, as specified in the third sub-division of section 4499, committed within the limits of their local jurisdiction as defined in section 4503, of this code.			
Information.	SEC. 5056. (3323.) Criminal actions for the commission of a public offense must be commenced before a justice of the peace by an information subscribed and sworn to, and filed with the justice.			
Its requisites.	SEC. 5057. (3324.) Such information must contain : 1. The name of the county and of the justice where the information is filed. 2. The names of the parties if the defendants be known, and if not, then such name as may be given him by the complainant. 3. A statement of the acts constituting the offense in ordinary and concise language and the time and place of the commission of the offense as near as may be.			
Form.	SEC. 5058. (3325.) The information may be substantially in the following form : <div style="margin-left: 40px;"> <table border="0"> <tr> <td style="border-right: 1px solid black; padding-right: 10px;">                 _____ county                  The state of Iowa,                  against                  A— B,— defendant.             </td> <td style="font-size: 3em; padding: 0 10px;">}</td> <td>Before justice (here insert the name of the justice.)</td> </tr> </table> <p>The defendant is accused of the crime (here name the offense.)                  For that the defendant on the _____ day of _____ A. D. 18—, at the (here name the city, village, or township) in the county aforesaid (here state the act, or omission constituting the offense as in an indictment.)</p> </div>	_____ county The state of Iowa, against A— B,— defendant.	}	Before justice (here insert the name of the justice.)
_____ county The state of Iowa, against A— B,— defendant.	}	Before justice (here insert the name of the justice.)		
Filed.	SEC. 5059. (3326.) The justice must file such information and mark thereon the time of filing the same.			
Warrant.	SEC. 5060. Immediately upon the filing of such information, the justice may, in his discretion, issue a warrant for the arrest of the defendant, directed in the same manner as a warrant of arrest upon a preliminary information, and may be served in like manner.			
Service.	SEC. 5061. (3328.) The officer who receives the warrant must serve the same by arresting the defendant, if in his power, and bringing him without unnecessary delay before the justice who issued the same.			
Appearance.	SEC. 5062. (3329.) When the defendant is brought before the justice, the charge against him must be distinctly read to him and he shall be asked whether he is presented by his right name and be required to plead. If he object that he is wrongly named in the information he must give his right name, and if he refuse to do so or does not object that he is wrongly named the justice shall make an entry thereof in his docket, and he is thereafter precluded from making any such objection.			
Pleadings.	SEC. 5063. (3330.) The defendant may plead the same pleas as upon an indictment. His pleas must be oral and shall be entered on the docket of the justice.			
Same.	SEC. 5064. Upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury, the justice must proceed to try the issue, unless a change of venue be applied for by the defendant.			
Change of venue.	SEC. 5065. If a change of venue be applied for, an affidavit must be filed stating that the justice is prejudiced against the defendant, or is of near relation to the prosecutor upon the charge, or the party injured or interested, or is a material witness for either party, or that the defendant can not obtain justice before him, as the affiant verily believes.			
Same.	SEC. 5066. If such affidavit be filed, the change of venue must be			



allowed, and the justice must immediately transmit all the original papers, and a transcript of all his docket entries in the case to the next nearest justice in the township, against whom no such objection exists, if there be any, if not, to the next nearest justice in the county to which no such objection exists, who shall proceed to try the case—unless a jury trial be demanded, but no more than one change of venue in the same case shall be allowed.

SEC. 5067. Before the justice has heard any testimony upon the Jury trial. trial, the defendant may demand a trial by jury.

SEC. 5068. If a trial by jury be demanded, the justice shall direct How jury got. any peace officer of the county, to make a list in writing, of the names of eighteen inhabitants of the county, having the qualifications of jurors in the district court, from which list the prosecutor and defendant may each strike out three names.

SEC. 5069. In case the prosecutor or the defendant neglect or refuse Same. to strike out such names, the justice shall direct some disinterested person to strike out the names, for either, or both of the parties so neglecting or refusing; and upon such names being struck out, the justice must issue a venire directed to any peace officer of the county, requiring him Venire. to summon the twelve persons whose names remain upon the list, to appear before such justice, at the time and place named therein, to make a jury for the trial of the cause.

SEC. 5070. The officer to whom such venire is delivered, must Summons. forthwith summon such jurors, and return the venire to the justice, within the time therein specified, naming the persons summoned, and the manner of service.

SEC. 5071. The names of the persons returned as jurors, shall be Selection of jury. written on separate ballots, folded each in the same manner as nearly as possible, and so that the name be not visible, and shall under the direction of the justice, be deposited in a box or other convenient thing.

SEC. 5072. The justice must then draw out six of the ballots suc- Same. cessively, and if any of the persons whose names are drawn do not appear, or are challenged, or set aside, such farther number must be drawn, as will make a jury of six, after all legal challenges have been allowed.

SEC. 5073. (3338.) The same challenges may be taken by either Challenges. party to any individual juror as on the trial of an indictment for a misdemeanor, but no challenge to the panel is allowed.

SEC. 5074. If any of the jurors named in the venire can not be Talesmen. found, or do not attend, or are challenged by either party, so that a sufficient number can not be obtained, the justice may direct the officer to summon any by-standers, or others, who may be competent and against whom no sufficient cause of challenge appears, to act as jurors.

SEC. 5075. If the officer by whom the venire is received, do New venire. not return it as required, he may be punished by the justice as for a contempt, and the justice shall issue a new venire for the summoning of the same jurors, upon which the same proceeding shall be had as upon the one first issued.

SEC. 5076. (3341.) When six jurors appear and are accepted they Six a jury. shall constitute the jury.

SEC. 5077. The justice must thereupon administer to them the fol- Oath. lowing oath or affirmation;—"you do swear (or you do solemnly affirm, as the case may be,) that you will well and truly try the issue, between

	the state of Iowa and the defendant, and a true verdict give, according to the evidence."
Proceedings of jury.	SEC. 5078. (3343.) After the jury are sworn they must sit together and hear the proofs and allegations of the parties, which must be delivered in public. After which they may either decide in court or may retire for consideration.
Same.	SEC. 5079. (3344.) If they do not immediately agree, they must retire with the officer, who shall be sworn to the following effect—"you do swear that you will keep the jury together in some private and convenient place, without meat or drink, unless otherwise ordered by the court; that you will not permit any person to speak to them, nor speak to them yourself unless it be to ask them whether they have agreed upon a verdict, and that you will return them into court when they have so agreed."
Verdict.	SEC. 5080. When the jury have agreed on their verdict, they must deliver it publicly to the justice, who shall enter it on his docket.
Kept together.	SEC. 5081. The jury must be kept together after the cause is submitted to them, until they have agreed upon and rendered their verdict, unless for good cause the justice sooner discharge them.
Discharged.	SEC. 5082. If the jury be discharged as provided in the last section, the justice may proceed again to the trial, in the same manner, as upon the first trial; and so on till a verdict is rendered.
Judgment.	SEC. 5083. When the defendant pleads guilty, or is convicted either by the justice or by a jury, the justice shall render judgment thereon of fine, or imprisonment, as the case may require, being governed by the rules prescribed for the district court, as far as the same are applicable, in rendering such judgment.
Imprisonment for fine.	SEC. 5084. (3349.) A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied.
Defendant discharged.	SEC. 5085. When the defendant is acquitted, either by the justice, or by a jury, he must be immediately discharged.
Costs.	SEC. 5086. When the defendant is acquitted the justice shall, if he is satisfied that the prosecution, is malicious, or without probable cause, tax the costs against the prosecuting witness and render judgment therefor.
Certificate of conviction.	SEC. 5087. Whenever a conviction is had upon a plea of guilty, or upon trial, the justice must make and sign with his name of office, a certificate of such conviction, in which it shall be sufficient briefly to state the offense charged and the conviction and judgment thereon, and if any fine has been collected, the amount thereof.
Filed.	SEC. 5088. Within twenty days after such conviction, the justice must cause such certificate to be filed in the office of the judge of the county court of the county where the conviction was had.
Evidence.	SEC. 5089. Every certificate of conviction made and filed under the foregoing provisions, or a duly certified copy thereof, shall be evidence in all courts and places, of the facts therein contained.
Judgment, how executed.	SEC. 5090. The judgment shall be executed by a peace officer of the county where the conviction is had, by virtue of a warrant under the hand of the justice specifying the particulars of such judgment.
If fine imposed.	SEC. 5091. If a fine be imposed and paid, before commitment, it shall be received by the justice, and by him paid over to the county treasurer, within thirty days after the receipt thereof, for the use of the schools in the county, as provided by law.
Same.	SEC. 5092. If the defendant be committed for not paying a fine, he may pay it to the sheriff of the county, but to no other person, who

must in like manner, within thirty days after the receipt thereof, pay it into the county treasury, for the use of the schools in the county as provided by law.

SEC. 5093. If the fine or any part thereof, is paid to the justice, or sheriff, he must execute duplicate receipts therefor, one of which he must file without delay, with the clerk of the county court.

SEC. 5094. Either party may appeal from the judgment, to the district court of the county, at the term which commences not less than Parties may appeal. seven days after the day on which the appeal is taken, the state in the same manner as the defendant.

SEC. 5095. The justice rendering a judgment against the defendant, must inform him of his right to an appeal therefrom, and make an entry on his docket of the giving of such information, and the defendant may, hereupon, take an appeal, by giving notice orally to the justice, that he appeals, and the justice must make an entry on his docket, of the giving of such notice. Defendant's right to appeal.

SEC. 5096. The justice must, thereupon, enter an order on his docket, fixing the amount in which bail may be given by the defendant, and the execution of the judgment against the defendant shall not be stayed, unless bail in that amount be put in, by an undertaking substantially in the following form: Bail, how fixed.

COUNTY OF \_\_\_\_\_

Form.

A. B. having been convicted before C. D., a justice of the peace of said county, of the crime of (here designate it generally as in the information,) by a judgment rendered on the \_\_\_\_\_ day of \_\_\_\_\_ A. D. 18—, and having appealed from said judgment to the district court of said county:

We, A. B. and E. F., (or I. E. F.) or, (we, E. F. and H. G.) hereby undertake that the said A. B. will appear in the district court of said county, at the term thereof, to which the appeal is returnable, and abide the judgment of said court, and not depart without leave of the same, or that we (or "I" as the case may be,) will pay to the state of Iowa, the sum of \_\_\_\_\_ dollars, (the amount of bail fixed.)

A. B.

E. F.

(as the case may be.)

Acknowledged before, and accepted by me, at \_\_\_\_\_ in the township of \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 18—.

C. D., Justice of the Peace.

SEC. 5097. The bail must possess the qualifications, must justify, and must be taken in the same manner prescribed in sections 4969 to 4975 of this code inclusive, and the same proceedings had in all respects, as nearly as applicable, except as in this chapter otherwise provided. Qualifications.

SEC. 5098. The bail may be taken by the justice who rendered the judgment, or by any magistrate in the county who has authority to admit to bail, or by the district court, or the clerk thereof. Bail, by whom taken.

SEC. 5099. When an appeal is taken, the justice must cause all material witnesses to enter into an undertaking, as in a case where a defendant is held to answer on a preliminary examination, to appear and testify on the trial of the appeal in the district court, at the term at which it is returnable, and shall, as soon as practicable, and at least ten days before the first day of such term of the district court of the county, file in the office of the clerk thereof, a certified copy of the entries on his docket, together with all the undertakings and papers in the case. Witnesses bound over.

When appealed,  
how tried.

SEC. 5100. The cause, when thus appealed, shall stand for trial anew in the district court, in the same manner that it should have been tried before the justice, and as nearly as practicable, as an issue of fact upon an indictment, without regard to technical errors or defects which have not prejudiced the substantial rights of either party, and the court has full power over the case, the justice of the peace, his docket entries, and his return, to administer the justice of the case according to the law, and shall give judgment accordingly.

Appeal not to be  
dismissed.

SEC. 5101. No appeal from the judgment of a justice of the peace in a criminal case shall be dismissed.

In district court.

SEC. 5102. (3365.) If any proceedings be necessary to carry the judgment upon the appeal into effect they shall be had in the district court.

Who may appeal.

SEC. 5103. Either party may appeal from the judgment of the district court, to the supreme court, in the same manner, as from a judgment in a prosecution by indictment, and the defendant may be admitted to bail, in like manner, and similar proceedings shall be had on the appeal in all respects, as nearly as applicable.

Judgment upon  
appeal.

SEC. 5104. The same proceedings shall be had to carry into effect the judgment of the supreme court upon the appeal, as if it had been taken from a judgment prosecuted by indictment.

DECISIONS. A justice has not jurisdiction to try and determine the crime of marrying or of being married without license, which crime is a misdemeanor, he can only hold over, 4 Iowa, 450; the venue of one count of an information is aided by the venue of another count, 4 Iowa, 445; a subscription to the affidavit is one to the information, 4 Iowa, 446; no motion in arrest allowed, 5 Iowa, 260; a warrant which follows substantially the form of Code, is good, 4 Iowa, 445; [the case does not show the warrant:] act of Jan'y, 1854, applies to criminal as well as civil cases, 4 Iowa, 505; appeal to be at once perfected under chap. 209 of Code, 1 Iowa, 507; form of bond, *State v. Benecke*, June term, 1859; notice to district attorney, 8 Iowa, 399; on an appeal herein the affidavit will be taken as true, unless it be contradicted by the return of the justice, 4 Iowa, 338, 505; on a motion by the state to dismiss an appeal the affidavit of errors will be held true, unless controverted by the return of the justice, 4 Iowa, 453; in new trial on appeal in criminal cause the record is not evidence, 4 Iowa, 350; no errors but those assigned in the affidavit will be regarded by the district court on writ of error, 5 Iowa, 414.

## CHAPTER 242.

### PROCEEDINGS AND TRIAL BEFORE POLICE AND CITY COURTS IN INCORPORATED CITIES AND TOWNS.

Proceedings and  
trial.

SECTION 5105. The proceedings in police and city courts, in incorporated cities and towns, in criminal cases within their jurisdiction, to hear, try and determine, as prescribed in the fourth sub-division of section 4499, and within the local limits designated in section 4504 of this code, shall be governed and regulated by the provisions contained in chapter 241 of this code, unless when they are otherwise regulated by the special statutes creating or regulating such courts, or otherwise provided by law.

CHAPTER 243.

COMPROMISING CERTAIN OFFENSES BY LEAVE OF THE COURT.

SECTION 5106. When a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act constituting the offense, has a remedy, by a civil action, the offense may be compromised, as provided in the next section, except when it was committed:

When misdemeanor may not be compromised.

1. By, or upon an officer while in the execution of the duties of his office.
2. Riotously; or
3. With an intent to commit a felony.

SEC. 5107. If the party injured in such a case, appear before the court to which the papers on a preliminary examination are required to be returned, at any time before trial, on an indictment for the offense, or the trial of an appeal in the district court, and acknowledge in writing that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom. But in that case, the reasons for the order must be set forth therein, and entered upon the minutes.

Same.

Order.

SEC. 5108. The order authorized by the last section, is a bar to another prosecution for the same offense.

Bar.

SEC. 5109. No public offense can be compromised, nor can any proceedings for the prosecution or punishment thereof, upon a compromise, be stayed, except as provided in this chapter.

Public offense not to be compromised.

CHAPTER 244.

GENERAL PROVISIONS.

SECTION 5110. The provisions of the existing laws respecting the coroner and his duties;—the removal from office of officers other than state officers;—the settlement and support of the poor;—illegitimate children, and their maintenance;—intoxicating liquors, their sale and manufacture;—master and apprentice;—*habeas corpus*, and any other special proceedings of a criminal nature, shall govern the special subjects to which they relate, respectively, except where it is otherwise provided in this code.

General provisions.

SEC. 5111. Neither a departure from the form or mode prescribed by this code, in respect to any pleadings or other proceedings, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tends to his prejudice, in respect to a substantial right.

When proceeding invalid.

SEC. 5112. The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. This code establishes the law of this state, respecting the subjects to which it relates; and its provisions, and all proceedings under it are to be liberally construed, with a view to promote its objects, and in furtherance of justice.

What the code does and how construed.

Code how construed.	SEC. 5113. The provisions of the existing laws relative to the construction of the statutes of this state, are applicable to the construction of this code, unless when it may in this code be otherwise provided.
Same.	SEC. 5114. The terms "heretofore," and "hereafter," as used in this code, have relation to the time this code takes effect.
Code to prevail.	SEC. 5115. Whenever any act of a general nature passed at the present session of the general assembly, separate from this code, conflicts with, or contravenes any, of the provisions thereof, the provisions of this code shall prevail.

## CHAPTER 245.

### REPRIEVES, COMMUTATIONS, AND PARDONS, AND REMISSION OF FINES AND FORFEITURES.

[Code—Chapter 205.]

Governor may grant.	SECTION 5116. The governor has power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason, and to remit fines and forfeitures, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to the regulations prescribed in this chapter.
Suspend execution.	SEC. 5117. He has power, also, to suspend the execution of the sentence upon a conviction for treason, until the case shall be reported to the general assembly at its next meeting, when the general assembly shall either grant a pardon, commute the sentence, or grant a further reprieve.
Issue warrant.	SEC. 5118. He shall have power to issue his warrant to all proper officers, to carry into effect any act which he has power to do, and which is regulated in this chapter, subject to such regulations, and all such officers are required to obey such warrant.
Governor to report.	SEC. 5119. He must report to the general assembly, at its next meeting thereafter, each case of reprieve, commutation, or pardon, granted, and the reasons therefor, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the reprieve, commutation or pardon. He must, in like manner, also report the names of all persons in whose favor fines and forfeitures shall have been remitted, and the several amounts remitted.
Application for pardon, &c.	SEC. 5120. When an application is made to the governor for a pardon, reprieve, or commutation, or for the remission of a fine or forfeiture, he may require the judge of the court, or the district attorney, or attorney-general, by whom the action was prosecuted, or the clerk of such court, to furnish him, without delay, a copy of the minutes of the evidence taken on the trial, and of any other facts having reference to the propriety of the exercise of his powers in the premises.
In what case officer to make return to secretary of state.	SEC. 5121. Whenever any convict is pardoned, or reprieved, or his sentence commuted, or any fine or forfeiture is remitted, it is the duty of the officer to whom the warrant is directed, as soon as may be after executing the same, to make a return in writing thereon, to the secretary of state, of his doings under the same, and sign the same with his name of office, and must also file in the office of the clerk of the court in which the conviction was had, or in which it was to have been enforced, a certified copy of the warrant and return, the proper entries in relation to which shall be made by such clerk.

CHAPTER 246.

IMPRISONMENT FOR PUBLIC OFFENSES, AND THE DISCIPLINE OF PRISONS.

[Code—Chapter 186.]

SECTION 5122. (3103.) The common jails now erected or which may hereafter be erected in the several counties in this state, in charge of the respective sheriffs, are to be used as prisons:

Jails, for what used.

1. For the detention of persons charged with an offense, and duly committed for trial or examination.
2. For the detention of persons who may be duly committed to secure their attendance as witnesses on the trial of any criminal cause.
3. For the confinement of persons pursuant to sentence upon conviction for any offense, and of all other persons duly committed for any cause authorized by law.

And the provisions of this section extend to persons detained or committed by authority of the courts of the United states as well as the courts and magistrates of this state.

SEC. 5123. (3104.) It is the duty of the keeper of the jail of the county to see that the same is constantly kept in a cleanly and healthy condition, and he must pay strict attention to the personal cleanliness of all the prisoners in his custody as far as may be. Each prisoner must be furnished daily with as much clean water as may be necessary for drink and for personal cleanliness, and with a clean towel and shirt once a week, and must be served three times each day with wholesome food which must be well cooked and in sufficient quantity.

Keeper's duty.

SEC. 5124. (3105.) The sheriff of the county must keep a true and exact calendar of all prisoners committed to any prison under his care, which calendar must contain the names of all persons who are committed, their place of abode, the time of their commitment, the time of discharge, the cause of commitment, the authority that committed them, and description of their person; and when any prisoner is liberated such calendar must state the time when and the authority by which such liberation took place; and if any person escape it must state particularly the time and manner of such escape.

Sheriff's duty.

SEC. 5125. (3106.) At the opening of each term of the district court within his county the sheriff must return a copy of such calendar under his hand to the judge of such court, and if any sheriff neglect or refuse so to do he shall be punished by fine not exceeding one hundred dollars.

Calendar for court.

SEC. 5126. (3107.) Whenever any person is confined in any jail pursuant to the sentence of any court, if such sentence or any part thereof be confinement at hard labor, the sheriff must furnish such convict with suitable tools and materials to work with either in the jail or yard thereof, and the expenses of said tools and materials must be defrayed by the county in which said convict is confined, and such county is entitled to his earnings.

Hard labor

SEC. 5127. (3108.) The keeper of each jail must furnish necessary bedding, clothing, fuel, and medical aid for all prisoners under his charge and keep an accurate account of the same.

What furnished prisoners

SEC. 5128. (3109.) Whenever by reason of any jail being on fire, or any building contiguous or near to a jail being on fire, there be reason to apprehend that the prisoners confined in such jail may be injured or endangered thereby, the sheriff or keeper of such jail may at his

Prisoners in case of fire.

- discretion remove such prisoners to some safe and convenient place and there confine them so long as may be necessary to avoid such danger.
- Who are inspectors of jails. SEC. 5129. In each county of this state, the judge of the county court, and district attorney, are inspectors of the jails respectively, and have power from time to time, to visit and inspect the same and inquire into all matters connected with the government, discipline, and police of such prisons.
- Their duty. SEC. 5130. (3111.) It is the duty of such inspectors to visit and inspect such prisons twice each year, and at the next district court which is thereafter held in their county to present to such court on the first day of its sitting a detailed report of the condition of such prisons at the time of such inspection.
- Their report. SEC. 5131. (3112.) Such report must state the number of persons confined in such prisons and for what causes respectively, the number of persons usually confined in one room, the distinction if any, usually observed in the treatment of prisoners, the evils if any found to exist in such prisons; and particularly, whether any of the provisions of this chapter have been violated or neglected and the causes of such violation or neglect.
- Right to inspect all things. SEC. 5132. (3113.) It is the duty of the keepers of such prisons to admit the said inspectors or any of them into every part of such prisons, to exhibit to them on demand, all the books, papers, documents, and accounts pertaining to the prison or to the prisoners confined therein, and to render them every other facility in their power to enable them to discharge the duties above prescribed.
- May swear officers, &c. SEC. 5133. (3114.) For the purpose of obtaining the necessary information to enable them to make such report as is above required in this chapter, the said inspectors have power to examine on oath, to be administered by either of them, any of the officers of such prison or any of the prisoners therein.
- Prisoners refractory. SEC. 5134. (3115.) If any person confined in any jail upon a conviction or charge of any offense is refractory or disorderly, or if he willfully destroy or injure any article of bedding or other furniture, door or window, or any other part of such prison, the sheriff of the county after due inquiry may chain and secure such person, or cause him to be kept in solitary confinement not more than ten days for any one offense; and during such solitary confinement he must be fed with bread and water only, unless other food is necessary for the preservation of his health.
- Expenses of jail. SEC. 5135. (3116.) All charges and expenses of safe keeping and maintaining convicts and persons charged with public offenses and committed for examination or trial to the county jail, shall be paid from the county treasury, the accounts therefor being first settled and allowed by the county court; except prisoners committed or detained by the authority of the courts of the United States, in which cases the United States must pay such expenses to the county.

JOHN EDWARDS,

*Speaker of the House of Representatives.*

N. J. RUSCH,

*President of the Senate.*

Approved March 30, 1860.

SAMUEL J. KIRKWOOD.



CHAPTER 247.

THE PENITENTIARY OF THE STATE, AND THE GOVERNMENT AND DISCIPLINE THEREOF.

[Code—Chapter 187.]

ARTICLE 1.

SECTION 5136. (3117.) The penitentiary at Fort Madison in the county of Lee shall continue to be maintained as the penitentiary of this state, in which convicts sentenced for life or any term of time shall be confined, employed, and governed, as hereinafter provided. At Fort Madison

SEC. 5137. (3118.) All punishment in the penitentiary by imprisonment must be by confinement to hard labor, and not by solitary imprisonment; but solitary imprisonment may be used as a prison discipline for the government and good order of the convicts as hereinafter mentioned. Punishment, hard labor.

SEC. 5138. (3119.) Convicts sentenced to hard labor in the penitentiary for life or any term of time by any court of the United States held within this state must be received into the prison by the warden thereof, when delivered by the authority of the United States, and there kept in pursuance of their sentences. Prisoners of United States.

[Sections 3120, 3121, 3122, 3123, 3124, repealed by section 5973.]

SEC. 5139. (3125.) It is the duty of the *inspectors*\* to inquire into any improper conduct which may be alleged to have been committed by the warden or any subordinate officer of the prison in relation to the concerns thereof, and for that purpose may issue subpoenas for witnesses to compel their attendance and the production of papers and writings, and may examine witnesses under oath to be administered by the chairman, and may adjudicate on such alleged improper conduct in like manner and with like effect as in case of arbitration. Inquire into conduct of officers

SEC. 5140. (3126.) The *inspectors*\* must examine into all disorderly conduct among the prisoners, and when it appears to them that such conduct is disorderly, refractory, or disobedient, they may order such punishment as they may deem necessary to enforce obedience and as shall not be inconsistent with humanity and may be authorized by the rules and regulations established for the government of the prison. And of prisoners

SEC. 5141. (3127.) The *inspectors*\* must from time to time establish such rules and regulations consistent with the laws of the state as they may deem necessary and expedient for the direction of the officers, agents, and servants of the prison in the discharge of their respective duties; or for their respective compensation not established by law; for the government, instruction and discipline of the convicts and for their clothing and subsistence; and for the custody, preservation and management of the public property; and so soon as may be after the establishment of the same by the *inspectors*, they shall cause a copy thereof to be laid before the governor, who may approve or modify the same and make and establish such other rules and regulations consistent with the laws of the state as to him may seem fit; and the governor must communicate all such rules and regulations as shall be thus approved or established to the next legislature after the same have been so approved and established. Establish regulations.

\* \* \* \* \*

\* Is not this duty now devolved on the warden by act of 8th session, chapter 97, art. 5 hereof?

- Duty of warden.** SEC. 5142. (3128.) The warden must not carry on nor be concerned in the business of trade or commerce during his continuance in office; he must reside constantly within the precincts of the prison, and shall have the care and custody of the prison and of the convicts therein in conformity to their respective sentences, and of the lauds, buildings, machines, tools, stock, provisions, and every other kind of property belonging to or within the precincts of the same. He is the treasurer of the prison and must receive, pay out, and be accountable for all moneys granted for maintaining the same or derived from the manufactures or other concerns thereof, and shall make or cause to be made in the books of the prison regular entries of all pecuniary and other concerns of the prison. \* \* \* \* \*
- Oversee convicts.** SEC. 5143. (3129.) It is the duty of the warden to inspect and oversee the conduct of the convicts and cause all the rules and regulations of the prison to be strictly and promptly enforced. \* \* \* He has authority to punish any convict for disobedience, disorderly behavior, or indolence, in such manner as may be \* \* \* prescribed in the rules and regulations, and must keep a register of all such punishments and the cause for which they were inflicted.
- Serve process in prison.** SEC. 5144. (3130.) The warden or his deputy shall serve, execute and return all process within the precincts of the prison, and such process may be directed to him or his deputy accordingly; and for the doings of his deputy the warden as well as his deputy is answerable. The warden shall have the command of all the force for guarding the prison and of all officers and persons employed under him.
- Contracts for supplies.** SEC. 5145. (3131.) All articles of food, clothing, bedding, raw materials for manufacture, fuel, and other articles that may be necessary for the use of the prison, must be contracted for by the year when such contracts can be advantageously made, in the following manner: the warden shall annually make an estimate of the quantity of each article necessary for the then next ensuing year, commencing on the first day of October of each year and ending on the last day of September thereafter, and advertise that he will receive sealed proposals for furnishing and delivering at the prison such articles or any of them until the first day of October; payments to be made quarterly, stating the quantity and quality of each article required, the time when each article must be delivered, and the terms of payment; which advertisement he shall cause to be inserted in one or more of the papers published in Fort Madison and in one or more of the papers published at the seat of government of this state, three weeks successively, the last publication to be at least one month before the first day of October in each year.
- Proposals examined.** SEC. 5146. (3132.) The *inspectors*\* must meet at the prison within five days next after the first day of October of each year, and having first estimated the lowest price at which each article advertised for can be procured shall open and examine the proposals; and the lowest offer for furnishing any article, not being above the market price, shall be accepted if good security be given to the warden for the faithful performance of the contract.
- Same.** SEC. 5147. (3133.) If no such offer be made below the estimated market price or if any article should not be included in such advertisement or if the *inspectors*\* should deem it expedient to decline any or all of such proposals, the warden may procure such articles as may be

\* Does not the substance of this section apply to warden under law of 8th sess., chap. 97, art. 5th hereof?

necessary for the prison by advertising anew or in such manner as may be prescribed by the *inspectors*.

SEC. 5148. (3134.) The warden must take bills of the quantity and price of the supplies furnished for the prison at the time of delivery and must exhibit the same to the clerk who must compare the same with the articles delivered; if the bills are found correct he must enter them with the date in a book to be kept for that purpose; in like manner bills shall be taken and entered of all services rendered for the prison; if any such bill be found incorrect the clerk shall omit to enter it and immediately give notice to the warden, that the error may be corrected.

Warden to take bills of supplies.

SEC. 5149. (3135.) No contract can be accepted by the warden unless the contractor give satisfactory security for the performance of it, and no officer of the prison shall be directly or indirectly interested in any such contract.

Security required.

SEC. 5150. (3136.) All actions founded on contract made with the warden in his official capacity may be brought by or against the warden for the time being; and any action for injuries done or occasioned to the real or personal property belonging to the state and appropriated to the use of the prison or being under the management of the warden thereof may be prosecuted in the name of the warden for the time being, and no such action shall abate by the warden's ceasing to be in office, but his successor, upon notice, is required to assume the prosecution or defense of the same. In any such action the warden is a competent witness, and his property shall not be taken or attached in any such suit nor shall any execution issue against him on any judgment thereon, but such judgment shall stand as an ascertained claim against the state; and whenever a new warden is appointed all the books, accounts and papers belonging to the prison shall be delivered to him, and he shall be vested with all the powers and subject to all the obligations with regard to any contracts or any debts due to or from the prison that his predecessor would have been if no change had taken place in the office.

Actions on such contracts.

SEC. 5151. (3137.) Whenever the office of warden is vacant or he is absent from the prison or unable to perform the duties of his office, the deputy warden has the power to perform the duties, and shall be subject to all the obligations and liabilities, of the warden.

Wardenship vacant.

[3138, superseded by act of eighth session, chapter ninety-seven, article five hereof.]

SEC. 5152. (3139.) It is the duty of the clerk and commissary to keep an exact account of all supplies purchased for the use of the prison as before provided in this chapter and of all the articles sold and delivered from the same, and to assist in effecting sales and purchases in such manner as the warden may direct; \* \* \* \* and perform such other services pertaining to his employment and the superintending of the prison as may be directed by the \* \* \* warden.\*

Duty of clerk.

SEC. 5153. (3140.) Persons having suitable knowledge and skill in the branches of labor and manufacture carried on in the prison may when practicable be employed as overseers; and they must respectively superintend such portions of the labor of convicts for which they are most suitably qualified, and which shall be assigned to them by the warden; and all of them as well as the other subordinate officers of the prison must perform such services in the management, superintending, and guarding of the prison as may be prescribed by the rules and regulations or directed by the warden.

Overseers.

\* See laws of eighth session chapter ninety-seven, article five hereof

- Delinquency of officers.** SEC. 5154. (3141.) If any subordinate officer of the prison is guilty of negligence or unfaithfulness in the discharge of his duties or of a violation of any of the laws or rules and regulations for the government of the prison, the warden, \* \* \* \* may deduct from the pay of such officer a sum not exceeding his pay for one month.\*
- Physician.** SEC. 5155. (3142.) The *inspectors*† must appoint some suitable person to be a physician and surgeon to the penitentiary, whose duty it is to visit the prison whenever requested by the warden, prescribe for the convicts who may be sick, see that the proper attention be paid to the clothing, regimen and cleanliness of such as may be in the hospital, and advise when the illness of any convict may require his removal to the same; and upon such advice he must forthwith be removed to the hospital, there to receive such care and attention and be furnished with such medicines and diet as his situation may require until the physician determine that he may leave it without injury to his health.
- Pestilence among convicts.** SEC. 5156. (3143.) In case of any pestilence or contagious sickness breaking out among the convicts in the prison the \* \* warden\* may cause the convicts confined therein or any of them to be removed to some suitable place of security where such of them as are sick shall receive all necessary care and medical assistance. Such convicts must be returned as soon as may be to the penitentiary, to be confined according to their respective sentences if the same be unexpired.
- Convicts suffered at large.** SEC. 5157. (3144.) If any officer or other person employed in the prison or its precincts negligently suffer any convict confined therein to be at large without the precincts of the prison or out of the cell or apartment assigned to him, or to be conversed with, relieved, or comforted contrary to law or the rules and regulations of the prison, he shall be punished by fine not exceeding five hundred dollars.
- Resistance to authority.** SEC. 5158. (3145.) If a convict sentenced to the penitentiary resist the authority of any officer or refuse to obey his lawful commands, it is the duty of such officer immediately to enforce obedience by the use of such weapons or other aid as may be effectual; and if in so doing any convict thus resisting be wounded or killed by such officer or his assistants they are justified and shall be held guiltless.
- Insurrection.** SEC. 5159. (3146.) It is the duty of all the officers and other citizens of this state by every means in their power to suppress any insurrection among the convicts sentenced to the penitentiary, and to prevent the escape or rescue of any such convict therefrom, or from any other legal confinement, or from any person in whose legal custody they may be; and if in so doing or in arresting any convict who may have escaped such officer or other person wound or kill such convict or other person aiding or assisting such convict, they shall be justified and held guiltless.
- Escape.** SEC. 5160. (3147.) When any convict escapes from the penitentiary it is the duty of the warden to take all proper measures for his apprehension; and for that purpose he may offer a reward not exceeding fifty dollars, to be paid by the state, for the apprehension and delivery of such convict.
- Discharge.** SEC. 5161. (3148.) No convict can be discharged from the penitentiary until he has remained the full term for which he was sentenced, to be computed from and including the day on which he was received into the same, exclusive of the time he may have been in solitary confine-

\* See laws of eighth session, chapter ninety-seven, article five hereof.

† The substance of this seems of force; laws of eighth session chapter ninety-seven, article five hereof.

ment for any violation of the rules and regulations of the prison, unless he be pardoned or otherwise released by legal authority.

SEC. 5162. (3149.) It is the duty of the warden to receive and take care of any property that a convict may have with him at the time of his entering the penitentiary, and, when it may be convenient, to place the same at interest for the benefit of such convict; of which property the warden must keep an account and pay the same to such convict on his discharge, or in case of his death to his representatives, unless the same have been otherwise legally taken and disposed of. Property of convicts.

SEC. 5163. (3150.) When any convict is discharged from the penitentiary who has conducted well during his imprisonment, the warden at his discretion may give to such convict from the funds of the prison a sum not exceeding five dollars, and if he desire it a certificate of such good conduct, and must take care that every convict on his discharge from the penitentiary is provided with decent clothing. Good conduct.

SEC. 5164. (3151.) The warden has authority to demand and receive of each person, not exempt by law, who visits the prison for the purpose of viewing the interior or precincts, such sum not exceeding twenty-five cents and under such regulations as the *inspectors*\* may prescribe, of which the warden must keep an account, and which money shall be applied for the purchase of books for the use of the prison under the direction of the inspectors. Fee from visitors.

SEC. 5165. (3152.) The following persons are authorized to visit the penitentiary at pleasure; the governor, secretary, auditor, and treasurer of state, members of the general assembly, judges of the supreme, district and county courts, *prosecuting*† attorneys of any of the counties of this state, and all regular officiating ministers of the gospel; and no other person shall be permitted to go within the walls of the prison where convicts are confined except by special permission of the warden or under such regulations as the *inspectors*‡ shall prescribe. Who authorized to visit.

SEC. 5166. (3153.) It is the duty of the \* \* \* warden§ to see that rigid economy is practiced in all matters pertaining to the prison and the employment of the convicts, and that duplicate receipts be taken for all expenditures made on account of the prison, one copy of which must be forwarded to the auditor of state monthly. Economy. Receipts.

SEC. (3154.) [Repealed.]

SEC. (3155.) [Substituted by section 5168.]

ARTICLE 2.

An Act supplemental to chapter 187 of the Code concerning the Penitentiary of the state, and the Government and Discipline thereof.

[Passed January 13, 1853, took effect July 1, 1853; *Laws of Fourth General Assembly, Chapter 14, page 37.*]

SECTION 5167. *Be it enacted by the General Assembly of the State of Iowa,* That the *inspectors and warden*|| of the Iowa penitentiary or a majority of them be, and they are hereby authorized and empowered to lease or hire out the prisoners to be worked in the shops upon the prison grounds, if they shall deem that the interests of the state will be best promoted by so doing. Lease.

\* Warden, laws of eighth session, chapter 97, article 5 hereof.

† District, see chapter 25.

‡ Warden, law of eighth session, chapter 97, article 5 hereof.

§ Laws of eighth session, chapter 97, article 5 hereof.

|| Inspectors abolished. Section 5173.

An Act to amend chapter 187 of the Code of Iowa, relating to the Penitentiary of the State.

[Passed January 24, 1855, took effect February 7, 1855; Laws of Fifth General Assembly, Chapter 96, page 157.]

[Repealed by laws of eighth session, chapter 97, article 5 hereof.]

### ARTICLE 3.

An Act to provide for the appointment of Warden of the Iowa Penitentiary and to amend the several acts relative to the Government and Discipline of the Penitentiary.

[Passed January 22, 1857, took effect February 9, 1857; Laws of Sixth General Assembly, Chapter 76, page 81.]

SECTION (1.) [Repealed by laws of eighth session, chapter 97, article 5 hereof.]

Perquisites abolished.

SEC. 5168. (2.) No officer or other person employed in or about the penitentiary, shall be permitted to receive in any way, perquisites for themselves or families, except that the warden shall keep his office, and reside with his family in the penitentiary, and shall be furnished with a garden of a quarter of an acre, and with fuel, and lights, and stationery, from the stock provided for the use of the prison. Nor shall they be permitted to receive any compensation or reward from any contractor, under penalty of dismissal from their office, and forfeiture of one month's pay, or either, as the *inspectors*\* shall determine; and if any officer procure the escape of any convict, or connive at, aid or assist in the escape of any convict from the penitentiary, whether such convict escape or not, he shall be guilty of felony; and shall, upon conviction thereof, be sentenced to hard labor in the penitentiary, for any term not less than one, nor more than three years. \* \* \* [The rest repealed by laws of eighth session, chapter 97, article 5 hereof.]

Compensation forbidden.

Penalty.

Duty of deputy warden.

SEC. 5169. (3.) It shall be the duty of the deputy warden to keep a book in which shall be entered a record of every infraction of published rules of discipline, with the name of the prisoner so guilty, which record shall be submitted to the *inspectors*\* at each quarterly meeting, and every prisoner who shall have been sentenced for a term of years, who shall at the end of the month have no infraction of the discipline recorded against him, shall for the first month be entitled to a diminution of one day from the time he was sentenced to the penitentiary; and if at the end of the second month, no infraction of the rules is recorded against him, two additional days of diminution from his sentence; and if he shall continue to have no such record against him for the third month, his time shall be shortened three additional days; and if he shall so continue for subsequent months, he shall be entitled to four days diminution of time from his sentence for each month he shall so continue his good behavior; and if any prisoner shall so pass the whole term of his service, or the remainder of his sentence after this act take effect: *provided*, he shall have the time of one year yet to serve, he shall be entitled to a certificate thereof from the warden, and upon the presentation thereof to the governor, he shall be entitled to a restoration of the rights of citizenship, which may have been forfeited by his conviction, and it shall be the duty of the warden to discharge such convict from the penitentiary, when he

\* Inspectors abolished, 5173.

shall have served the time of his service, less the number of days he may be entitled to have deducted therefrom, in the same manner as if no such deduction had been made: *provided*, that if such convict shall be guilty of a violation of the printed and published rules of the prison, after he shall, as provided in this section have become entitled to a diminution of his term of service to which he has been sentenced, the *inspectors*\* shall have the power to deprive, at their discretion, such convict of a portion, or all (according to the flagrance of the violation of discipline) of the diminution of the term of sentence to which he had been previously entitled by this act.

[Sections 4, 5 and 6, repealed.]

ARTICLE 4.

An Act to prohibit the Inspectors, Wardens, and other officers of the Iowa Penitentiary, from being interested in contracts for furnishing such Penitentiary with provisions, clothing or other necessaries, and from being concerned or interested in contracts for building or furnishing building materials for such Penitentiary.

[Passed March 22, 1858, took effect April 7, 1858; Laws of Seventh General Assembly, Chapter 116, page 235.]

SECTION 5170. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That no \* \* \* \* warden or other officer of the Iowa penitentiary, shall be interested directly or indirectly in contracts for furnishing such penitentiary with provisions, clothing or other necessaries, to be used in any manner by the inmates of such penitentiary, or for the use of such penitentiary, nor shall any or either of such officers be concerned or interested in any manner in contracts for buildings of any kind connected with such penitentiary, or for materials to be used in any such buildings.

Officers can not take contracts.

SEC. 5171. (2.) Should any person, in the contemplation of section one of this act, of the Iowa penitentiary, be or become in any manner interested in contracts for furnishing provisions, clothing or other necessaries for the use of such penitentiary, or be or become in any manner interested in contracts for buildings, or the construction of buildings, of any kind, in any way connected with such penitentiary, or for furnishing material of any kind for the construction of such buildings, such officer so interested, shall, on proof being made of his being so interested, be removed from office, and shall forfeit any interest he may have in any such contract, and on conviction of being so interested by a court of competent jurisdiction shall be fined in any sum not more than two thousand dollars nor less than five hundred dollars.

Violation of this act punished by removal and fine

SEC. 5172. (3.) \* \* \* \* the district attorney of the judicial district in which Lee county may be situate shall prosecute any complaint made against any officer or other person who may become subject to the provisions of this act.

Attorney appointed to prosecute.

ARTICLE 5.

An Act in relation to the government of the Penitentiary of Iowa—the appointment of its officers—fixing their salaries—and punishing malfeasance in office.

[Passed April 2, 1860; Laws of Eighth General Assembly, Chapter 97.]

SECTION 5173. (1.) *Be it enacted by the General Assembly of the State of Iowa*, That the office of inspector of the penitentiary is

Office of inspector abolished

\* The spirit of this section seems of force.

	hereby abolished and the government of said institution shall be under a warden, subject to the supervision of the governor of the state.
Warden elected by general assembly.	SEC. 5174. (2.) Said warden shall be elected by joint ballot of the general assembly of the state of Iowa, and shall hold his office for two years from the date of his election, and until his successor is elected and qualified. He shall be the general financial and superintending agent of the state for said institution, and shall be held responsible for its government and disciplinary regulations, for the receipt and disbursement of all moneys that may be appropriated for building, construction, general support, the payment of indebtedness, or salaries of his under officers, or for any other purpose whatever in connection with said institution.
Term of office.	
Warden to give bond.	SEC. 5175. (3.) Before entering upon the discharge of his duty, he shall execute a bond payable to the state of Iowa, in the penal sum of fifty thousand dollars, with not less than five free-hold securities, to be approved by the governor, conditioned that he will faithfully discharge all of his duties as general superintendent, and financial agent of the state for said institution, that he will faithfully apply any and all moneys that may come into his hands by virtue of his office, to the purposes for which they are appropriated, and none other; that he will cause to be kept a fair, intelligible and business-like record of all the transactions of a monetary character, connected with the institution; that he will impartially and to the best of his ability administer the disciplinary regulations of the institution, so as to contribute to the health, safe-keeping, and profitable employment of the convicts; that he will appoint no one to the office of clerk, deputy warden, or guard, through favoritism, or other personal consideration; and no one without due and proper regard to their qualifications for said stations; that he will render a faithful account of all the transactions of the institution to the governor or his lawfully authorized agent, every thirty days, and as much oftener as he may be required; that he will not become directly or indirectly interested in any contract for supplying materials, labor, provisions, clothing, or any other thing for the use of said penitentiary, whereby any profit may inure to him privately, and that at the expiration of his official term he will surrender all books, papers, records, moneys, or other property or securities belonging to said institution, to his successor in office. Said warden shall also take and subscribe an oath or affirmation, which shall be indorsed on the back of said bond, that he will support the constitution of the United States and the constitution of the state of Iowa, and that he will scrupulously observe all the stipulations and conditions of said bond, and faithfully discharge all his duties agreeably to law, according to the best of his judgment and ability, which bond shall be filed with the secretary of state.
Its conditions.	
Take oath.	
Take charge of penitentiary, &c.	SEC. 5176. (4.) The warden thus elected and qualified, shall take charge of the penitentiary, and of all the interests of the state therewith connected, and shall appoint some suitable person as clerk, (who shall also act as commissary under the direction of the warden,) and one deputy, and as many guards as may be necessary to the safe-keeping and government of the convicts, not exceeding one for every ten convicts under his charge.
May appoint clerk.	
Warden to render monthly statement to governor.	SEC. 5177. (5.) The warden shall render to the governor of state, between the 1st and 10th day of every month, and as nearly as practicable every thirty days, and as much oftener as the governor may require, a statement, under oath, of all the transactions of the institution, including the receipts or disbursements of funds, (for which disbursements he



shall, in all cases, present the proper vouchers,) the entering into or discharging contracts, the reception and discharge of convicts, the construction, altering or repairing the buildings, walls, &c., and of all his official acts and doings for the thirty days next preceding the presentation of said monthly report, which statement must contain an exact account of all moneys received, from what source, and on what account, and of all moneys paid out, and for what purpose the same was expended, and a succinct account of all his doings, as warden, during the said period, and a reference to his authority for such action.

SEC. 5178. (6.) Said warden shall, in addition to the monthly report provided for in the preceding section of this act, on or before the 20th day of December next preceding the commencement of any regular session of the general assembly, report to the governor, under oath, all his acts and doings for the preceding two years, and the general condition of the institution, financially and otherwise, together with the estimates necessary for the next succeeding two years, specifying distinctly the items for which those estimates and the basis upon which his calculations are made, and the governor may require a like or any other report before any special session of the general assembly.

To report to governor immediately preceding a regular or special session of general assembly.

SEC. 5179. (7.) Said warden shall see that the laws and disciplinary rules and regulations of the institution are faithfully executed by his under officers, and obeyed by the convicts; and it shall be his duty, upon failure or refusal of any clerk, deputy warden or guard, to discharge their respective duties agreeably to law, forthwith to discharge such delinquent, and fill the vacancy by the appointment of another person; and disobedience of the convicts shall be punished by the infliction of such penalties as are now provided for by law, and the rules which are now, or may hereafter be prescribed for the government of said institution.

To enforce discipline.

Officials for neglect of duty discharged.

Convicts punished.

SEC. 5180. (8.) The clerk of the penitentiary shall receive his appointment from and hold his office during the pleasure of the warden, and be in all things responsible to said warden. Before he enters upon the discharge of his duties he shall give bond to the state of Iowa in the penal sum of five thousand dollars, with two or more free-hold securities to be approved by the governor, conditioned that he will keep a fair, honest, impartial and faithful record of the affairs of the penitentiary, written in fair round hand with proper indices, upon a system of book-keeping, which shall enable him at all times to present in a plain and intelligible style the financial condition of the institution, that he will discharge all his duties of clerk, and commissary faithfully, and with direct reference to the best interests of the penitentiary, agreeably to law, and that he will not become interested directly or indirectly in any contract for furnishing supplies of any nature, kind or description, for the use of said institution, and that he will yield strict and implicit obedience to the laws, rules and regulations of the institution, and to all the legal orders of the warden. He shall, also, take and subscribe an oath which shall be indorsed on the back of said bond, that he will support the constitution of the United States and the constitution of the state of Iowa, and that he will scrupulously observe all the conditions, stipulations and requirements of his bond, and will faithfully discharge his duty as clerk and commissary during his continuance in office agreeably to law, according to the best of his judgment and ability; which bond shall be filed in the office of the secretary of state, and suit thereon may be brought for the violation of any of its conditions in the name

Clerk appointed by warden.

Bond conditions of.

Bond filed.

- of the state, for the use of the warden, or any other person injured by such violation.
- How clerk shall keep books.** SEC. 5181. (9.) Among other entries which it shall be the duty of the clerk to make in the books of the institution—he shall open a separate account in said books with the state, and he shall also have a cash, prisoners fund, construction, repairing, provision, bedding and lights, fuel, salaries, hospital, and miscellaneous account, and an account with the lessees of convict labor, and an account with each officer and guard; and all the entries belonging to any one of the classes whether they are debits or credits shall be made under the appropriate head; and in order to enable the warden to render his statements herein provided for, to the governor, the clerk shall whenever required by the warden, make out a complete balance sheet and swear to the same.
- Deputy warden appointed by warden.** SEC. 5182. (10.) The deputy warden shall receive his appointment from the warden, and shall hold his office during the pleasure of the warden; and he shall give bond and security for a like amount, and in the same manner; and take a like oath, and be in all respects subject to like responsibilities with the clerk, so far as the same are applicable. He shall keep a regular time table of the convict labor, and record the same in a book to be kept for that purpose, and he shall moreover keep a record of all the business under his control, and return an account thereof, together with an account of the convict labor to the clerk at the close of each day.
- Gives bond and takes oath same as clerk.**
- His duties.**
- Guards.** SEC. 5183. (11.) Each of the guards when appointed shall give bond to the warden with security to be approved of by said warden, in the penal sum of one thousand dollars, conditioned that he will faithfully discharge his duty as such guard, agreeably to law and the rules and regulations of the prison, and the lawful orders of the warden; and shall also take and subscribe an oath which shall be indorsed on the back of his bond, that he will support the constitution of the United States, and the constitution of the state of Iowa, and that he will scrupulously observe all the conditions and stipulations of his bond; which bond shall be filed in the office of the clerk of the penitentiary, and a note thereof made on the record as to the date, amount, and name of the principal and his securities.
- Bond.**
- Oath.**
- Term of office.** SEC. 5184. (12.) Guards thus appointed and qualified shall hold their offices during the pleasure of the warden.
- Minister of the gospel to be appointed chaplain.** SEC. 5185. (13.) It shall be the duty of the warden to appoint some suitable discreet minister of the gospel, chaplain of the penitentiary, who shall hold his office at the pleasure of the warden, and who shall give as much of his time as the condition and employment of the convicts will reasonably justify, in giving them moral and religious instruction, and who shall at all times, when in the opinion of the warden, the necessary labor of the convicts or the safety of the prison do not forbid it, have access to the convicts for that purpose; and should any of the convicts be illiterate, the chaplain should so instruct them as that he may sustain the character among them of teacher as well as spiritual advisor and minister.
- To be a teacher as well as spiritual advisor.**
- Duty of the governor.** SEC. 5186. (14.) It shall be the duty of the governor to visit said penitentiary personally, as often at least, as once in three months, to inspect the books, papers, and records of the clerk, and deputy warden, and strictly to inquire into the official conduct of the warden, to examine into the general economical, sanitary and disciplinary regulations of the prison; and to alter and amend the same in any manner which may be best calculated to promote economy in expenditure, and the health, safe

keeping and obedience of convicts, and all such alterations and amendments shall be reduced to writing, and signed by the governor, and filed by him with the clerk, who shall forthwith record the same. And in case it is impracticable at any time for the governor to make such visit and inspection personally, he may appoint some suitable person to perform that service and report to him; but such person so appointed shall not have the power to make any alteration in the government of the institution, but may report to the governor only; and it is hereby made the duty of the governor to perform the service personally if practicable.

Governor may appoint visitor in his absence.

SEC. 5187. (15.) In making the appointment of visitor, as provided for in the last section, the governor shall take care that no one is appointed who may be supposed to be under the influence surrounding said penitentiary, or any of its officers, nor shall any one be appointed who has hitherto been officially connected therewith, nor shall the same person be appointed twice in succession.

Appointee to be disconnected with Penitentiary.

Not to be appointed twice in succession.

SEC. 5188. (16.) Should the governor at any time become satisfied that the warden is guilty of official negligence or malfeasance, in any particular, so that the safety or health of the convicts is endangered, or any funds appropriated for said institution illegally invested or misapplied, or that said warden is in any manner conducting the affairs of the prison contrary to law and good faith, he shall forthwith remove said warden, notifying him of the specific causes for his removal, and also reporting to the next session of the general assembly, specifically his reasons therefor. He shall also appoint a warden to fill the vacancy thus occasioned, who shall qualify in the same manner as the regularly elected warden, but shall hold his office only until the next succeeding general assembly.

Governor may remove warden.

Vacancy filled by appointment.

SEC. 5189. (17.) The governor shall also fill all vacancies that may occur in the office of warden by death, resignation or otherwise, between the sessions of the general assembly, but no appointment thus made shall last over a session of the general assembly.

Governor to fill all vacancies.

SEC. 5190. (18.) The warden of the penitentiary shall receive one thousand dollars per annum, to be paid out of the state treasury quarterly, as his salary, and at the end of each quarter he shall obtain from the governor a certificate of the amount due him for salary, which certificate shall authorize the auditor to draw his warrant on the state treasury for the amount therein specified, in favor of said warden.

Salary of warden.

SEC. 5191. (19.) The clerk and deputy warden shall each receive seven hundred and fifty dollars per annum as their salaries, respectively to be paid in like manner as the warden.

Salary of clerk and deputy warden.

SEC. 5192. (20.) Each night-guard shall receive fifty dollars per month for his services; and each wall-guard forty dollars per month for his services; and each shop or house-guard, thirty dollars per month for his services, to be audited by the warden and paid at the end of each month out of the fund especially designated for the payment of guards and chaplains' salary.

Salaries of guards.

SEC. 5193. (21.) The chaplain shall receive for his salary five hundred dollars per annum, or at that rate for the time actually employed by him in the discharge of the duties herein assigned him, or required by the warden, which shall be paid at the end of each quarter out of the fund specified in the last preceding section, upon the warden's certificate, appended to the statement of the chaplain as to the amount of time he was actually employed during the preceding quarter.

Salary of chaplain.

SEC. 5194. (22.) For the services herein required of the governor, he

Governor to be allowed traveling expenses.

shall be allowed out of the state treasury his traveling expenses, and he shall present a bill therefor, under oath, to the auditor of state, which bill, thus sworn to, shall be a sufficient voucher for the auditor to issue his warrant on the treasury of the state for the amount so claimed.

Compensation of visitor appointed by governor.

SEC. 5195. (23.) Should the governor be compelled to appoint any person, or persons, to visit the penitentiary, as provided in the fourteenth section of this act, such person shall render to the governor an account of his traveling expenses and time employed under said appointment, which account shall be sworn to, and the governor shall determine the amount to which said person is entitled, not exceeding three dollars per day and expenses, and shall give him a certificate thereof, which certificate shall authorize the auditor to issue his warrant on the treasury of state for said amount, in favor of the person entitled thereto.

Failure to perform duty, a misdemeanor.

SEC. 5196. (24.) Should any person required by this act to perform any duty under the same, or any other law of this state relative to the penitentiary, willfully fail or refuse obedience thereto, he shall be deemed guilty of a misdemeanor, and shall be punished by fine in any sum not exceeding one thousand dollars, and shall forfeit his office, and should said willful failure or refusal result in the escape of any of the convicts, or in the loss of any of the funds appropriated to the use and benefit of the penitentiary, provided said sum so lost shall exceed the amount of twenty dollars, he shall be deemed guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term not less than two nor more than ten years.

Punished by fine and forfeiture of office.

Proviso.

SEC. 5197. (25.) The present warden, Edward A. Leyton, shall continue in office until the next regular session of the general assembly: *provided*, that he shall immediately qualify, and conform in the appointment of his under officers, (and require them to do likewise,) and in all other respects to the provisions of this act; and *provided further*, that he is not sooner removed by the governor for cause.

Edward A. Leyton, to continue in office until session of general assembly.

Proviso.

SEC. 5198. (26.) All acts and parts of acts contravening the provisions of this act, shall be and the same are hereby repealed.

Repeal.

PRIOR LAWS. 1. An act to provide for the completion of the penitentiary, passed Feb. 5, took effect Feb. 26, 1851; 3d sess., chap. 87, p. 205.

2. An act to provide for election of warden, passed Jan. 14, took effect Jan. 19, 1853; 4th sess., chap. 17, p. 40.

3. "An act to amend chap. 187 of the Code of Iowa, relating to the penitentiary of the state," passed Jan. 24, took effect Feb. 7, 1855; 5th sess., chap. 96, p. 157.

4. "An act providing for imprisonment within the Iowa Penitentiary," passed Jan. 15, took effect Feb. 6, 1857; 6th sess., chap. 37, p. 30.

PRIOR LAWS UNDER TITLES 24 AND 25 OF CODE OF 1851, WHICH ARE INCLUDED IN THIS CODE. 1. An act to regulate general proceedings in criminal causes, passed April 22, 1833; M. D., 1833, p. 485.

2. An act for providing and regulating prisons, passed April 12, 1827; M. D., 1833, p. 495.

3. An act as to escape of prisoners, passed May 3, 1821; M. D., 1833, p. 500.

4. An act on fines, penalties, and forfeitures, passed April 12, 1827; M. D., 1833 p. 501.

5. An act for the better apprehending felons and offenders, passed March 12, 1827; M. D., 1833, p. 503.

6. An act to deliver up fugitives from justice, passed March 12, 1827. All the above repealed Aug. 30, 1840.

7. An act regulating criminal proceedings, passed Jan. 4, 1839, took effect Jan. 1, 1840; I. T., 1st sess., p. 109; Reprint, 1843, p. 148.

8. An act for erection of penitentiary and its discipline, passed Jan. 25, took effect Feb. 25, 1839; I. T., 1st sess., p. 365; also, Reprint, 1843, p. 483.

9. An act to change venue, passed Jan. 18, took effect Feb. 18, 1839; I. T., 1st sess., p. 457.

10. An act in relation to the safe custody of persons arrested for crimes and misdemeanors, passed Nov. 26, 1839; I. T., 2d sess., p. 3; repealed Jan. 18, 1843, by Reprint, chap. 55, p. 211.

11. An act amending the act of Jan. 25, 1839, passed Jan. 17, 1840; I. T., 2d sess., chap. 86, p. 130.

12. An act to amend the penitentiary act, passed Jan. 15, 1841; I. T., 3d sess., chap. 71, p. 81; also, Reprint, 1843, p. 487.

13. An act amending act relative to the safe custody of prisoners, passed Feb. 10, took effect March 10, 1842; I. T., 4th sess., chap. 46, p. 33; repealed by Reprint, 1843, chap. 55, p. 211.

14. An act to amend an act regulating criminal proceedings, passed Jan. 4, 1839, took effect Feb. 15, 1842; I. T., 4th sess., chap. 63, p. 49; also, Reprint, 1843, p. 148.

15. An act supplemental to an act regulating criminal proceedings, passed Feb. 17, took effect March 17, 1842; I. T., 4th sess., chap. 101, p. 89; also, Reprint, 1843, p. 162.

16. An act regulating criminal proceedings, passed 1843, to be of force Jan., 1844; Reprint, 1843, chap. 47, p. 148.

(This act seems to intend to be all the law on the subject, and is made of parts of other acts not directly repealed, mainly of act marked 7, as above; see section 3 of chap. 20, p. 9), Reprint; its date of force is also questionable, from the passage of the old act, or the new one? It originates no new provision, and yet the act of Jan. 4, 1839, is amended below as if unrepealed?)

17. An act in relation to the safe custody of persons arrested for crimes and misdemeanors, passed Jan. 18, took effect Feb. 18, 1843; Reprint, chap. 55, p. 211.

18. An act to amend the several acts providing for the creation of a penitentiary, passed Feb. 16, took effect March 16, 1843; Reprint, chap. 116, p. 489.

19. An act to amend the criminal act of Jan. 4, 1839; I. T., 8th sess., chap. 1, p. 2; Jan. 1, 1846.

20. An act to lease the penitentiary, passed Jan. 17, 1846; I. T., 8th sess., chap. 20, p. 19.

21. An act relative to the penitentiary, passed Feb. 25, 1847? 1st sess., chap. 101, p. 147.

22. An act relating to penitentiary, passed Jan. 13, took effect Feb. 8, 1849? 2d sess., chap. 70, p. 82.



# APPENDIX.\*

## LAWS OF IOWA.

### REVISION OF 1860.

An Act providing for the Revision of the Laws of this Session into the Revision presented by the Commissioners, and also for Superintending the Publication and Indexing and Distributing of the same.

[Passed April 2, 1860, took effect April 21, 1860; *Laws of Eighth Session, Chapter 160.*]

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That Charles Ben Darwin is hereby appointed to incorporate, by proper revision, into the revision prepared by him, and presented to this session by the code commissioners, all the laws of a general nature passed at this session, to the end that the volume of revised laws about to be published, and which shall be known as the Revision of 1860, shall contain, when published, all the laws of a general nature which shall be of force in this state, when the laws of this session shall have taken effect. Darwin Supt.  
Revision

SEC. 2. That said Darwin (or, in case of his resignation, or other inability to discharge the duties herein imposed, some other person to be, in that event, appointed by the governor,) shall, within ten days after the adjournment of this session, proceed to complete the revision as herein provided, without any change of language, save as in section four hereof allowed.

SEC. 3. That said revisor may employ a clerk to assist him, at a compensation of three dollars per day, and his certificate of the number of days of such service shall entitle the clerk to compensation for the same. May employ  
clerk.

SEC. 4. That the revisor shall also superintend the order of publication of such revision, and prepare brief marginal notes, as in the code of 1851, and a full and complete index, and arrange and properly number in a convenient and suitable manner, the several divisions and sub-divisions, from the beginning throughout; and examine and correct the proof sheets, and cause all clerical, typographical and grammatical errors, and errors of punctuation, to be corrected. Arrange and  
index

SEC. 5. That the same shall be arranged in conformity to the code of 1851, as near as may be, and that such sections of such revision as are part of said code of 1851, shall be indicated also, by the old numbers of sections, placed within brackets.

SEC. 6. That an appendix shall accompany the same, as in the code of 1851, wherein shall be placed the constitution of Iowa, and also all Appendix

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\* Several laws are placed in this Appendix which would have been placed in some other order could it have been known before printing too far that there would be room for them in the book.

- the matter included in the appendix of said code of 1851, excepting the index thereof.
- Secretary of state furnish copy.** SEC. 7. The secretary of state is hereby directed to furnish to the revisor, copies of all the general laws of this session, which said revisor may demand, and to allow him free access to the state archives, for the purpose of comparing any law with the original act.
- Compensation of superintendent.** SEC. 8. For his services to be rendered as herein contemplated, said revisor shall receive the sum of one thousand dollars, from any money in the treasury not otherwise appropriated, to be paid when the whole work is in print.
- Session laws.** SEC. 9. There shall also be printed and indexed, under the superintendence of the secretary of state, three thousand copies of those acts and resolutions of the eighth general assembly, which are not to be included in the revision; two thousand of which shall be distributed among the counties of this state, according to the population of each, giving eight copies, at least, to each county, for which services he shall be paid the sum of three hundred dollars.
- Number of copies to be published** SEC. 10. There shall be published ten thousand copies of said revision. When the revision shall have been published and delivered to the secretary, he shall immediately deliver, or transmit to the governor, two copies; to each other state officer one copy each; retain one in his own office; deposit twenty copies in the state library, and transmit to the secretary of state of each of the United States one copy, and to the executive of each of the United States one copy. He shall also transmit to the clerk of the district court of each county, four copies, which shall be for the use of the county judge, the clerk of the district court, the treasurer, the president of the board of supervisors.
- Distribution and sale.** SEC. 11. Of the remainder of the edition, the secretary shall divide seven thousand copies among the counties of the state, in proportion to the population, but giving to no county less than ten copies, and as soon as practicable, transmit to the district court clerk of each county, the number of copies to which his county is entitled, which the clerk is required to sell at three dollars a copy, and pay to the treasurer of his county the amount received by him for them, on or before the first day of December of each year, and the treasurer shall pay the same into the state treasury, at the time of making his next return.
- Clerk of district court report to auditor.** SEC. 12. The said clerk shall also, on or before the first day of December, each year, make out in writing, under oath, a statement of the number of copies sold by him, and not before accounted for, and the number remaining on hand, and the amount paid to the county treasurer, and transmit such statement to the auditor of state, who shall charge the county treasurer with such amount, and the secretary of state shall certify to the auditor the number of copies transmitted to each clerk, and the auditor shall charge such clerk therewith, and subsequently credit him with such as may be sold or otherwise lawfully disposed of.
- Clerk deliver to his successor.** SEC. 13. When the clerk goes out of office, having any such copies remaining, he shall deliver them to his successor, taking his receipt therefor, which shall be his sufficient discharge therefor, and every county officer, on receiving a copy, shall give his receipt therefor, and shall pass the copy to his successor, or deliver it to the clerk, for the use of subsequent officers, and each shall be liable therefor on his official bond.
- Secretary to sell.** SEC. 14. The remainder of the edition of the revision shall be deposited in the office of the secretary of state, and he may in like



manner apportion and deliver them to any counties hereafter organized. The secretary may also sell them at the rate above named, after setting apart copies for subsequent distribution, he paying the proceeds into the state treasury.

SEC. 15. For the distribution of the revision, the secretary shall receive fifteen hundred dollars.

SEC. 16. This act shall take effect from its publication in the Iowa State Register and Iowa State Journal, or any other two newspapers printed in this state.

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OATH OF OFFICE.

An Act requiring Trustees, Managers, Commissioners and Inspectors of Public Buildings, Improvements and Institutions to take and subscribe an oath, and punishing violation of the same.

[Passed April 2, 1860, took effect May 2, 1860; Laws of Eighth Session, Chapter 106.]

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That every person appointed by the governor, or elected by the legislature, or otherwise appointed or elected a trustee, manager, commissioner or inspector, or a member of any board of trustees, managers, commissioners or inspectors, now or hereafter created or provided by law for the government, control, management or inspection of any public building, improvement or institution whatsoever, owned, controlled or managed, in whole or in part, by or under the authority or direction of this state, shall, before entering upon the discharge of his duties, as such trustee, manager, commissioner or inspector, take and subscribe an oath, in substance and form as follows: "I (here insert affiant's name) do solemnly swear that I will support the constitution of the United States, and of the state of Iowa; that I will honestly and faithfully discharge the duties of (here describe nature of the office, trust or position as trustee, manager or inspector, as the case may be) according to the laws that now are or that may hereafter be in force, regulating said institution, and prescribing the duties of trustees, managers, commissioners or inspectors thereof, (as the case may be;) that I will, in all things, conform to the directions contained in said law or laws, and that I will not, directly or indirectly, as such trustee, manager, commissioner or inspector, (as the case may be) make, or enter into, or consent to any contract or agreement, expressed or implied, whereby any greater sum of money shall be expended or agreed to be expended than is expressly authorized by law, at the date of such contract or agreement.

Officer having disposition of money for the erection of public building shall be sworn, &c.

SEC. 2. Any such officer who shall be empowered to expend any public monies, or to direct such expenditures, is hereby prohibited from making any contract for the erection of any building, or any other purpose which shall contemplate any excess of expenditures beyond the terms of the law under which said officer was appointed.

Contracts must be limited to within the term of the officer contracting.

SEC. 3. Any such officer already elected or appointed, who has not already taken such oath, shall forthwith do so, and shall be subject to the provisions of this act.

SEC. 4. All the oaths required by this act shall be filed in the office of auditor of state, and the state auditor shall not draw any warrant upon the state treasurer for the purposes for which any of said officers are appointed until said oaths are so filed.

Oath to be filed with the auditor of state.

SEC. 5. Any person willfully violating the provisions of this act, Penalty.

shall, upon conviction thereof, be liable to a fine not exceeding five thousand dollars, or imprisonment in the penitentiary not exceeding five years, or both, at the discretion of the court.

SEC. 6. All acts and parts of acts inconsistent with this act are hereby repealed.

SEC. 7. This act shall be in force from and after its publication in the Iowa State Register and Iowa State Journal.

COMMISSIONER OF IMMIGRATION.

An Act to provide for the establishment of a Commissioner in the City of New York, to promote Immigration to the State of Iowa.

[Passed March 30, 1860, took effect April 11, 1860; Laws of Eighth Session, Chapter 81.]

To be appointed by the governor with consent of the senate.

Keep an intelligence office in New York.

Report to the governor.

Governor may remove.

Appropriation.

Salary paid quarterly.

No fee except salary to be received.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That a commissioner of immigration for the state of Iowa, shall be appointed by the governor, with the consent of the senate, who shall hold his office for two years from the first day of May next, and shall reside and keep an office in the city of New York at least from the first day of May until the first day of December in each year, which office shall be kept open at all reasonable business hours, between the dates aforesaid, and to give to immigrants the necessary information in relation to the soil and climate of the state, and the branches of business to be pursued with advantage therein, and the cheapest and most expeditious route by which the same can reach the state, and to give such further information as will, as far as practicable, protect immigrants against the impositions often practiced upon them; to report to the governor as often as required, and in the manner to be prescribed by him, the number of immigrants sent by him to the state, their nationality, and the branches of business intended to be pursued by them.

SEC. 2. The governor shall have power to remove such commissioner for inefficiency and misconduct in the discharge of the duties of his office, and to appoint some proper person in his place.

SEC. 3. The following sums of money are hereby appropriated out of any moneys in the state treasury not otherwise appropriated, to carry out the objects of this act, the sum of two thousand four hundred dollars for the salary of said commissioner of immigration, for two years; a sum not exceeding one thousand dollars, to be expended under the direction of the governor, in a publication of a description of the state, in English, German, and such other languages as the governor shall deem advisable; a sum not exceeding one thousand one hundred dollars for office rent, furnishing the same, and for maps and books to be used in the office of the commissioner of immigration.

SEC. 4. The salary of said commissioner shall be paid to him quarterly, in advance, and the remainder of the sums appropriated shall be paid on the order of the governor, for said purposes, in such sums and at such times as the governor shall direct.

SEC. 5. *And be it further enacted,* That if said commissioner shall, directly or indirectly, take or receive any fee, compensation or reward, except said salary, he shall be deemed guilty of felony, and shall be punished by imprisonment in the state's prison for not less than one nor more than five years.

SEC. 6. This act shall take effect from and after its publication in

the Daily Iowa State Register and the Daily Iowa State Journal, published at Des Moines.

An Act to provide for the redemption of Real Estate sold on foreclosure of Mortgages.\*

[Passed April 2, 1860, took effect April 13; Laws of Eighth Session, Chapter 103.]

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That in all cases when judgments or decrees are rendered by any of the courts of this state upon a foreclosure of mortgages on real estate, the defendants, judgment creditors, and other creditors having liens on the mortgaged premises, shall in case of the sale of the mortgaged premises on execution, have the same time to redeem and the same rights to redemption as in cases of sales on ordinary judgments at law, as provided for in chapter 110 of the code, and all acts inconsistent with the provisions of this act are hereby repealed. Redemption from mortgage sales.

SEC. 2. *And be it further enacted,* That this act shall take effect from and after its publication in the Daily Iowa State Register and the Daily Iowa State Journal, two newspapers published in Des Moines City.

#### JUDICIAL DISTRICTS.

An Act creating Eleven Judicial Districts and defining their Boundaries.

[Passed March 20, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 94, page 186.]

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That the state is hereby divided into eleven districts for judicial purposes, as provided in the constitution. No. of districts.

##### *District Number 1.*

SEC. 2. The counties of Lee, Henry, Des Moines and Louisa shall constitute the first district. District No. 1.

##### *District Number 2.*

SEC. 3. The counties of Van Buren, Davis, Wapello, Monroe, Appanoose, Lucas and Wayne shall constitute the second district. District No. 2.

##### *District Number 3.*

SEC. 4. The counties of Clarke, Decatur, Union, Ringgold, Adams, Montgomery, Page, Mills, Fremont, Pottawattamie and Cass shall constitute the third district. District No. 3.

##### *District Number 4.*

SEC. 5. The counties of Harrison, Shelby, Monona, Crawford, Woodbury, Ida, Sac, Buena Vista, Cherokee, Plymouth, Clay, O'Brien, Sioux, Buncombe, Osceola, Dickinson, Emmett, Palo Alto, Pochahontas, Calhoun, Kossuth and Humboldt shall constitute the fourth district. District No. 4.

##### *District Number 5.*

SEC. 6. The counties of Carroll, Audubon, Greene, Guthrie, Adair, Madison, Dallas, Warren and Polk shall constitute the fifth district. District No. 5.

\* This act was deemed by me to be equivalent to section 3664 and so not inserted at that place.

*District Number 6.*

District No. 6. SEC. 7. The counties of Jasper, Marion, Poweshiek, Mahaska, Keokuk, Washington and Jefferson shall constitute the sixth district.

*District Number 7.*

District No. 7. SEC. 8. The counties of Muscatine, Scott, Clinton and Jackson shall constitute the seventh district.

*District Number 8.*

District No. 8. SEC. 9. The counties of Johnson, Iowa, Tama, Benton, Linn, Cedar and Jones shall constitute the eighth district.

*District Number 9.*

District No. 9. SEC. 10. The counties of Dubuque, Delaware, Buchanan, Black Hawk and Grundy, shall constitute the ninth district.

*District Number 10.*

District No. 10. SEC. 11. The counties of Clayton, Alamakee, Fayette, Winnesheik, Howard, Chickasaw, Bremer, Mitchell, Floyd and Butler shall constitute the tenth district.

*District Number 11.*

District No. 11. SEC. 12. The counties of Hardin, Franklin, Hamilton, Wright, Hancock, Winnebago, Webster, Marshall, Story, Cerro Gordo, Worth and Boone shall constitute the eleventh district.

Effect of act. SEC. 13. Nothing in this act shall in any way interfere with the holding of courts in the district as now organized, before the first day of January, 1859.

In force. SEC. 14. This act shall be in force from and after its publication according to law.

*Times of Holding Courts.*

## ARTICLE I.

An Act to define the Time of holding Courts in the several Judicial Districts in this State.

[Passed March 23, 1858, took effect July 4, 1858; Laws of Seventh General Assembly, Chapter 150, page 296.]

Court held in. SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That the district courts of the several judicial districts of this state shall be held at the times and places hereinafter designated.

First district, Keokuk. SEC. 2. In the first district, commencing at Keokuk, Lee county, Iowa, on the first Monday in February and September of each year, and at Fort Madison, in said county, on the third Monday in May and first Monday in December of each year.

Burlington. At Burlington, in Des Moines county, on the first Monday in January, first Monday in October and third Monday in April each year.

Mt Pleasant. At Mount Pleasant, in Henry county, on the second Mondays of March, June and November each year.

At Wapello, in Louisa county, on the first Monday in April and fourth Monday in October each year.

[Section third substituted by article second thereof.]

Third district, Lewis. SEC. 4. In the third judicial district, commencing at Lewis, in Cass county, on the last Monday in January and July each year.

Council Bluffs. At Council Bluffs City, in Pottawattamie county, on the first Monday

in February and August each year, and at such special times as may be provided and called by the judge of said district.

At Glenwood, in Mills county, on the third Monday in February and August each year. Glenwood.

At Sidney, in Fremont county, on the first Monday in March and September each year.

[The remainder of this section substituted by article third hereof.]

[Section five superseded by article four hereof.]

[SEC. 6, superseded by article five hereof.]

[SEC. 7, superseded by article six hereof.]

[SEC. 8, superseded by article seven hereof.]

[SEC. 9, superseded by article eight hereof.]

SEC. 10. In the ninth district, commencing at Dubuque, in Dubuque county, on the first Mondays of February and August and November, and second Monday in May each year. 9th dist., Dubuque.

At Delhi, in Delaware county, on the first Mondays of April and September in each year. Delhi.

At Independence, in Buchanan county, on the first Thursday after the second Monday in April and September each year. Independence.

At Waterloo, in Black Hawk county, on the fourth Monday in April and September in each year. Waterloo.

In Grundy county on the first Monday after the fourth Monday in April, whether the same shall be in April or May each year: *provided*, that the judge of the district court of said county may, upon petition of legal voters of said county, hold a special term in said county at such time as suits the convenience of the people: *provided*, that the judge of said ninth district may by rule establish, if deemed advisable, the August term of the court in Dubuque county, an issue term, for hearing equity cases, and such other matters as may not demand the attendance of a jury, and after such order or rule shall be established, no person shall be required to attend at said term of court. Grundy. Special term in Grundy. June term in Dubuque.

SEC. 11. In the tenth district, commencing in Clayton county, Iowa, on the third Monday of January, May and September each year. 10th dist., Clayton.

At Waukon, in Alamakee county, on the first Monday after the third Monday in May and September each year. Alamakee.

At Decorah, in Winneshiek county, on the second Monday after the third Monday in May and September. Winneshiek.

At West Union, in Fayette county, on third Monday after third Monday in May and September each year. Fayette.

In Howard county on the fifth Monday after the third Monday in May and September each year. Howard.

In Mitchell county on the sixth Monday after the third Monday in May and September. Mitchell.

At St. Charles, in Floyd county, on the seventh Monday after the third Monday in May and September each year. Floyd.

At Clarkesville, in Butler county, on the eighth Monday after the third Monday in May and September each year. Butler.

At Waverly, in Bremer county, on the ninth Monday after the third Monday in May and September each year. Bremer.

At Bradford, in Chickasaw county, on the tenth Monday after the third Monday in May and September each year. Chickasaw.

SEC. 12. [The preceding part of this section is superseded by article nine hereof.]

The county of Hancock is hereby attached to the county of Winnebago, and the county of Worth is attached to the county of Cerro Gordo for judicial purposes. Hancock. Worth.

Court held in 1859.	SEC. 13. No courts shall be held under this act till after the first day of January 1859, but all courts up to the said day shall be held as if this act had not been passed.
All proceedings confirmed.	SEC. 14. All writs, pleadings, process and proceedings pending in or returnable to any district court of any county before and on the first day of January 1859, shall be deemed pending in and returnable to the terms hereby fixed by this act, and no suit, plea, process, recognizance, indictments, or other proceeding, shall be quashed or held invalid by reason of this act, or by reason of any change of the terms of court hereby made.
Court held at county seat.	SEC. 15. In any county which shall change the location of her county seat, the terms of the district court shall be held at the county seat notwithstanding any provision herein contained.
Jurors appear.	SEC. 16. The judges of said district may, if deemed advisable by them, order the jurors summoned to attend any term of the court in said districts, to appear on the first or some subsequent day of the term.
Special terms.	SEC. 17. Should the causes pending in the district court of either of said counties remain undisposed of for want of sufficient time, being allowed for the term of court in such county under this act, the judges of any of said districts may order and hold a special term for the disposition of such pending causes, but not so as to interfere with any regular term as fixed by law.
Take effect.	SEC. 18. This act to be in force from and after its publication according to law.

*Second Judicial District.*

ARTICLE 2.

An Act fixing the time of holding Courts in the Second Judicial District.

[Passed February 11, 1860, took effect February 18, 1860; Laws of Eighth Session, Chapter 13.]

Times of holding.	SECTION 1. <i>Be it enacted by the General Assembly of the State of Iowa,</i> That the district courts within and for the counties composing the second judicial district of this state shall be held at the times and places hereinafter designated, commencing at Keosauqua, in the county of Van Buren on the first Mondays of March and September: <i>provided</i> that the first term of court in said county next after the taking effect of this law shall be held on the tenth Monday after the first Monday in March, 1860.
Van Buren.	At Bloomfield, in Davis county, on the second Monday after the first Monday of March and September.
Davis.	At Centerville, in Appanoose county, on the fourth Monday after the first Monday of March and September.
Appanoose.	At Corydon, in Wayne county, on the sixth Monday after the first Monday of March and September.
Wayne.	At Chariton, in Lucas county, on the eighth Monday after the first Monday of March and September.
Lucas.	At Albia, in Monroe county, on the tenth Monday after the first Monday of March and September: <i>provided</i> that the first term of court in said county next after the taking effect of this law shall be held on the first Monday in March, 1860.
Monroe.	And at Ottumwa, in Wapello county, on the twelfth Monday after the first Monday of March and September.
Wapello.	SEC. 2. All suits, pleadings, and process now pending or returnable to any of the district courts in the counties hereinbefore mentioned, shall
Suits pending not affected.	

be deemed pending in and returnable to the terms herein fixed; and no such suit, plea, process, recognizance, indictment or other proceedings shall be quashed or held to be invalid by reason of any change in the terms of court hereby made.

SEC. 3. All acts and parts of acts inconsistent with the provisions <sup>Repealed.</sup> of this act are hereby repealed.

SEC. 4. This act shall be in force from and after its publication in <sup>Take effect.</sup> the Iowa State Journal and Iowa State Register.

### *Third Judicial District.*

#### ARTICLE 3.

An Act to fix the time of holding Courts in the third Judicial District of the State of Iowa.

*Passed February 14, 1860, took effect July 4, 1860; Laws of Eighth Session, Chapter 17.]*

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That the terms of the district court in the counties of Cass, Pottawattamie, Mills, and Fremont, be held at the times now fixed by law. <sup>To be held in Cass, Pottawattamie Mills and Fremont.</sup>

In the county of Page, at Clarinda, on the third Monday in March and September in each year. <sup>Page.</sup>

At Bedford, in Taylor county, on the fourth Monday in March and September in each year. <sup>Taylor.</sup>

At Mount Ayr, in Ringgold county, on the first Monday after the fourth Monday in March and September in each year. <sup>Ringgold.</sup>

At Leon, in Decatur county, on the second Monday after the fourth Monday in March and September in each year. <sup>Decatur.</sup>

At Ocoola, in Clark county, on the fourth Monday after the fourth Monday in March and September in each year. <sup>Clark.</sup>

At Afton, in Union county, on the sixth Monday after the fourth Monday in March and September in each year. <sup>Union.</sup>

At Quincy, in Adams county, on the seventh Monday after the fourth Monday in March and September in each year. <sup>Adams.</sup>

At Frankfort, in Montgomery county, on the Thursday after the seventh Monday after the fourth Monday in March and September in each year. <sup>Montgomery.</sup>

SEC. 2. All writs, processes and proceedings pending in any of said courts, and returnable at the terms now fixed by law, shall be deemed pending and returnable at the terms as fixed by this act; and no suit, notice, recognizance, indictment, or other proceeding, shall be quashed or held invalid by reason of this act, or by reason of the change of the terms of court hereby made. <sup>Suits pending not affected.</sup>

SEC. 3. This act to be in force from and after its publication according to law. <sup>Take effect.</sup>

### *Fourth Judicial District.*

#### ARTICLE 4.

An Act fixing the times of holding Courts in the Fourth Judicial District.

*[Passed January 23, 1860; Laws of Eighth Session, Chapter 3.]*

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That the several courts in the fourth judicial district shall be holden as follows:

Woodbury.	Woodbury—In the county of Woodbury on the first Monday of April and third Monday in September in each year.
Monona.	Monona—In the county of Monona on the Mondays next succeeding the courts in Woodbury.
Harrison.	Harrison—In the county of Harrison on the Mondays next succeeding the courts in Monona.
Shelby.	Shelby—In the county of Shelby on the Mondays next succeeding the courts in Harrison.
Crawford.	Crawford—In the county of Crawford on the Thursdays of the same weeks of the courts in Shelby.
Sac.	Sac—In the county of Sac on the Mondays next succeeding the courts in Crawford.
Humboldt.	Humboldt—In the county of Humboldt on the Mondays next succeeding the courts in Sac.
Kossuth.	Kossuth—In the county of Kossuth on the Mondays next succeeding the courts in Humboldt.
Dickinson.	Dickinson—In the county of Dickinson on the Mondays next succeeding the courts in Kossuth.
Time of sitting in Woodbury.	SEC. 2. In the county of Woodbury, at the April term of each year, said court may sit two weeks, and at the September term thereof, and in the counties of Monona and Harrison, at all the terms, said court may sit one week if the business require it.
And other counties.	In the counties of Shelby and Crawford, courts may sit three days at each term, and in the counties of Sac, Humboldt, Kossuth and Dickinson, courts may sit four days at each term, if the business require it.
Special terms.	In the above named counties, and all the other counties of the district, courts may be held at such other times as the district judge of said district may designate, and at least one term of court in each year shall be holden in each county of said district wherein a cause may be pending.
Suits pending.	SEC. 3. All writs, process and proceedings pending in any of said courts, and returnable at the terms now fixed by law, shall be deemed pending and returnable at the terms as fixed by this act, and no suit, notice, recognizance, indictment or other proceeding shall be quashed or held invalid by reason of this act, or by reason of the change of the terms of court hereby made.
Repealing.	SEC. 4. That all acts or parts of acts inconsistent herewith are hereby repealed, and this act shall take effect from and after its publication in the Sioux City Register, Ft. Dodge Sentinel and Magnolia Republican, which shall be done without expense to the state.

*Fifth Judicial District.*

ARTICLE 5.

An Act to fix the time of holding the Courts in the Fifth Judicial District of the State of Iowa.

[Passed February 16, 1860, took effect February 18, 1860; Laws of Eighth Session, Chapter 18.]

Times of holding.	SECTION 1. <i>Be it enacted by the General Assembly of the State of Iowa,</i> That the times of holding court in the fifth judicial district of the state of Iowa shall be as follows:
Warrar.	In Warren county on the second Monday of February and the first Monday in August in each year.
Polk.	In the county of Polk on the first Monday of March and third Monday of August in each year.



In the county of Madison on the first Monday of April and third Monday in September in each year.

In the county of Dallas, on the third Monday of April and fourth Monday of September in each year.

In the county of Adair, on the first Monday after the fourth Monday in April, and the second Monday after the fourth Monday of September in each year.

In the county of Guthrie, on the second Monday after the fourth Monday in April, and the fourth Monday after the fourth Monday in September in each year.

In the county of Greene, on the third Monday after the fourth Monday in April, and the fifth Monday after the fourth Monday of September in each year.

In the county of Audubon, on the fourth Monday after the fourth Monday in April, and the sixth Monday after the fourth Monday of September in each year.

In the county of Carroll on the Thursday after the fourth Monday after the fourth Monday in April, and the Thursday after the sixth Monday after the fourth Monday of September in each year.

SEC. 2. All writs, processes, and proceedings, pending in any of said courts and returnable at the terms now fixed by law, shall be deemed pending and returnable at the terms as fixed by this act, and no writ, notice, recognizance, indictment or other proceedings shall be quashed or held invalid by reason of this act, or by reason of the change of the times of holding court in the several counties in said district.

Suits pending not affected.

SEC. 3. This act to be in force from and after its publication in the Daily Iowa State Register and the Daily Iowa State Journal, papers published at Des Moines, Iowa.

Take effect.

### *Sixth Judicial District.*

#### ARTICLE 6.

An Act to amend Chapter 150 of the acts of the Seventh General Assembly.

[Passed January 27, 1860, took effect February 4, 1860; Laws of Eighth Session, Chapter 7.]

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That the seventh section of chapter one hundred and fifty of the acts of the seventh general assembly, approved March 23, 1858, be and the same is hereby amended so as to read as follows, to wit:

Times of holding courts.

In the sixth judicial district, commencing at Sigourney, in Keokuk county, on the second Mondays in February and August in each year.

Keokuk county

At Oskaloosa, in Mahaska county, on the fourth Mondays of February and August in each year.

Mahaska

\* \* \* \* \*

At Newtown, in Jasper county, on the third Mondays of March and September in each year.

Jasper

At Washington, in Washington county, on the second Tuesdays of April and November in each year.

Washington

At Fairfield, in Jefferson county, on the fourth Tuesday of April and November in each year.

Jefferson

At Knoxville, in Marion county, on the third Monday of May and the second Monday of December in each year.

Marion.

\* The omitted part superseded by section 1 of the act immediately following it.

Not affect suits pending.	SEC. 2. All petitions, answers, notices, recognizances, or other pleadings or processes returnable to or pending in said district courts for adjudication at the terms now fixed by the act to which this is amendatory, shall be held returnable to and pending at the terms of said courts as fixed by this act.
Repealing.	SEC. 3. All acts or parts of acts contravening the provisions of this act, be and the same are hereby repealed.
Take effect.	SEC. 4. This act to be in force from and after its publication in the Iowa State Register, published at Des Moines, and the Democratic Standard, published at Knoxville, in said district.

*Sixth Judicial District.*

An Act to amend an Act entitled an Act to amend Chapter 150 of the Acts of the Seventh General Assembly.

[Passed February 20, 1860, took effect March 1, 1860; Laws of Eighth Session, Chapter 19.]

Times of holding court in Powsheik county.	SECTION 1. <i>Be it enacted by the General Assembly of the State of Iowa,</i> That so much of the act entitled an act to amend chapter one hundred and fifty of the acts of the seventh general assembly, and approved January 27, 1860, as reads as follows: "At Montezuma, in Powsheik county, on the second Tuesdays of March and September in each year," is hereby repealed, and in lieu thereof, it is enacted as follows: at Montezuma, in Powsheik county, on the first Mondays in July and January in each year
Proceedings not affected.	SEC. 2. All petitions, answers, notices or other pleadings or processes returnable to or pending in said district court for adjudication at the time now fixed by the act to which this is amendatory, shall be held returnable to and pending at the terms of said court as fixed by this act.
Take effect.	SEC. 3. This act to take effect and be in force from and after its publication in the Daily Iowa State Register, published at Des Moines, Iowa, and in the Jasper Free Press, published at Newton, Jasper county, Iowa, any thing in section 21 of the code to the contrary notwithstanding.

*Seventh Judicial District.*

ARTICLE 7.

An Act fixing the terms of Court in the Seventh Judicial District.

[Passed Jan. 27, 1860, took effect Feb. 16, 1860; Laws of the Eighth Session, Chapter 5.]

Times of holding.	SECTION 1. <i>Be it enacted by the General Assembly of the State of Iowa,</i> That the terms of the district court in the seventh judicial district shall commence and be held as follows:
Muscatine.	In the county of Muscatine on the first Mondays of January and May, and on the third Monday of October in each year.
Scott.	In the county of Scott on the first Mondays of February, June, August and December in each year: <i>provided,</i> that this section shall not affect the term of said court now in session.
Clinton.	In the county of Clinton on the first Mondays of March, September and November in each year.
Jackson.	In the county of Jackson on the first Tuesdays after the fourth Mondays of March and September in each year.
Attendance of jurors.	SEC. 2. That the judge of said district, upon the adjournment of said court in Scott county, at the June term in each year, may, in his

discretion, enter an order that the grand and petit jurors be summoned to attend at the August term of said court in said Scott county, or that their attendance may be dispensed with at said term.

SEC. 3. No suits, pleas, indictments or proceedings of any character, Suits pending. civil, criminal or special, shall be abated, quashed, discontinued or affected in consequence of the change of time of holding said courts; all process issued at any time before the taking effect of this act shall be considered as returnable to the first term of the court in said counties respectively, which shall be held next after the taking effect of this act.

SEC. 4. This act shall take effect from and after its publication in Take effect. the Iowa State Register, Muscatine Journal, Davenport Gazette, Bellevue Courier and DeWitt Standard.

### *Eighth Judicial District.*

#### ARTICLE 8.

An Act to change the times of holding Courts in the Eighth Judicial District of the State of Iowa.

[*Passed Jan. 27, 1860, took effect Feb. 4, 1863; Laws of Eighth Session, Chapter 6.*]

SECTION 1. *Be it enacted by the General Assembly of the State of* Times of holding. *Iowa,* That the district courts of the eighth judicial district shall be held as follows:

At Iowa City, in Johnson county, on the first Monday in March, Johnson county. fourth Monday in June, and first Monday in November: *provided,* that the first term in said county after the passage of this act shall be held on the third Monday in March.

At Marengo, in Iowa county, on the first Monday in February and Iowa county. September.

At Toledo, in Tama county, on the second Monday in February and Tama county. September.

At Vinton, in Benton county, on the third Monday in February and Benton county. September: *provided,* that the first term held in said county after the passage of this act, shall be held on the first Monday in March, as now provided by law.

At Marion, in Linn county, on the second Monday in January, May Linn county. and October.

At Tipton, in Cedar county, on the first Monday in June and De- Cedar county. cember.

At Anamosa, in Jones county, on the second Monday in June and Jones county. December.

SEC. 2. That no process, writ, notice, petition or indictment issued Suits pending. out of or filed in any of the courts in said district, and made returnable or triable at any term now fixed by law for holding courts in the counties composing said district shall be quashed, set aside or in any manner invalidated by reason of anything in this act, but the same shall be held returnable and triable at the times fixed by this act, and all proceedings hereafter pending shall be treated as if under this act commenced.

SEC. 3. That section nine, of chapter one hundred and fifty of the Repealing. acts of the seventh general assembly of the state of Iowa, be and the same are hereby repealed.

SEC. 4. That this act shall take effect from and after its publication Take effect. in the Iowa Weekly Citizen, and Iowa State Journal, published at Des Moines, and Iowa Weekly Republican, published at Iowa City, and

shall be in force from the date of such publication; section twenty-one, of chapter three of the code to the contrary notwithstanding.

*Eleventh Judicial District.*

ARTICLE 9.

An Act fixing the times of holding Court in the Eleventh Judicial District.

[Passed Jan. 19, 1860, took effect Feb. 1, 1860; Laws of Eighth Session, Chapter 2.]

Times of holding court	SECTION 1. <i>Be it enacted by the General Assembly of the State of Iowa,</i> That the district courts within and for the counties composing the eleventh judicial district of this state, shall be held at the times and places hereinafter designated.
Marshall county.	At Marshall, in the county of Marshall, on the first Monday in April and first Monday in September.
Story County.	At Nevada, in the county of Story, on the first Monday after the first Monday in April and September.
Boone county.	At Boon-boro, in the county of Boone, on the second Monday after the first Monday in April and September.
Webster county.	At Fort Dodge, in Webster county, on the third Monday after the first Monday in April and September.
Hamilton county	At Webster City, in Hamilton county, on the fourth Monday after the first Monday in April and September.*
	* * * * *
Wright county.	In the county of Wright, on the seventh Monday after the first Monday in April.
Hancock county.	In the county of Hancock, on the first Thursday after seventh Monday, after first Monday in April.
Winnebago county.	In the county of Winnebago, on the eighth Monday after the first Monday in April.
Worth county.	In the county of Worth, on the first Thursday after the eighth Monday, after the first Monday in April.
Cerro Gordo county.	In the county of Cerro Gordo, on the ninth Monday after the first Monday in April.
Franklin county.	In the county of Franklin, on the tenth Monday after the first Monday in April.
Suits pending.	SEC. 2. All suits, pleadings, process, and proceedings now pending in or returnable to any of the district courts in the counties hereinbefore named, shall be deemed pending in and returnable to the terms herein fixed, and no suit, plea, process, recognizance, indictment or other proceeding shall be quashed or held to be invalid by reason of this act, or by reason of any change in the terms of court hereby made.
Jurors to appear.	SEC. 3. The judge of said district may, if deemed advisable by him, order the jurors summoned to attend at any term of the courts in said district, to appear on the first or some subsequent day of the term.
Hold an adjourned term.	SEC. 4. Should the causes pending in the district courts of any of the counties of said district remain undisposed of for want of sufficient time being allowed for the term of court in such county under this act, the judge of said district may order and hold an adjourned term for the disposition of such business as may be so pending, and the announcement in open court at the term at which said adjourned term shall be

\* The omitted part is superseded by the act immediately following.

determined upon, shall be sufficient notice of the time for holding the same to all persons interested therein.

SEC. 5. All acts and parts of acts inconsistent with the provisions of Repealing. this act, are hereby repealed.

SEC. 6. This act shall be in force from and after its publication in Take effect. the Iowa State Register, and the Marshall County Times.

*Eleventh Judicial District.*

An Act to amend an Act fixing the times of holding Courts in the Eleventh Judicial District.

[Passed March 22, 1860, took effect March 26, 1860; Laws of Eighth Session, Chapter 48.]

SECTION 1. *Be it enacted by the General Assembly of the State of* Change time of Iowa, That the sixth sub-division of chapter two of the acts of the holding court in eighth general assembly, approved January 19, 1860, entitled "An act Hardin county. fixing the times of holding courts in the eleventh judicial district," be amended as follows: At Eldora, in the county of Hardin, commencing on the fifth Monday after the first Monday in April and September in each year: *provided*, that all actions commenced in said court since the approval of the act to which this is amendatory and prior to the first day of May, 1860, shall be tried as though this amendment had not been made.

SEC. 2. So much of said chapter two as is inconsistent with this act is hereby repealed.

SEC. 3. This act shall take effect from and after its publication in Take effect. the Daily Iowa State Register and the Daily Iowa State Journal, anything in section twenty-one of the code, to the contrary notwithstanding.

REPRESENTATIVE APPORTIONMENT.

An Act apportioning the State of Iowa into Representative Districts.

[Passed April 2, 1860, took effect July 4, 1860; Laws of Eighth Session, Chapter 95.]

SECTION 1. *Be it enacted by the General Assembly of the State of* Iowa, That one representation to seven thousand five hundred inhabitants, or fraction thereof exceeding one-half in each representative district, is hereby constituted the ratio of apportionment.

SEC. 2. Lee county is the first district, and entitled to four repre- 1st district sentatives.

SEC. 3. Van Buren county is the second district, and entitled to two 2d district representatives.

SEC. 4. Davis county is the third district, and entitled to two repre- 3d district sentatives.

SEC. 5. Appanoose county is the fourth district, and entitled to two 4th district representatives.

SEC. 6. Wayne county is the fifth district, and entitled to one repre- 5th district sentative.

SEC. 7. Decatur county is the sixth district, and entitled to one rep- 6th district resentative.

SEC. 8. Des Moines county is the seventh district, and entitled to 7th district three representatives.

SEC. 9. Henry county is the eighth district, and entitled to two rep- 8th district resentatives.

- 9th district. SEC. 10. Jefferson county is the ninth district, and entitled to two representatives.
- 10th district. SEC. 11. Wapello county is the tenth district, and entitled to two representatives.
- 11th district. SEC. 12. Monroe county is the eleventh district, and entitled to one representative.
- 12th district. SEC. 13. Lucas county is the twelfth district, and entitled to one representative.
- 13th district. SEC. 14. Clarke county is the thirteenth district, and entitled to one representative.
- 14th district. SEC. 15. Fremont county is the fourteenth district, and entitled to one representative.
- 15th district. SEC. 16. Mills county is the fifteenth district, and entitled to one representative.
- 16th district. SEC. 17. Louisa county is the sixteenth district, and entitled to one representative.
- 17th district. SEC. 18. Washington county is the seventeenth district, and entitled to two representatives.
- 18th district. SEC. 19. Keokuk county is the eighteenth district, and entitled to two representatives.
- 19th district. SEC. 20. Mahaska county is the nineteenth district, and entitled to two representatives.
- 20th district. SEC. 21. Marion county is the twentieth district, and entitled to two representatives.
- 21st district. SEC. 22. Warren county is the twenty-first district, and entitled to one representative.
- 22d district. SEC. 23. Madison county is the twenty-second district, and entitled to one representative.
- 23d district. SEC. 24. Pottawattamie county is the twenty-third district, and entitled to one representative.
- 24th district. SEC. 25. Muscatine county is the twenty-fourth district, and entitled to two representatives.
- 25th district. SEC. 26. Johnson county is the twenty-fifth district, and entitled to two representatives.
- 26th district. SEC. 27. Iowa county is the twenty-sixth district, and entitled to one representative.
- 27th district. SEC. 28. Poweshiek county is the twenty-seventh district, and entitled to one representative.
- 28th district. SEC. 29. Jasper county is the twenty-eighth district, and entitled to one representative.
- 29th district. SEC. 30. Polk county is the twenty-ninth district, and entitled to one representative.
- 30th district. SEC. 31. Dallas county is the thirtieth district, and entitled to one representative.
- 31st district. SEC. 32. Scott county is the thirty-first district, and entitled to three representatives.
- 32d district. SEC. 33. Clinton county is the thirty-second district, and entitled to two representatives.
- 33d district. SEC. 34. Cedar county is the thirty-third district, and entitled to two representatives.
- 34th district. SEC. 35. Jackson county is the thirty-fourth district, and entitled to two representatives.
- 35th district. SEC. 36. Jones county is the thirty-fifth district, and entitled to two representatives.
- 36th district. SEC. 37. Linn county is the thirty-sixth district, and entitled to two representatives.

SEC. 38. Benton county is the thirty-seventh district, and entitled to 37th district. one representative.

SEC. 39. Tama county is the thirty-eighth district, and entitled to 38th district. one representative.

SEC. 40. Marshall county is the thirty-ninth district, and entitled to 39th district. one representative.

SEC. 41. Story county is the fortieth district, and entitled to one 40th district. representative.

SEC. 42. Boone county is the forty-first district, and entitled to one 41st district. representative.

SEC. 43. Dubuque county is the forty-second district, and entitled to 42d district. four representatives.

SEC. 44. Delaware county is the forty-third district, and entitled to 43d district. one representative.

SEC. 45. Buchanan county is the forty-fourth district, and entitled 44th district. to one representative.

SEC. 46. Black Hawk county is the forty-fifth district, and entitled 45th district. to one representative.

SEC. 47. Hardin county is the forty-sixth district, and entitled to 46th district. one representative.

SEC. 48. Clayton county is the forty-seventh district, and entitled to 47th district. two representatives.

SEC. 49. Fayette county is the forty-eighth district, and entitled to 48th district. two representatives.

SEC. 50. Bremer county is the forty-ninth district, and entitled to 49th district. one representative.

SEC. 51. Chickasaw county is the fiftieth district, and entitled to one 50th district. representative.

SEC. 52. Alamakee county is the fifty-first district, and entitled to 51st district. one representative.

SEC. 53. Winnesheik county is the fifty-second district, and entitled 52d district. to two representatives.

SEC. 54. The counties of Howard and Mitchell shall constitute the 53d district. fifty-third district, and be entitled to one representative, and the votes therein for representative shall be canvassed at the county seat of Mitchell county.

SEC. 55. The counties of Floyd, Cerro Gordo, Worth and Winne- 54th district. bago shall constitute the fifty-fourth district, and entitled to one representative, and the votes therein for representative shall be canvassed at the county seat of Floyd county.

SEC. 56. The counties of Butler, Grundy and Franklin shall con- 55th district. stitute the fifty-fifth district, and entitled to one representative, and the votes therein for representative shall be canvassed at the county seat of Butler county.

SEC. 57. The counties of Hancock, Kossuth, Emmett and Palo 56th district. Alto shall constitute the fifty-sixth district, and entitled to one representative, and the votes cast therein for representative shall be canvassed at the county seat of Kossuth county.

SEC. 58. The counties of Humboldt, Wright, Hamilton and Web- 57th district. ster shall constitute the fifty-seventh district, and entitled to one representative, and the votes cast therein for representative shall be canvassed at the county seat of Hamilton county.

SEC. 59. The counties of Dickinson, Clay, Buena Vista and Poca- 58th district. hontas shall constitute the fifty-eighth district, and entitled to one representative, and the votes cast therein for representative shall be canvassed

- at the county seat of Clay county : *provided*, that the unorganized counties of Osceola and O'Brien shall be attached to this district.
- 59th district. SEC. 60. The counties of Plymouth, Cherokee, Ida and Woodbury shall constitute the fifty-ninth district, and entitled to one representative, and the votes cast therein for representative shall be canvassed at the county seat of Woodbury county : *provided*, that the unorganized counties of Sioux and Buncombe shall be attached to this district.
- 60th district. SEC. 61. The counties of Sac, Calhoun, Carroll and Greene shall constitute the sixtieth district, and entitled to one representative, and the votes cast therein for representative shall be canvassed at the county seat of Greene county.
- 61st district. SEC. 62. The counties of Audubon, Guthrie, Cass, and Adair, shall constitute the sixty-first district, and entitled to one representative, and the votes cast therein for representative, shall be canvassed at the county seat of Adair county.
- 62d district. SEC. 63. The counties of Taylor, Ringgold and Union, shall constitute the sixty-second district, and entitled to one representative, and the votes cast therein for representative, shall be canvassed at the county seat of Taylor county.
- 63d district. SEC. 64. The counties of Adams, Montgomery and Page, shall constitute the sixty-third district, and entitled to one representative, and the votes cast therein for representative, shall be canvassed at the county seat of Adams county.
- 64th district. SEC. 65. The counties of Shelby, Harrison, Monona and Crawford, shall constitute the sixty-fourth district, and shall have one representative, and the votes cast therein in said district, shall be canvassed at the county seat of Harrison county.
- SEC. 66. This act to take effect and be in force from and after its publication according to law.

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SENATORIAL APPORTIONMENTS.

An Act to re-apportion the State into Senatorial Districts.  
 [Passed March 30, 1860; took effect July 4, 1860; Laws of Eighth Session, Chapter 80.]

- SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, The ratio for the apportionment of the state into senatorial districts shall be one senator for each seventeen thousand inhabitants or fraction thereof, exceeding one-half in each senatorial district.
- 1st district. SEC. 2. The county of Lee shall constitute the first district, and shall have two senators.
- 2d district. SEC. 3. The county of Van Buren shall constitute the second district, and shall have one senator.
- 3d district. SEC. 4. The county of Davis shall constitute the third district, and have one senator.
- 4th district. SEC. 5. The county of Appanoose shall constitute the fourth district, and shall have one senator.
- 5th district. SEC. 6. The counties of Wayne and Decatur shall constitute the fifth district, and shall have one senator; and the votes for senator in said district shall be canvassed at the county seat of Decatur county.
- 6th district. SEC. 7. The counties of Ringgold, Taylor, Page, Union, Adams, and Montgomery, shall constitute the sixth district, and shall have one senator; and the votes for senator in the sixth district shall be canvassed at the county seat of Taylor county.



SEC. 8. The counties of Fremont, Mills and Pottawattamie, shall constitute the seventh district, and have one senator. The votes for senator in the seventh district shall be canvassed at the county seat of Mills county.

SEC. 9. The county of Des Moines shall constitute the eighth district, and have one senator.

SEC. 10. The county of Henry shall constitute the ninth district, and shall have one senator.

SEC. 11. The county of Jefferson shall constitute the tenth district, and shall have one senator.

SEC. 12. The county of Wapello shall constitute the eleventh district, and have one senator.

SEC. 13. The counties of Monroe and Lucas shall constitute the twelfth district, and have one senator. The votes for senator in the twelfth district shall be canvassed at the county seat of Monroe county.

SEC. 14. The county of Louisa shall constitute the thirteenth district, and shall have one senator.

SEC. 15. The county of Muscatine shall constitute the fourteenth district, and shall have one senator.

SEC. 16. The county of Washington shall constitute the fifteenth district, and shall have one senator.

SEC. 17. The county of Keokuk shall constitute the sixteenth district, and shall have one senator.

SEC. 18. The county of Mahaska shall constitute the seventeenth district, and shall have one senator.

SEC. 19. The county of Marion shall constitute the eighteenth district, and shall have one senator.

SEC. 20. The county of Scott shall constitute the nineteenth district, and shall have two senators.

SEC. 21. The county of Clinton shall constitute the twentieth district, and shall have one senator.

SEC. 22. The county of Cedar shall constitute the twenty-first district, and shall have one senator.

SEC. 23. The county of Johnson shall constitute the twenty-second district, and shall have one senator.

SEC. 24. The county of Polk shall constitute the twenty-third district, and shall have one senator.

SEC. 25. The county of Jackson shall constitute the twenty-fourth district, and shall have one senator.

SEC. 26. The county of Jones shall constitute the twenty-fifth district, and shall have one senator.

SEC. 27. The county of Linn shall constitute the twenty-sixth district, and shall have one senator.

SEC. 28. The county of Dubuque shall constitute the twenty-seventh district, and shall have two senators.

SEC. 29. The county of Clayton shall constitute the twenty-eighth district, and shall have one senator.

SEC. 30. The county of Warren shall constitute the twenty-ninth district, and shall have one senator.

SEC. 31. The counties of Madison and Clark shall constitute the thirtieth district, and shall have one senator. The votes for senator in the thirtieth district shall be canvassed at the county seat of Madison county.

SEC. 32. The counties of Adair, Cass, Dallas, Guthrie, Audubon and Shelby, shall constitute the thirty-first district, and shall have one

- senator. And the votes for senator in the thirty-first district shall be canvassed at the county seat of Adair county.
- 32d district. SEC. 33. The counties of Harrison, Monona, Crawford, Carroll, Woodbury, Sac, Ida, Calhoun, Webster, Humboldt, Pocahontas, Buena Vista, Cherokee, Plymouth, Sioux, O'Brien, Clay, Palo Alto, Kossuth, Emmett, Dickinson, Osceola and Buncombe, shall constitute the thirty-second district, and shall have one senator. And the votes cast in said district for senator shall be canvassed at the county seat of Sac county.
- 33d district. SEC. 34. The counties of Iowa and Poweshiek shall constitute the thirty-third district, and shall have one senator. And the votes for senator in the thirty-third district shall be canvassed at the county seat of Poweshiek county.
- 34th district. SEC. 35. The counties of Marshall, Hardin and Grundy, shall constitute the thirty-fourth district and shall have one senator. And the votes cast therein for senator shall be canvassed at the county seat of Marshall county.
- 35th district. SEC. 36. The counties of Benton and Tama shall constitute the thirty-fifth district, and shall have one senator. And the votes cast for senator in said district shall be canvassed at the county seat of Benton county.
- 36th district. SEC. 37. The counties of Black Hawk, Butler and Franklin shall constitute the thirty-sixth district, and shall have one senator. And the votes cast for senator therein shall be canvassed at the county seat of Black Hawk county.
- 37th district. SEC. 38. The counties of Delaware and Buchanan, shall constitute the thirty-seventh district, and shall have one senator. And the votes cast in said district for senator shall be canvassed at the county seat of Buchanan county.
- 38th district. SEC. 39. The counties of Fayette and Bremer shall constitute the thirty-eighth district, and shall have one senator. And the votes cast therein for senator shall be canvassed at the county seat of Fayette county.
- 39th district. SEC. 40. The county of Alamakee shall constitute the thirty-ninth district, and shall have one senator.
- 40th district. SEC. 41. The counties of Chickasaw, Howard, Mitchell, Winnebago, Hancock, Floyd, Worth, Cerro Gordo and Wright, shall constitute the fortieth district, and shall have one senator. And the votes cast in said district for said office shall be canvassed at the county seat of Floyd county.
- 41st district. SEC. 42. The counties of Story, Boone, Hamilton, and Greene, shall constitute the forty-first district, and shall have one senator, and the votes cast in said district for said office shall be canvassed at the county seat of Story county.
- 42d district. SEC. 43. The county of Winneshiek shall constitute the forty-second district, and shall have one senator.
- 43d district. SEC. 44. The county of Jackson shall constitute the forty-third district, and shall have one senator.
- Allotment. SEC. 45. No district herein constituted shall be represented in the next general assembly by a greater number of senators than herein provided for.

## SENATORS.

An Act to provide for the allotment of Terms of Senators.

[Passed April 2, 1860, took effect July 4, 1860; Laws of Eighth Session, Chapter 99.]

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That whenever under the provisions of the constitution it becomes the duty of the senate to determine by lot the members elect, who shall hold respectively for the terms of two years, and of four years, the same shall be determined at the first session by depositing in a box, to be provided by their secretary, a number of folded ballots equal to the whole number of new members elected, the proper proportion of each number so as to equalize the classes as nearly as possible, shall bear the writing "for two years," and the remainder "for four years," which ballots shall be prepared and deposited by the secretary of the senate, and then the roll of such new members shall be called, and as each member's name is called he shall draw one of such ballots from the box, and hand the same to the secretary, who shall announce the term so drawn, and if any such member shall refuse to draw his ballot, or is absent when his name is called, or being present shall refuse to draw, the president shall in like manner draw and announce the term so drawn; and the term so drawn shall be the term of office for which said senator shall be taken and held to have been elected, and shall be accordingly entered on the journal of the senate.

Allotment.

Mode of determining.

SEC. 2. The members of the senate elected at the October election in the year one thousand eight hundred and fifty-nine, except those elected to fill vacancies, shall hold their said office for the term of four years, but their successors, if it shall then be necessary to equalize the classes of members holding for the respective terms aforesaid, shall determine the terms for which each shall hold his said office by lot, as provided in the preceding section.

Senators elected in 1859 hold for four years.

## DES MOINES RIVER LANDS.

The acts concerning the Des Moines River are important to so many persons, and those parts of them not now of force, are yet in such demand, as defining existing rights, that we deem it best to insert them all.

An Act creating a Board of Public Works, and providing for the Improvement of the Des Moines River.

[Passed February 24, 1847, took effect March 18, 1847; Laws of First General Assembly, Chapter 113, page 165.]

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That for the improvement of the Des Moines river, there shall be established a board, to be called the "board of public works," which shall consist of a president, secretary, and treasurer, who shall be elected by the qualified electors of this state, on the first Monday of August next, and every two years thereafter, and shall remain in office until their successors are elected and qualified; and before entering upon the discharge of their duties, they shall take and subscribe (before some person qualified to administer the same) an oath or affirmation for the faithful and

Board of public works.

When elected.

Oath.

- impartial performance of the duties required of them by law, which shall be deposited with the secretary of state.
- Vacancy. SEC. 2. In case of a vacancy, occasioned otherwise than by expiration of the term of service, the governor shall have power to appoint a successor, who shall serve until the place is regularly filled by election, in the manner prescribed in the first section of this act.
- Salaries. SEC. 3. The president shall receive one thousand dollars, and the secretary and treasurer each eight hundred dollars, per annum, payable quarterly. The president shall be the active agent of said board; shall superintend said work, and make report of the progress of contractors, every month or oftener, as the board may direct; and said board shall hold its regular sessions monthly—but the president may call them together whenever he may deem it expedient.
- Expenses how paid. SEC. 4. Such payments, as well as all the other expenses attending the prosecution of the work, shall be paid from the fund resulting from the sale of the donated lands.
- President may appoint. SEC. 5. In case of inability of the president to discharge the duties of his office, he may appoint either of the other members of the board to act in his stead.
- Chief engineer. SEC. 6. The board shall have power to procure a chief engineer and such assistants as may be necessary, and to take all other steps for the effectual prosecution of the work, and for the preservation thereof, as fast as it shall be completed.
- Quorum. SEC. 7. They shall have the general supervision and control of said work, and any two of said board shall constitute a quorum: *provided*, they shall all have been notified to attend, or if for any reason the attendance of the third member shall be impracticable.
- Treasurer to give bond. SEC. 8. The treasurer shall give bond in the penalty of fifty thousand dollars, with securities to be approved by the governor, conditioned that he will faithfully perform the duties of his office—account for and pay over all moneys that shall come into his hands in his official capacity.
- President and secretary's bonds. The president and secretary shall each give bond, with security to be approved in like manner, in the sum of ten thousand dollars, conditioned that they will faithfully perform the duties required of them by law, which bonds shall be filed in the office of the secretary of state.
- Report. SEC. 9. The board shall make report to the governor, on or before the first day of every regular session of the legislature, giving a full statement of all their doings, and recommending such legislative action as they may deem expedient.
- Extra allowance. SEC. 10. No extra allowance shall be made to any contractor or other person, except under circumstances wherein the law would have compelled such allowance by a private individual. In all such full statements thereof, and the reasons therefor, shall be made out and filed in the office of the board.
- SEC. 11. The board may sue and be sued in their legal name—service of process upon any member of the board shall be sufficient.
- Office. SEC. 12. The board shall establish an office at some suitable place, which they may remove from time to time, so as to be as convenient as practicable to the land to be sold and the improvement to be made.
- Nature of improvement. SEC. 13. The general nature of the said improvement shall be a system of slack water navigation, by means of dams and locks; but, if, at any particular part of said river, such mode of improvement shall be found improper, such other mode may be adopted as the board may deem best.
- Where to commence. SEC. 14. As far as compatible with the advantageous prosecution

of the work, the improvement of the river shall commence, at either the mouth of the *Dead Slough*, or the mouth of the *Massau Slough*, on the Mississippi river—thence up the slough to the Des Moines river—unless the board find the improvement of either of said sloughs not best calculated to advance the interest of the state. They shall then be authorized to select such other point for the commencement of the work as they shall deem expedient; and said improvement shall progress regularly up said Des Moines river; and said board may require the proprietors of any mill dam in said river to place a sufficient lock therein with-  
 in a reasonable time, or otherwise, they may proceed to cause such dam to be removed, or to take such other steps as they may deem proper to render the river navigable. Mill dams.

SEC. 15. The board shall fix upon such dimensions for the locks Locks. as after full inquiry and investigation, they shall deem best adapted to the purpose for which they are intended.

SEC. 16. The dams shall be located, as far as practicable, so as to accommodate the mills and machinery now begun or erected on said river; and the board shall have power to make such arrangements with the proprietors thereof, in relation to the water power as may be just and proper. If no satisfactory arrangement can be made the board shall have power to proceed with the work, and the fact shall be reported as early as practicable, to the governor, to be laid before the legislature. Dams and mills.  
Power of board.

SEC. 17. The board shall also have power to make arrangements with the proprietors of the lands adjacent to the dams on either side of said river, where no mill or machinery shall have been begun or erected for the purpose of procuring for the state a tract of land sufficient to make the water power thereby created fully available; if no such satisfactory arrangement can be made, the sheriff of the county shall summon eighteen disinterested and qualified jurors; of whom each party shall strike off six, and the remaining six shall proceed to mark off such tract of land not exceeding ten acres, and to fix the fair value of the same; and upon the payment of that amount, the board shall have power by a bill in chancery, to compel the proprietors thereof, to execute a deed to the state: *provided*, in the opinion of the court, such convention is necessary to render the water power available. Adjacent land.

SEC. 18. The board shall have power to lease out any water power that may be created by said improvement, for a period of not more than fifty years. They may also make contracts of like duration with individuals, granting them the water power created by any dam: *provided*, they will erect the same, and the necessary appendages, and keep them in repair, upon such conditions and with such securities for the faithful performance of such contracts as they shall deem proper. Water power.  
Contracts for.

SEC. 19. The board may, also, as soon as they shall deem it expedient, cause the removal of rocks and other obstructions to the navigation of any part of said river, below the *Racoon Forks*; and may, after the survey of the river and location of the dams, cause such dams to be built at certain points, out of their regular order, whenever they think the public interest requires it. Removal of  
rocks, &c.  
Dams.

SEC. 20. The board shall have power to take all the necessary steps to prevent waste upon the public lands granted for the improvement of the river, and may bring suit to recover damages therefor. To prevent  
waste.

SEC. 21. They shall have power to purchase any tract of land which may be found necessary to promote the prosperity of the work, or to accomplish the object contemplated by this act, which tract shall be held and used for the public benefit. May purchase  
lands.

- Dam charters vacated.** SEC. 22. All charters granted by the legislature of the territory of Iowa, for building dams across said river, are hereby declared to be vacated, unless the proprietors thereof will construct dams and locks, in accordance with the direction of the board. The board shall require the proprietors, or any person who may have obtained a charter to build one, to build or alter the same so as to correspond with the general character of the improvement of the river, and unless they will comply with such requirement, their charters shall be deemed to be vacated, and the board are authorized to proceed to construct the dams or locks themselves; and nothing herein contained shall prevent the board from paying the proprietors of such dams whatever they may deem reasonable, in addition to the privileges authorized by this act.
- Dams to be altered.** SEC. 23. As far as practicable, the work shall be done and the materials furnished by contracts, which shall be given to the lowest responsible bidders, after full public notice shall have been given. When the lowest bid shall not have been accepted, the reasons therefor shall be stated and filed in the office of the board, and be subject to public inspection.
- May pay proprietors.** SEC. 24. All contracts shall be made in writing, signed by the president of the board and the contractor, and a duplicate thereof filed in the office of the board previous to the commencement of the work; and no contract shall be entered into between the board and either of its members.
- Work to be done by contract.** SEC. 25. The board shall keep a record of all the proceedings, which, together with all papers filed in their office, shall at all times be subject to the inspection of such persons as the legislature may appoint for that purpose.
- Lowest bid.** SEC. 26. The board shall proceed to sell the lands donated for such improvement as fast as the funds shall be required, and as shall be permitted by the terms of said grant; and for the sale of said land the treasurer shall be receiver, and the secretary shall be register, and the secretary and treasurer, in the discharge of their duties as receiver and register, shall be governed by the laws and rules prescribed by congress for the sale of lands in this state, so far as applicable under the restrictions of said grant and provisions of this law, subject to such restrictions as may be authorized by this act.
- Contracts.** SEC. 27. Any person who, on first day of January, 1847, was by the then existing laws of this state, entitled to a claim upon the lands in this act mentioned, or who shall at the time of entering the same be the owner of such claim, shall have the right to enter the same in legal subdivisions of not less than forty acres, unless it be a fractional quarter, at the price of one dollar and twenty-five cents per acre, and the provisions of the several pre-emption laws of congress, passed since the first of June, 1838, and all the privileges and benefits thereby granted are extended to the settlers on said lands, as far as the same are applicable, and the same rules and regulations shall be observed in the entry and sale of said lands by the board.
- Record.** SEC. 28. In all cases when the dams in said river shall abut on lands not then sold, or on which there shall not be a legal pre-emption right, under the laws of the United States, the board shall select a tract of land not exceeding ten acres in extent, and retain the same, in order to render the water power more valuable, or to be otherwise used for the benefit of the state.
- To sell lands.** SEC. 29. The treasurer and secretary shall establish rules for proof of pre-emptions under this act, as well as for fixing the time when such
- Receiver and register.**
- How governed.**
- Claim upon lands.**
- Dams on unsold lands.**
- Rules of pre-emption.**

pre-emptions shall be proved up, and any person who, in making oaths or affirmations in accordance with such rules, shall swear falsely, shall be deemed guilty of perjury and punished accordingly. The said treasurer or secretary, or either of them, are hereby authorized to administer said oaths.

Perjury.

SEC. 30. At the time of the sale, the treasurer and secretary shall issue their certificates of the same to the respective purchasers, retaining duplicates thereof; patents shall thereupon issue, signed by the governor, subject to such regulations as may be prescribed by law.

Certificates of purchase.

Patents.

SEC. 31. The board shall keep books which shall show the amount of sales and to whom; the amount and items of money received, and also of all payments made; and any intentional fraud or deception used in the keeping such books, or any other of the accounts or papers of the office, either by themselves or persons in their employment, shall subject the offenders to imprisonment in the penitentiary, for a period not exceeding three years.

Board to keep books.

Fraud.

SEC. 32. All laws giving power to the county commissioners of any county to authorize the building of dams across the Des Moines river, be, and the same are, hereby repealed, so far as the same applies to said river below the mouth of the Raccoon river, and no farther.

Laws repealed.

SEC. 33. When it shall be compatible with the public interest and the vigorous prosecution of the work, the board may, in payment of pre-emption rights, receive labor or materials, or other things deemed necessary; and for this purpose may postpone the day of payment for pre-emptions for such a length of time as to the board may seem reasonable and proper under all the circumstances: *provided*, that nothing in this section contained shall in any manner change the mode of receiving proposals for said work or materials.

Labor and materials.

SEC. 34. The board shall make an estimate monthly of the work as it progresses, and shall make payment for the same, which in no case shall exceed eighty-five per cent. of the amount due for work done, until the said work is completed.

Monthly estimates. Payments.

SEC. 35. Should it be found impracticable, upon examination and survey, to improve the river in the manner herein contemplated, or if for any other reason the work can not progress successfully, the board shall report that fact to the governor, and from that time their salaries and all further proceedings shall cease.

Duty of board to report.

SEC. 36. The board may, in all sales of land, under this act, reserve to the state the right of using any stone which they may need during the progress of the work, for the construction of any part of the same, and also may reserve from sale such timber lots as they may deem necessary to furnish timber for locks and dams, or any purpose connected with the work: *provided*, that the authority in this section granted shall not extend to the reservation of lands upon which at the time of taking effect of this act there shall be a valid pre-emption right under 1 Ex. 41, sec. 5.

Reserves.

Proviso.

SEC. 37. This act to take effect and be in force, from and after its publication in the weekly newspapers of Iowa city.

Take effect.

Approved, February 24, 1847.

An Act supplemental to an Act creating a Board of Public Works, and providing for the improvement of the Des Moines river, approved February 24, 1847.  
*Passed January 24, 1848, took effect February 25, 1848; Laws of First General Assembly, Extra, Chapter 41, page 39.]*

Who may pre-empt lands.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That any person who is over the age of twenty-one years, or who is the head of a family, and was on the first day of January, 1847, the legal owner and occupant of any claim on the lands donated for the improvement of said river, shall have the privilege of pre-empting and entering three hundred and twenty acres of the same, at the rate of \$1.25 per acre, under such rules and regulations as the board have made; which rules shall conform, as nearly as practicable, with the rules and regulations of the government of the United States in similar cases. And that the privileges of the several pre-emption acts of congress, passed since the first day of June, A. D., 1838, are hereby granted to the actual settlers on said lands: *provided, however,* that no person shall be allowed more than one pre-emption on said lands.

Persons guilty of trespass.

SEC. 2. That if any person applying for any of the privileges embraced in the foregoing section, shall hereafter be guilty of trespass or waste on any of said lands, other than those embraced in their application, shall be liable for such trespass or waste in double the value of such trespass or waste, which may be collected by the board, for the use of the improvement and state, before any court having jurisdiction in such cases. Further, any other person who may be guilty of trespass or commit waste on said lands, shall be liable as above provided.

Board may select lands.

SEC. 3. In all cases when the dams or other improvements of the state, shall abut or be located on lands not sold, or on which there shall not be a legal pre-emption right under the laws of congress, the board shall select such tract or parcel of land as they may find necessary to advance the prosecution of the work, and to render the water power available and most valuable, which lands shall be retained and used for the benefit of the improvement and the state.

Public sale.

SEC. 4. The board shall, after having given public notice, and a reasonable time for pre-empting, which shall be at least two months, offer the residue of said lands at public sale, in such parcels, and at such times and places as they may find necessary and convenient in the prosecution of the work; any person who may purchase any of said lands within one year after said notice has been given, upon which improvements have been made, the purchaser shall pay to the claimant of such land a reasonable compensation for his or her improvements.

Improvements to be paid for.

SEC. 5. That the two last words in the thirty-sixth section of said act be stricken out, and the following added: "the several pre-emption acts of the United States referred to in this act."

Act amended.

Act repealed.

SEC. 6. That sections twenty-seven and twenty-eight, and all other parts of said act, that conflict with this act, be and the same are hereby repealed.

An Act to provide for the descending navigation of the Des Moines river between the mouth of the Raccoon fork thereof, and the northern boundary of the State.  
*[Passed December 27, 1845; Laws of Second General Assembly, Chapter 7, page 31.]*

Obstructing the navigation

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That if any person or persons shall in any wise obstruct the navi-



gation of the Des Moines river, between the mouth of the Raccoon fork thereof and the northern boundary of this state, or continue such interruption or obstruction, shall be subject to indictment, and upon conviction shall be fined in any sum not less than fifty dollars, to be assessed by a jury: *provided, however*, that no person shall be liable for any obstructions occasioned by a mill dam in said river, who shall construct and keep in repair to such dam a good and sufficient slope of the following dimensions, to wit: in length at the rate of six feet for one foot high at the entrance of the slope, with a notch in the dam the full width of the slope, of two feet deep for every six feet high from the bottom of the dam to the top, and said slope shall not be less than thirty feet wide.

SEC. 2. That all acts and parts of acts contravening the provisions of this act are hereby repealed.

Penalty.  
Proviso.  
Repealing section.

An Act providing for the re-organization of the Board of Public Works, and repealing so much of the several acts relating thereto, as conflicts with the provisions of this act.

[Passed January 15, 1849, took effect March 9, 1849; Laws of Second General Assembly, Chapter 85, page 112.]

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, That for the better organization of the board of public works, there shall be elected by the qualified voters of said state, on the first Monday of August next a board consisting of three members, one of whom shall be designated as president, and shall hold his office for and during the term of three years, from and after said day of election, and until his successor is elected and qualified; one of whom shall be designated as secretary, who shall hold his office for the period of two years, and until his successor is elected and qualified; and the other shall be designated the treasurer, who shall hold his office for the term of one year, and until his successor is elected and qualified; and thereafter one member of said board shall be elected annually as their respective terms of office expire, and shall hold their offices for the period of three years, from and after said election, and in case of any vacancy in said board by death, or resignation, the governor of the state shall be and is hereby authorized to fill said vacancy for the unexpired portion of the time.

Election of board and terms of office.

SEC. 2. Said officers shall receive the salaries, and qualify in the manner and under all the restrictions of the laws now in force on this subject, except as herein otherwise provided: *provided*, that for the purpose of securing order and harmony, said board shall meet at their office on the first Wednesday of each month, at which meeting each member shall make report in writing, in a clear and plain manner, setting forth all his acts and doings in the discharge of his official duties for the then preceding month, which reports shall be placed on file in the office, and the same, with all other official acts of said board, shall be plainly and fully recorded in a book kept for that purpose: *provided*, that the salary, when specified, shall be the only compensation said officers shall receive for their services.

Salary.

Monthly meetings and reports.

SEC. 3. That the board at their monthly meeting shall require of the principal engineer, who may be employed on such improvement, a statement in writing over his proper signature, of the probable amount of money which will be required for the prosecution of the work for the month then next following; and after first deducting the balance, if any, which may appear to be in the hands of the treasurer, from an examination of his vouchers for payments during the month then next

Engineer to report probable amount of money required for ensuing month.

Board to give order in favor of president.

preceding, the board shall, by a proper order to be entered of record, authorize the president to make his draft, which shall be signed by him and countersigned by the secretary, for the amount so required, upon the treasurer, for said improvements; and said draft, with the duly certified copy of said order, shall be filed in the office of the treasurer, or person holding said funds, as the proper and only voucher for the amount so paid.

Sell land as fast as necessities require.

SEC. 4. That it shall be the duty of said board to proceed as fast as the necessities of said work demand, and the conditions of the grant will permit, to offer at public sale the lands appropriated for said improvement, in such parcels as they may select, giving at least two months notice to pre-emptors.

Secretary to make out deeds.

SEC. 5. That it shall be the duty of the secretary of the board of public works to make out deeds in fee simple to all lands entered under the provisions of this act and forward the same to the governor, who shall sign the same and affix the state seal thereto and return said deed to the secretary, who shall record the same in a book to be kept for that purpose, and shall attach a certificate to such deed, stating therein the day on which such deed was received from the governor, the day on which the same was recorded, and the book and page on which such deed is recorded, and the secretary shall deliver such deed to the person entitled thereto on demand, at his office, for which service he shall receive a fee of one dollar, to be paid by the person receiving the deed.

Secretary to record deeds; fee therefor.

Lands placed under the control of county commissioners.

SEC. 6. That for the better protection and security of the lands appropriated to aid in said improvement, as well as any lands which may be hereafter acquired by this state, the same shall be and hereby are placed under the care of the county commissioners of the respective counties in which they may be situated, and any or every person who shall commit waste or trespass on any of said lands, shall be liable and subject to the same penalties and punishments as are now provided against trespass or waste upon the sixteenth section and other school lands in this state by law, approved January, 1840; and it is hereby made the duties of all township and county officers to take notice of, and report any, and all violations of this act in their respective townships and counties.

Punishment for waste or trespass.

Duty of township and county officers.

Persons injuring said works liable for damages and subject to punishment.

SEC. 7. That any person or persons who shall be guilty of injuring or removing any portion or parcel of work, material, or property, on or belonging to said improvement, shall be liable to treble the amount of damages caused by the same, to be recovered in the name of the president, for the use of the work, before any competent jurisdiction, and shall be indictable in the county in which the offense shall be committed, and on conviction thereof, be punished by fine of not more than five thousand dollars, or imprisonment for not more than one year.

Pre-emptors.

SEC. 8. Every head of a family, or single man over the age of twenty-one years, who, on the first day of January, 1849, had a claim thereon, made and improved according to the claim laws now in force in this state, shall have the right to pre-empt said claim, not exceeding three hundred and twenty acres, at any time before said claim is offered at public sale, at one dollar and twenty-five cents per acre: *provided*, that any person who has pre-empted a part of his or her claim, may pre-empt the residue thereof in such legal sub-divisions, as may suit his or her convenience, not exceeding three hundred and twenty acres in all of said pre-emptions.

Board may withhold lands from sale

SEC. 9. After said public sale, the board shall have power, and they are hereby authorized, if, in their opinion, the best interests of the said

work demands it, to withhold the balance of said lands from sale or pre-emption until such time as in their opinion it would be good policy to again offer said lands for sale, the notice for which shall be given for the time herein provided for the first sales.

SEC. 10. That all after the word "improvements," in the eighth line of the fourth section of an act entitled "An act supplemental to an act creating a board of public works, and providing for the improvement of the Des Moines river," approved January 24, 1848, and all other acts and parts of acts now in force in this state conflicting with the provisions of this act, be and the same are hereby repealed. Repealing sec

SEC. 11. This act shall be in force from and after its publication in the Iowa Democrat and Des Moines Valley Whig. Take effect.

Approved January 15, 1849.

An Act to secure a more vigorous prosecution and early completion of the Des Moines River Improvement, and amendatory and supplemental to all other Acts now in force in relation thereto.

[Passed Feb. 5, 1851, took effect Feb. 17, 1851; Laws of Third General Assembly, Chapter 58, page 131.]

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That the offices of president, secretary and treasurer, of the board of public works, be and the same are hereby abolished; that the control and management of the Des Moines river improvement is given to the officers hereinafter mentioned. The offices of president, secretary and treasurer abolished. New officers created.

SEC. 2. That all sales of lands granted by the United States for said improvement are suspended, except as herein provided. Sales suspended.

SEC. 3. The governor shall, by and with the advice and consent of the senate, appoint a suitable individual to be known as *commissioner* of the Des Moines river improvement, who shall hold his office for the term of two years from and after the first day of February, 1851, and until his successor is duly appointed and qualified. Before entering upon the discharge of his duties he shall take and subscribe the following oath, before some person authorized to administer the same: "I, \_\_\_\_\_, do solemnly swear that I will to the best of my ability, honestly and faithfully discharge the duties imposed upon me as commissioner of the Des Moines river improvement, and to the utmost of my exertions, strive to promote the vigorous prosecution, and secure the early and economical completion of the said work; and that I will give my constant and unremitting personal attention thereto." The said commissioner shall also, previous to entering upon the discharge of the duties of his office, execute a bond to the state of Iowa, in the sum of thirty thousand dollars, with freehold security, to be approved by the governor, conditioned for the faithful and honest discharge of his duties as commissioner aforesaid: which said bond and oath shall be filed with the secretary of state, and preserved by him. Governor shall appoint a commissioner. Bond. Governor to approve. Filed.

SEC. 4. There shall in like manner be appointed some suitable person to the office of *register* of the Des Moines river improvement, who shall hold his office for the like term as the commissioner, and until his successor is duly appointed and qualified. Before entering upon the discharge of the duties of his office, he is required to take and subscribe (so far as applicable) a like oath with that taken by the commissioner, and he shall also execute a bond in the sum of fifty thousand dollars, with like security, and to be similarly approved, filed and preserved as the bond executed by the commissioner: *provided*, That if the appoint- Register. Oath. Bond. Approved and filed.

Proviso.	ments hereby authorized to be made shall not be made in time for confirmation by the senate, the governor shall have the same right to appointment as though a vacancy existed.
Commissioner and register to be appointed every two years.	SEC. 5. At the regular meeting of the general assembly in the year 1852, and every two years thereafter, there shall, in like manner, be appointed by the governor, by and with the advice and consent of the senate, a commissioner and register of the Des Moines river improvement, who shall qualify severally, as required in the two preceding sections.
Commissioner's duty. Oversight and control of works.	SEC. 6. It is the duty of the commissioner to take a personal oversight and control of the improvement as it progresses;—examining each and every part thereof as often as practicable;—to do all things properly devolving upon such an officer, and in all his acts connected with said improvement; to have special reference to the permanency and early completion of the entire work. He shall immediately after qualifying as herein provided, proceed at once to the discharge of his duties;—shall take charge of all books, papers, plans and other matters of whatever kind or description, now in the hands of the president of the board of public works, &c., in like manner deliver the same to his successor in office, and in general perform all the duties now devolving on such president, with such additional duties as are herein provided.
Take charge of books, papers, &c.	
Deliver to successor	
Register's duty.	SEC. 7. The register is to do and perform all such acts and things connected with the sale of the lands mentioned in this act as have heretofore been done and performed by the secretary and treasurer of the board of public works, and such other duties as are herein imposed, or would properly come within the scope of such an officer, under such rules and regulations as have been or may be established by the board, or said commissioner and register.
May contract for completion of works below Keosauqua.	SEC. 8. The commissioner and register are hereby authorized to contract with any individual or individuals, company or companies, for the completion of that part of the improvement of said river at and below Keosauqua, by allowing the contractors in payment for such work, as the same progresses, any portion of the lands granted for the improvement of said river which lie below Raccoon Forks, at a price not less than one dollar and twenty-five cents per acre; and if the lands lying below the Raccoon Forks can not be disposed of upon such terms as to procure the completion of the works mentioned in this section, after having made provisions for the payment of the present liabilities of said work, the commissioner and register are hereby authorized and empowered, to contract and consent on the part of the state, to surrender to such contractor or contractors, the water rents of the power created by the above improvement, and also the tolls at the locks, upon such conditions and for such time as will compensate such contractor or contractors for such work;—but the tolls shall not exceed in their average rate those now charged on the Monongahela river, in the state of Pennsylvania, nor shall the water-powers thus to be surrendered include the water-power needed for the purposes of lockage;—nor shall the contract above contemplated be entered into unless it will secure the completion of the improvement above mentioned.
May sell water-rents and tolls	
Tolls limited.	
Must complete works.	
May build dams and locks above Keosauqua.	SEC. 9. The said commissioner and register have the same power to build dams and locks above Keosauqua, at such points as they may deem necessary for the best interest of the improvement, as has heretofore been given by law to the board of public works; and they are hereby authorized and required to build a lock at any point above Keosauqua: <i>provided</i> they can get an individual or company to build the

dam and abutment at the said point for the use of the water-power thus created; the dam to be built according to the plans and specifications adopted for said improvement: *and provided further*, that said dam and lock shall be located at such point or points as will assist in carrying out the general system of said improvements, and shall be paid for from the lands granted above the Raccoon Forks.

SEC. 10. If no satisfactory arrangement can be made by which the locks and dams now under contract can be finished as specified above, the said commissioner and register may make such arrangement as to complete such portions of said improvement as will secure the navigation of said river for the longest period of time in each year.

May make arrangements to secure navigation, &c.

SEC. 11. In all contracts herein contemplated, the individual or individuals, company or companies, so contracted with, shall look alone to the funds and lands belonging to said improvement for payment, and not to the state.

Contractor's payments, come from improvement fund.

SEC. 12. Such work, whether done by a company or companies or otherwise, is to be done according to such plans and specifications as are or may be adopted by the officers having the management of the improvements, and shall be under their supervision.

Work must be done under the supervision of the officers.

SEC. 13. All loans or other moneys procured under the provisions of this act, must be paid to the register, or upon his order; and no creditor has any claim for money loaned, and no debtor any credit for money paid, until such money has been paid to the register, or upon his order.

Moneys must be paid to register.

SEC. 14. None of the above mentioned contracts will be valid until they are signed by the commissioner, countersigned by the register, and approved by the governor; and, subject to such approval, the commissioner may in like manner make any other arrangement of the kind and character of those above authorized, having the same object in view, and not exceeding in their general operations the authority above conferred.

Contracts not valid until made and approved by governor.

SEC. 15. The commissioner and register also have power to dispose of any other lands which have been or may hereafter be granted for the improvement of the Des Moines river, in any mode above specified, subject to the like approval of the governor; or they may direct any portion thereof to be sold, but not for a less price than one dollar and twenty-five cents per acre. Such lands or their proceeds shall be devoted to the completion of said improvement to the greatest extent practicable.

Sale of lands

Governor approved \$1.25 per acre.

SEC. 16. Any of the lands which may be occupied by actual settlement on the first day of April next, may be purchased by the occupant at any time before the first day of July next, under such rules and regulations as may be established by the commissioner and register under this act, and the laws now in force not conflicting herewith; and the same shall not be subject to be contracted away, as above provided, prior to said first day of July, 1851, except such contract, if made before that time, shall reserve to the said occupant the right to purchase as aforesaid; and said occupant shall have the right to purchase at the rate of one dollar and twenty-five cents per acre.

Pre-emption.

SEC. 17. All contracts authorized by this act shall be executed in triplicate, one of which shall be filed with the register, and by him recorded in a book to be kept for that purpose, another of which is to be filed with the secretary of state, to be by him preserved, and the other to be delivered to the contractor.

Contracts triplicate, one to be filed with register, secretary of state, contractor.

SEC. 18. The register is required to make out triplicate receipts for all lands purchased at his office under this act—one to be filed in his office and to be recorded by him in a book to be kept for that purpose—

Triplicate receipts for land sold.

- Purchaser.** one to be given to the purchaser; and as to the third, he shall at least once in each month or oftener if required by the commissioner, make out a full and correct statement of all lands entered at his office, by whom and when entered, and of all moneys received, and, after verifying the same by affidavit, shall hand the same together with the said third receipt, or receipts, over to the commissioner, which said statement and receipts, after having been examined and compared by the said commissioner with the books and papers in the office of said register, shall be indorsed and so examined and approved by said commissioner and by him forwarded to the secretary of state, to be by him preserved.
- Commissioner to examine, indorse and forward to secretary of state.** SEC. 19. The commissioner has power to discharge all engineers in the employ of the state in the prosecution of said improvement, and to employ the same or others if he deems their service necessary; but it shall be and is hereby made the absolute duty of said commissioner, to employ no more or other engineer or engineers than are strictly necessary to the speedy and proper prosecution of said work.
- Commissioner may discharge engineers and employ them again, or others.** SEC. 20. The commissioner and register shall receive, as the only compensation for their services, annual salaries, to be paid quarterly out of any funds arising from the grant of lands mentioned in this act. The salary of the commissioner shall be ten hundred dollars, and that of the register ten hundred dollars, per year.
- Salaries.** SEC. 21. For the present, all further work on the canal at the mouth of the Des Moines river is suspended, and it is not to be regarded as a part of the improvement mentioned in this act; but the said commissioner and register shall nevertheless place the said canal in such condition as to prevent injury to the work already done, and shall see that all the property of the state in connection therewith is properly preserved.
- Commissioner \$1,000.** SEC. 22. The commissioner is required to remove all obstructions now in said river, in the way of dams or otherwise, when the same in his judgment, are obstructions to the navigation; and he may if he deems it necessary for the best interest of the improvement, remove such obstructions as exist at or near the mouth of said river.
- Work on canal suspended.** SEC. 23. Deeds in fee-simple for all lands purchased shall be made by the register and governor in the same manner as has heretofore been provided for making like deeds by the secretary, but no fee shall be allowed therefor.
- Preservation.** SEC. 24. Should a vacancy occur in either of the above offices at any time, the governor is to fill the same by appointment. The person so appointed shall qualify as those elected, and shall hold his office until the regular appointment and confirmation herein contemplated; and for good cause the governor is hereby empowered to remove either of said officers, and appoint others in their place.
- Commissioner to remove dams and other obstructions.** SEC. 25. It is the duty of the commissioner and register to make an annual report of all their doings connected with their offices to the governor, on or before the first day of December in each year, and the governor shall lay the same before the general assembly whenever it may be in session.
- Deeds.** SEC. 26. That any individual or company who may build any dam or dams, on the terms specified in the eighth section of this act shall, when the whole work below Keosauqua shall be completed and paid for up to that point, be paid for the building of said dam, at the price agreed upon by said individual or company and the commissioner and
- Vacancy.**
- Commissioner and register to make annual report to governor.**
- Contractor paid, dam to become property of the state.**

register before such dam was built, and the whole work shall thereafter be the property of the state.

SEC. 27. The state at any time may have the privilege of taking said improvement off the hands of any contractor, contractors or company herein contemplated, by the payment of all moneys due them, over and above the proceeds of the sales of such lands as he or they may have received from the state in payment as above provided.

State may take improvements off contractor's hands

SEC. 28. The said commissioner and register have full power and authority, and it is hereby made their duty, to settle and arrange all claims and demands preferred and presented by any mill owner on said river, for damages or otherwise; but in so doing, shall take into view all of the circumstances of advantage to said mill owners as well as their delays, and to settle such controversies; have the right to make agreed cases for hearing before any court of competent jurisdiction, or to make any other arrangement that they may deem expedient. Suits may be brought against the commissioner by the name of "A. B. commissioner of the public works of the state of Iowa," and such suits may be brought not only for liabilities incurred by himself but also for those for which the late board of public works might have been sued. The commissioner has power in all cases to settle with contractors or other creditors of the Des Moines river improvement fund, and to submit any controversy that may arise on those subjects to an arbitration when the same can not be settled amicably.

Commissioner and register to settle claim of mill owners for damages.

Agree cases.

Suits.

Arbitration.

SEC. 29. That if the commissioner and register can contract for the completion of the entire improvement below Keosauqua, including the canal below St. Francisville with any company or companies by pledging the entire net proceeds arising from the sale of the lands lying below the Raccoon Forks, and water rents and tolls below Keosauqua, they are hereby authorized so to do, any thing in this act to the contrary notwithstanding.

May contract for completion of work.

SEC. 30. All acts and parts of acts coming in conflict with the provisions of this act are hereby repealed.

Repeal.

An Act supplemental to an Act, providing for the more vigorous prosecution of the Des Moines River Improvement, &c. Approved February 1, 1851.

[Passed February 5, 1851, took effect July 1, 1851; Laws of Third General Assembly, Chapter 3, page 158.]

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That the present secretary of the board of public works, be and he is hereby authorized, to make out and record all deeds for lands sold by the board of public works up to the date of the taking effect of the act to which this is supplementary, and, that he be allowed the fee as provided by the 5th section of an act providing for the re-organization of the board of public works, &c., approved January 15th, 1849.

Secretary of board of public works to record deeds

Fees.

SEC. 2. That the register of the said land office allow said secretary, to enter lands to the amount of his fees for making out and recording said deeds, at the rate of two dollars per acre, and that they be delivered to the purchasers free of charge: *provided,* said secretary furnish the record books for said deeds free of charge to the state.

To be paid in lands, @2 per acre.

Record books.

An Act to amend "an Act to secure the more vigorous prosecution of the Des Moines River Improvement," and amendatory and supplemental to all other acts now in force in relation thereto. Approved February 5th, 1851.

[Passed January 19, 1853, took effect February 9, 1853: *Laws of Fourth General Assembly, Chapter 32, page 63*]

Lands, may be sold.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That the commissioner and register of the Des Moines river improvement be, and they are hereby authorized and empowered to sell, and dispose of all and any lands which have been, or hereafter may be granted by congress for the improvement of the Des Moines river, in such manner as they may deem most expedient for the early completion, and vigorous prosecution of said improvement: *provided,* that said land shall not be sold for a less sum than one dollar and twenty-five cents per acre, or a less amount than one million, three hundred thousand dollars in the aggregate: *and provided further,* that the proceeds of said sales shall, after paying the present indebtedness and liabilities of said improvement, be devoted to its completion to the greatest extent practicable.

Limitation.

Object.

Wholesale or retail.

SEC. 2. That said commissioner and register are hereby authorized and empowered, if deemed by them necessary for the best interest of the improvement, to transfer, or convey in fee simple, or by other title to any individual or individuals, company or companies, any portion or all of said lands, procure fund for the object above specified, upon in order to such terms and with such rights and privileges to the contractor, or contractors, as they may deem necessary, subject to the limitations herein contained; and they are also authorized and empowered to transfer, lease, or convey unto any such company, or companies, individual or individuals, the right to the tolls, and water rents arising from said improvement for such length of time, not exceeding twenty-five years, and upon such terms as in their judgment will most certainly secure a speedy prosecution of said improvement, so as not to interfere with existing rights: *provided,* that no privileges shall be granted said company, or individuals which will prevent the construction of other works of internal improvement to, or through the Des Moines river valley.

Tolls and water rents.

Proviso.

Trustees.

SEC. 3. And they are also authorized and empowered, if deemed by them advisable or necessary to the attainment of that object, to place said lands in the hands of trustees, not exceeding three in number, to be by them and the person with whom they may contract, agreed upon for the purpose of the raising means to pay off the present indebtedness and liabilities, and secure the prosecution of said work.

Contracts.

SEC. 4. For the purpose of selling said lands, leasing said water rents, conveying the right to said tolls, or placing said lands in the hands of such trustees, except as herein otherwise provided, said commissioner and register are hereby given full power to make and enter into such agreement, or agreements, contract, or contracts, as may by them be deemed necessary, such contracts or agreements only being valid when signed by the commissioner, and countersigned by the register, and approved by the governor.

Pre-emption.

SEC. 5. Any of said lands which may be claimed by *bona fide* settlers at the time of taking effect of this act, may be purchased by such settlers at any time before the first day of December next, under such rules and regulations as may be established by said commissioner and register, in lots not exceeding one hundred and sixty acres each; and any contract made as herein contemplated, shall reserve to said settler the right to purchase as aforesaid at the rate of one dollar and twen-



ty-five cents per acre: *provided, however*, that where such *bona fide* set- Conditions.  
tlement is now made on lands which are not now surveyed, said settlers shall have the right to purchase their said lands under the regulations aforesaid at any time within one year after said lands are surveyed, at the rate per acre above named.

SEC. 6. Contracts made as herein contemplated, shall be executed, Records.  
filed and recorded as provided in section seventeen of the act to which this is amendatory.

An Act to secure to the Electors of Iowa the right to elect a Commissioner and Register of the Des Moines River Improvement, and to make further provisions for the prosecution and completion of said Improvement.

[Passed January 24, 1853, took effect February 10, 1853. Laws of Fourth General Assembly, Chapter 103, page 162.]

SECTION 1. *Be it enacted by the General Assembly of the State of* Election, com-  
*Iowa*, That there shall be a commissioner and register of the Des Moines commissioner and  
river improvement elected by the qualified electors of this state, on the register.  
first Monday of April, 1853, who shall hold their respective offices for Term.  
the term of two years and until their successors are elected and quali-  
fied; the said election to be conducted as other state elections are, and Returns.  
returns made, canvassed, and certified, as provided in the case of other Qualification.  
state officers; and the said commissioner and register to qualify as is  
provided in sections 3 and 4 of "an act to secure the more vigorous  
prosecution and early completion of the Des Moines river improvement,"  
etc., approved February 5th, 1853.

SEC. 2. That for the purpose of aiding the commissioners in con- Assistants.  
ducting or concluding any contract, or agreement, under the provisions  
of this act, or any other act on the subject of the Des Moines river im-  
provement, George G. Wright, of Van Buren county, and Uriah Biggs,  
of Wapello county, are hereby appointed his assistants, with equal  
power with said commissioner, in making and determining such contracts  
and agreements, as are mentioned in section six of this act.

SEC. 3. Prior to the said assistants entering upon the discharge of Oath.  
the duties devolved upon them, they shall each take and subscribe an  
oath that they will faithfully and impartially discharge their said duties,  
which said oath shall be filed with the register.

SEC. 4. The duties of said assistants shall not extend any further Duties  
than to aid said commissioner in negotiating such contracts or agreements  
as are contemplated in this act, or any other act passed at the present Powers.  
session of the general assembly; and any thing in this act, or any act  
on the subject of the Des Moines river improvement, which vests author-  
ity and power in the commissioner and register to make contracts and  
agreements, is herein so modified as to vest said power and authority in  
the said commissioner and the two assistants.

SEC. 5. The compensation to each of the said assistants shall be Pay. 1  
three dollars per day, for each day he may be necessarily engaged in  
negotiating as afore-said, to be paid out of any moneys arising from the  
sales of lands granted to this state, to aid in improving said river.

SEC. 6. That the said commissioner and assistants, in contracting Contracts  
for the means to carry on said improvement, shall not make any con-  
tract, or agreement, with any company, or individual, under the provis-  
ions of this act, or any law now in force, or which may be in force at the  
time of making said contract or agreement, unless such contract or  
agreement stipulates for at least thirteen hundred thousand dollars to be

Tolls and water rents.	faithfully expended in the payment of the debts and liabilities of said improvement, and to the completion thereof to the greatest extent practicable: <i>provided</i> , that if it be necessary, in order to effect a contract, or agreement of the character in this section mentioned, such contract or agreement may convey to any company, or individual, the right to the tolls and water rents arising from said improvements for such length of time, and upon such terms as they may deem expedient: <i>provided</i> , any
Settlers.	of said lands which may be claimed by <i>bona fide</i> settlers, at the time of taking effect of this act, may be purchased by such settlers, at any time before the first day of December next, under such rules and regulations as may be established by said commissioner and register; and any contract made as herein contemplated, shall reserve to said settlers the right
Rate.	to purchase, as aforesaid, one hundred and sixty acres, at the rate of one dollar and twenty-five cents per acre: <i>provided, however</i> , that where such <i>bona fide</i> settlement is now made on lands, which are not now surveyed, said settlers shall have the right to purchase their said lands,
Unsurveyed lands.	under the regulations aforesaid, at any time within one year after said lands are surveyed, at the rate per acre above named.
Salary to cease.	SEC. 7. If no contract or agreement shall have been made by said commissioner and assistants, on or before the first day of September, 1853, of the character of that required in section six of this act, then from that day the compensation to all officers connected with said improvement, except the register and one engineer, whom he shall employ, shall cease; and all operations connected with said work, except such
Unfinished work.	parts as are now under contract, shall be suspended until further legislation can be had on the subject. But the register shall, nevertheless, cause the unfinished work, not now under contract, to be placed in such
Preservation.	condition as to prevent injury, and shall also see that all the property of the state, connected with the work, is carefully preserved, and exercise all other powers connected with said improvement now vested by law in the commissioner, except as herein otherwise provided.
Propositions.	SEC. 8. If at any time subsequent to the first of September, 1853, the register shall receive propositions, from any individual or company, which he deems of sufficient importance, he may submit the same to the commissioner and the assistants; and, should a contract of the kind required in this act be consummated, then the salary of the commissioner shall again commence to run; and the improvement shall proceed, under such contract, as though the work had not been suspended.
State to be protected.	SEC. 9. Any contract made under the laws now or hereafter to be in force, shall be so made as to protect the state from any damages under any pre-existing contract; and, in no event, shall the state be liable for any contract made or to be made; but the person or company contracting shall look alone to the funds belonging to, and arising from, said improvement.
Repeal.	SEC. 10. All acts and parts of acts coming in conflict with the provisions of this act are hereby repealed; and this act shall take effect and be in force, from and after its publication in the Iowa Star and Des Moines Republic.

An Act in relation to the Des Moines River Improvement.

[Passed January 29, 1857, took effect February 23, 1857; Laws of Sixth General Assembly, Chapter 222, page 383.]

Commissioner contract.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, That there shall be appointed by the governor of the state of

Iowa, a *commissioner* who, with the *commissioner* already existing by law, shall be, and is hereby fully authorized and empowered, to agree and contract with any party or parties for the speedy and earliest prosecution of the work upon the Des Moines river improvement, upon such terms as they may believe to be just and advantageous to the state, and it shall also be the duty of said commissioners upon just and equitable terms to ascertain and pay any and all indebtedness which may be due any party or parties for money advanced, work done or materials furnished for or on account of said improvement. In case of a disagreement between the commissioners as to the terms of the contract or settlement, the attorney general shall act as a third commissioner, and any two of the commissioners shall have power to act. Any settlement or contract entered into by said commissioners shall not be valid until approved by the governor.

SEC. 2. That it shall be lawful for said commissioners to sell and dispose of lands belonging to the Des Moines river grant, and not heretofore sold or any portion thereof, or pledge the same or any portion thereof, by mortgage or deed of trust, together with the improvement contemplated, and make them the basis of bonds to be issued for money borrowed, which sale, if any is made, shall be for the payment of indebtedness and the construction of said improvement; and the proceeds of said bonds, if any shall be issued in conformity to the above provisions, shall be applied to the prosecution of said improvement, or to the payment of just claims against the same, and any diversion therefrom of said lands or the moneys raised by the pledge of the same shall be illegal.

Sell and mortgage lands.

SEC. 3. That the commissioners be, and they are hereby empowered to enter into contract with any company for the sale of all the lands and the tolls and water rents for a term of years, who will give satisfactory evidence and security for the entire completion of the improvement.

Duty of commissioners.

SEC. 4. That any and all bonds, if there should be any issued in pursuance of the provisions of this law, shall be signed by the governor and countersigned by the commissioners and duly registered in the office of the auditor of state, and shall contain a condition that the un-sold lands of the Des Moines river grant, and the improvements are alone bound as security for the same, and that the state is in no way responsible other than to faithfully appropriate such lands or the income of the improvement to the liquidation of the same. In case a contract is made with any person or persons, the provisions of the contract shall be such as that the lands donated by congress for said improvement, and yet remaining unsold, shall be faithfully applied to said work at their actual value, either by being sold in the manner hereinafter provided, or by being taken by the contracting party at a fair valuation: *provided*, that any disposition of said lands shall be in strict compliance with the terms and conditions of the act of congress donating the same.

Bonds.

SEC. 5. That if any lands are sold as above provided for by said commissioners, it shall be their duty to advertise the same by publication in at least three newspapers in or nearest to the county, wherein said lands are situated, and one newspaper published at Fort Des Moines, at least thirty days before the sale, and said sale shall not be valid unless made at public auction at the county seat of the county in which the same are situated. In case it is necessary, in order to carry out the provisions of this act, to value any of the said lands, the same shall be valued by three persons, who shall be citizens of this state, and who shall be chosen as follows: one by the governor of the state, one

Advertise.

by the attorney general, and the third to be the commissioner of said improvement, who shall appraise the required amounts of said lands at their actual cash value, at the time of such valuation, and the said appraisers shall first subscribe an oath that they will faithfully and impartially perform the said duty.

Salary.

That the salary of the commissioners shall hereafter be twelve hundred dollars per annum, and the salary of the commissioner herein provided for, shall be the same as the commissioner for the time he shall be actually employed in the business connected with said improvement.

Transfer papers.

SEC. 6. That it shall be the duty of the register of the Des Moines river improvement, as early as practicable, to transfer and deliver over to the register of the state land office any and all vouchers, plats, books, and other things belonging to and connected with said register's office.

Register abolished.

SEC. 7. That the office of *register* and the office of *assistant commissioners* be and the same are hereby *abolished*, and the *register of the state land office* be, and hereby is required to do and perform all the duties, heretofore performed by the register of the Des Moines river improvement.

Old accounts.

SEC. 8. That said commissioners be and are hereby authorized to settle all accounts of former commissioners and agents of the Des Moines river improvement, and demand and receive from any and all of them all vouchers, books and other things belonging to and connected with said improvement, and the same shall be transferred and kept at the office of the commissioners of said improvement.

Commissioners' report.

SEC. 9. It shall be the duty of the commissioner or commissioners to report semi-annually to the governor a full and true statement of his or their doings, and the progress of the improvement, and all matters of importance connected therewith, and these reports, or a summary of them, shall be by the governor reported to the legislature.

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Joint Resolutions, containing Propositions for the Settlement with the Des Moines Navigation and Railroad Company.

[Approved March 22, 1858; Resolution of the Seventh General Assembly, No. 4, page 427.]

WHEREAS, The Des Moines navigation and railroad company have heretofore claimed, and do now claim, to have entered into certain contracts with the state of Iowa, by its officers and agents, concerning the improvement of the Des Moines river in the state of Iowa, and whereas disagreements and misunderstandings have arisen and do now exist between the state of Iowa and said company, and it being conceived to be to the interests of all parties concerned, to have said matters, and all matters and things between said company and the state of Iowa, settled and adjusted. Now, therefore, be it

*Resolved by the General Assembly of the State of Iowa*, That for the purpose of such settlement, and for that purpose only, the following propositions are made by the state to said company: that the said company shall execute to the state of Iowa full releases and discharges of all contracts, agreements and claims with or against the state, including rights to water rents which may heretofore or do now exist, and all claims of all kinds against the state of Iowa and the lands connected with the Des Moines river improvement, excepting such as are hereby, by the state secured to the said company; and also surrender to said state the dredge-boat and its appurtenances, belonging to said improvement; and the state of Iowa shall, by its proper officer, certify and convey to the said

company, all lands granted by an act of congress, approved August 8th, 1846, to the then territory of Iowa, to aid in the improvement of the Des Moines river, which have been approved and certified to the state of Iowa by the general government, saving and excepting all lands sold or conveyed or agreed to be sold or conveyed by the state of Iowa, by its officers and agents, prior to the 23d day of December, 1853, under said grant, and said company or its assignees shall have right to all of said lands as herein granted to them as fully as the state of Iowa could have under or by virtue of said grant, or in any manner whatever, with full power to settle all errors, false locations, omissions or claims in reference to the same, and all pay or compensation therefor by the general government, but at the costs and charges of said company, and the state to hold all the balance of said lands, and all rights, powers and privileges under and by virtue of said grant, entirely released from any claim by or through said company; and it is understood that among the lands excepted and not granted by the state to said company, are 25,487.87 acres lying immediately above Raccoon Forks, supposed to have been sold by the general government, but claimed by the state of Iowa.

And it is further agreed that said company release and convey to the state of Iowa or its representatives, all materials of every kind and description, prepared for or intended for the construction of locks or dams in said improvement, wheresoever the same may be, and the state shall take the existing contracts, but no other liabilities of any name or nature except as herein provided, for constructing or repairing the works on said improvement at Keosauqua, Bentonsport, Plymouth and Croton, and no other or different, with all liabilities and advantages arising upon said contracts, and per centage retained thereon, excepting that the company shall pay all estimates for work done or material prepared up to this date, beyond the per centage retained from the contractors under their agreements; and the said company shall be discharged from all liability for the claims of the officers of the state for services or salaries.

The said company hereby agree to pay the state the sum of twenty thousand dollars, which sum shall be paid to the order of the commissioner of the Des Moines river improvement, (as fast as he may require the same, to liquidate existing liabilities against said Des Moines river improvement,) on thirty days' notice given to said company at their office in the city of New York; and any bonds or certificates of indebtedness against said improvement not exceeding in amount the sum of eleven thousand dollars, which are now due and unpaid, are to be received in part payment of said sum of twenty thousand dollars: *provided*, that no liabilities assumed by the state in this contract, shall be a charge against the state in her sovereign capacity, but all such liabilities, if any, shall be chargeable upon and payable out of the remaining lands belonging to the Des Moines river grant; *and provided also*, that if congress shall permit a diversion of the lands of said Des Moines river grant, or the title thereto shall become vested in the state, so as to become subject to grant, the said remaining lands, after the payment of all the liabilities, as aforesaid, against said improvement, and the completion of such locks and dams on the Des Moines river as the legislature shall direct, shall be granted to the Keokuk, Fort Des Moines and Minnesota railroad company, to aid in the construction of a railroad up and along the valley of the Des Moines river, upon such terms and in such manner as the legislature may provide, one-fourth of which said lands shall be applied by said company to aid in the construction of said road above

the city of Des Moines: *and provided further*, that if the said Des Moines navigation and railroad company shall ratify and accept these propositions for a contract by filing a written acceptance thereof in the office of the secretary of state within sixty days from the passage of this joint resolution, then this contract shall be in force and bind both of the parties thereto.

Approved, March 22, 1858.

An Act disposing of the Grant of Land made by an Act of Congress granting land to the Territory of Iowa to aid in the Improvement of the Navigation of the Des Moines river.

[Passed March 22, 1858, took effect April 7, 1858; Laws of Seventh General Assembly, Chapter 99, page 195.]

Des Moines river  
lands given to  
the railroad.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, That all the lands granted to the then territory of Iowa by an act of congress, approved August eighth, eighteen hundred and forty-six, entitled an act granting lands to the territory of Iowa, to aid in the improvement of the navigation of the Des Moines river in said territory, and all lands and compensation which may be given in extension or in lieu of any portion thereof by the general government, and also all stone, timber and other material turned over to the state by the Des Moines navigation and railroad company in settlement with the state of Iowa, be and the same are hereby disposed of and granted to the Keokuk, Fort Des Moines and Minnesota railroad company, a body corporate created and existing under the laws of the state of Iowa, to aid in the construction of a railroad from the city of Keokuk, at the mouth of the Des Moines river, up and along the valley of said river by way of the city of Des Moines, to the northern line of the state, in the direction of the southern bend of the Minnesota or St. Peters river, *excepting* all the lands belonging to said grant heretofore sold by the state of Iowa, or which may hereafter be conveyed to the Des Moines navigation and railroad company by virtue of a settlement now pending between the state and said company, and also so much of the said timber, stone and other material as may be used in the completion of the locks and dams at Croton, Plymouth, Bentonsport and Keosauqua, this grant to become operative so soon as congress shall assent to or permit a diversion or the title thereto shall become vested in the state so as to be subject to grant.

Lands of navigation  
company  
excepted.

Railroad company  
to pay liabilities  
of improvement  
to company.

SEC. 2. That the Keokuk, Fort Des Moines, and Minnesota railroad company, shall pay all liabilities against said Des Moines river improvement, and against the state of Iowa, growing out of said improvement, whether by contracts between the state and other parties or between the Des Moines navigation and railroad company and other parties, or between any parties whatever which have been assumed by the state in consequence of the proposed settlement with the Des Moines navigation and railroad company, as contained in the joint resolution passed at the present session of the general assembly; and said company shall also complete the locks and dams at Croton, Plymouth, Bentonsport and Keosauqua, and fifty thousand acres of the lands which may hereafter be certified by the general government to the state of Iowa shall be set apart by the register of the state land office, which said lands shall be held for the purpose of securing the payment of said liabilities and the completion of said lock and dams, and that whenever said company shall pay thirty thousand dollars of said liabilities properly

Co. completes  
locks and dams.

Liabilities paid  
secures lands.

audited and allowed by the register of the state land office, or shall do thirty thousand dollars worth of work on said locks and dams to be certified and allowed by an engineer to be appointed by the governor to superintend said works, that then the register of the state land office shall issue to said company a certificate for ten thousand acres of said lands, so set apart for every thirty thousand dollars so paid or expended until said liabilities are paid, and said locks and dams are completed and if any of said fifty thousand acres of land shall remain after the payment of said liabilities and the completion of said locks and dams, it shall be certified to said railroad company in the same manner provided in this act: *provided*, that if the proceeds of the said fifty thousand acres of land shall at any time be found insufficient to discharge existing contracts for constructing or repairing the works at Keosauqua, Bentonsport, Plymouth and Croton and in all respects preserve the state harmless on account of any liability now existing against the state, or that has been assumed by the proposed settlement with the Des Moines navigation and railroad company, or arising in any manner from the past improvement of the Des Moines river, or the payment of the officers or agents employed in and about said improvement, then the said Keokuk, Fort Des Moines and Minnesota railroad company shall be liable to pay the state the amount of such deficiency.

SEC. 3. Whenever the president and chief engineer of said railroad company shall certify under oath to the register of the state land office that twenty miles of said railroad in a continuous line from the town of Bentonsport up the valley of the Des Moines river have been completed and the cars running thereon, the register shall issue to said company a certificate for one hundred and twenty sections of land, to be taken as nearly as practicable in a body from the remaining lands nearest to the completed part of said railroad, and the governor shall upon presentation of said certificate issue to said company a patent for said lands and so from time to time as twenty miles are completed until three-fourths of said lands are exhausted: *provided*, that the lands hereby granted and so certified to said company shall be exclusively applied in extending the construction of said railroad in a continuous line above Bentonsport, and shall be applied to no other purpose whatever; *and provided also*, that one fourth in quantity of said land shall be applied by said company in the construction of said road above the city of Des Moines; the said one-fourth to be certified in manner as herein provided from the completion of each twenty miles from the city of Des Moines up the valley of the Des Moines river.

SEC. 4. The grant aforesaid is made to said company upon the express condition that in case such railroad company shall fail to have completed and equipped seventy-five miles of road up the valley of the Des Moines river, from the town of Bentonsport, within three years from the first day of December next, thirty-three miles in addition in each year thereafter for five years, and the remainder of the whole line in three years thereafter, or on the first day of December, eighteen hundred and sixty-eight, then in that case it shall be competent for the state of Iowa to reserve all rights to the lands hereby granted, then remaining uncertified to said company so failing to have the length of road completed in manner as aforesaid.

SEC. 5. That this grant is subject to all the provisions of an act of the general assembly of the state of Iowa, approved July fourteenth, eighteen hundred and fifty-six, entitled an act to accept the grant and carry into execution the trust conferred upon the state of Iowa by an

State preserved harmless.

120 sections of land given for 20 miles of road.

Lands applied to railroad only.

Seventy-five miles completed in three years.

Whole line completed by 1868.

This grant subject to all provisions of other railroad grants.

act of congress entitled an act making a grant of lands to the state of Iowa in alternate sections to aid in the construction of railroads in said state, approved May 15, 1856, so far as the same are applicable and not inconsistent with the foregoing provisions of this act.

An Act to authorize the Register of the State Land Office and Governor of Iowa, to issue Patents to the Purchasers of Des Moines River Improvement Lands.  
 [Passed March 23, 1858, took effect April 7, 1858; Laws of Seventh General Assembly, Chapter 148, page 289]

Register authorized to issue.	SECTION 1. <i>Be it enacted by the General Assembly of the State of Iowa,</i> That it is hereby made the duty of the register of the state land office to issue patents to the purchasers of Des Moines river improvement lands purchased prior to the ninth day of June, A. D., 1854.
Governor sign.	SEC. 2. It is made the duty of the register to present said patents to the governor, whose duty it shall be to sign them.
Patents recorded.	SEC. 3. The register shall record each patent and shall indorse on the same a marginal certificate of the book and page in which the same is recorded.
Fee for patent.	SEC. 4. The register shall deliver to each person entitled to a patent the same by said person paying the register the sum of one dollar.
Conflicting act repealed.	SEC. 5. So much of chapter one hundred and fifty-three of the acts of the fifth general assembly of the state of Iowa as conflicts with this act be and the same is hereby repealed.

DES MOINES RIVER IMPROVEMENT.

An Act in relation to the Des Moines River Improvement, and abolishing the Office of Commissioner thereof.

[Passed March 3, 1860, took effect March 16, 1860; Laws of Eighth Session, Chapter 25.]

Lands to pay liabilities.	SECTION 1. <i>Be it enacted by the General Assembly of the State of Iowa,</i> That the fifty thousand acres of land to be set apart by the register of the state land office under the second section of an act of the general assembly, approved March 22, 1858, entitled "An act disposing of the grant of land made by an act of congress, granting land to the territory of Iowa to aid in the improvement of the navigation of the Des Moines river," shall be taken from the lands next above those transferred by the state to the Des Moines Navigation and Railroad Company by the terms of settlement with that company, authorized by joint resolution of the general assembly, approved March 22, 1858.
Where set apart.	
Completion of dams.	SEC. 2. That the uncompleted dams to be built by the Keokuk, Fort Des Moines and Minnesota Railroad Company as provided by the said second section of the act above referred to, shall be completed as follows: that is to say, the dam at Keosauqua shall be completed in one year after the lands granted to said railroad company by said act shall have been certified by the general government to the state of Iowa, or otherwise become the property of said company, and the dam at Plymouth and the other works within two years after the lands shall have been certified as aforesaid.
Office of commissioner abolished.	SEC. 3. That the office of commissioner of the Des Moines river improvement be, and the same is hereby abolished.



SEC. 4. That George G. Wright, of Van Buren County, Edward Johnston, of Lee county, and Christian W. Slagle, of Jefferson county, be, and they are hereby appointed a board of commissioners for the purpose of ascertaining all the liabilities whether in suit or otherwise, against said Des Moines river improvement, and against the state of Iowa, growing out of said improvement, and which are to be paid by the Keokuk, Fort Des Moines and Minnesota Railroad Company, as provided by the said second section of the act of the 22d of March, 1858, above referred to.

Commissioners appointed to ascertain liabilities.

SEC. 5. Said commissioners, or a majority of them, shall meet at the city of Keosauqua, in the county of Van Buren, within six months after the passage of this act, or as soon thereafter as practicable; and shall organize the board by taking an oath that they will well and truly discharge the duties imposed upon them by this act.

Meeting of commissioners.

SEC. 6. After having organized, said commissioners shall give public notice of the time and place of their meeting, and the objects of the commission, by a general notice to all persons claiming to be entitled to be paid by the provisions of the said section of the said act of March 22, 1858, that unless they present their claims within six months after the time fixed in said notice for the meeting of the board, they will not thereafter be received or acted upon, but forever barred; which notice shall be published for at least four weeks in some newspaper published at the county seat of Van Buren county, and a newspaper published in the city of Keokuk.

Notice to claimants.

SEC. 7. After said notice shall have been given, said commissioners, or a majority of them, shall meet at the time and place appointed by said notice, and proceed to hear testimony and decide upon the validity of all claims presented which are legal and equitable, and the amount thereof, which decision shall be final and conclusive, and may adjourn from time to time during and after the said six months from the time of their meeting, until they shall have decided upon all the claims presented within said six months; and at any time during said six months, when said board shall not be in session, claims may be filed with the clerk of the district court of the county in which the board sits, and it shall be the duty of said clerk to present said claims so filed to the said commissioners at their first meeting thereafter. Said commissioners shall have power to administer oaths, and to compel the attendance of witnesses and the production of papers, and the sheriff of the county in which the board sits shall serve and execute the necessary processes, when required by said commissioners, and all claims not presented within the said six months shall be forever barred.

Commissioners, a court to determine the right of claimants.

SEC. 8. When any of the claims aforesaid shall have been decided, the commissioners shall report the same to the register of the state land office, who shall audit said claims and none others, in accordance with the second section of the said act of the 22d of March, 1858, and it shall be the duty of the Keokuk, Fort Des Moines and Minnesota railroad company, to pay said liabilities so audited, one-half within one year, and one-half within two years after the aforesaid lands shall have been certified to the state of Iowa, or otherwise become the property of said company, with ten per cent. interest thereon from the time said claims were audited.

Register of state land office to audit claims

Claims paid by K., Ft. D. & M. R. R. Co.

SEC. 9. For every three thousand dollars worth of work done on the locks and dams, and for every three thousand dollars of said audited liabilities paid by the said Keokuk, Fort Des Moines and Minnesota railroad company, in accordance with the second section of the said act

Register to certify lands to K., Ft. D. & M. R. Co.

of March 22d, 1858, the register of the state land office shall certify to said company one thousand acres from said fifty thousand acres of land.

Commissioners to complete dams upon the failure of the K., Ft. D. & M. R. R. Co.

SEC. 10. In case said Keokuk, Fort Des Moines and Minnesota railroad company shall not complete said dams or pay said audited liabilities as hereinbefore provided, then the said commissioners shall proceed to complete said dams and pay said liabilities by the sale or mortgage of so much of said fifty thousand acres of land as may be necessary for that purpose: *provided*, that said commissioners may give said railroad company further time for the completion of said dams, if in their opinion the said company shall have proceeded in the construction thereof in good faith, and that said further time is necessary.

The state shall sell water power and land.

SEC. 11. Said commissioners shall, as soon after the organization of the board as may be expedient, proceed to sell all the interest of the state in all such locks and dams belonging to the Des Moines river improvement and the land appertinent thereto, and the water power thereto belonging, as shall have been completed by the state or by the said railroad company; and shall also sell the dams and water power at Keosauqua and Plymouth in the same manner, when said dams shall have been completed, and shall make conveyances in the name of the state without warranty to the purchasers of the interest so sold, containing covenants on the part of said purchasers that they and their heirs and assigns shall and will forever keep said locks and dams in good repair, and that they will at all reasonable times pass boats through said locks, and charge only such tolls as may be agreed upon between said commissioners and the purchasers, not exceeding the maximum rates prescribed in the contract by the state with the Des Moines navigation and railroad company, which conveyances shall also be executed by the purchasers as parties of the second part thereto, and said sale shall be made upon such terms as will secure the state against all liability upon any leases or contracts for water power heretofore executed between the officers of the improvement and individuals, and the proceeds of said sales shall be applied first to the payment of the expenses of said sales, second to the payment of said commissioners, third to the payment of damages for any lands condemned, and fourthly, any balance that may remain shall be paid on the audited claims herein provided for.

Dams to be kept in repair

Tolls.

State not to be liable.

Proceeds arising from sale of water power.

Commissioners' compensation.

SEC. 12. Said commissioners shall receive five dollars per day for the time actually employed in said commission: *provided*, that the aggregate per diem of each of said commissioners shall not exceed three hundred dollars; which if not paid by the proceeds of the sales aforesaid, shall be paid by the said Keokuk, Fort Des Moines and Minnesota railroad company, as one of the audited claims hereinbefore provided for.

Materials to be relinquished to the K., Ft. D. & M. R. R. Co.

SEC. 13. That all the stone, timber and other materials belonging to said Des Moines improvement, and not necessary to be used in the construction of the locks and dams provided for in the second section of the said act of the 22d of March, 1858, are hereby relinquished and transferred to the Keokuk, Fort Des Moines and Minnesota railroad company.

Vacancy of commissioners to be filled by appointment by the governor.

SEC. 14. In case of the death, resignation, or refusal to act, of any of said commissioners, it shall be the duty of the governor to fill such vacancy by appointment.

Commissioners may purchase lands adjacent to dams.

SEC. 15. Said commissioners shall have power to procure for the state at any one of said points where dams are or may hereafter be erected, the land upon which any part of any lock or dam, or abutment,

is or may be erected, and also a sufficient quantity of land at and adjacent to said dams, not exceeding two acres in extent on each side of the river, to make the water power created by said dam available and of value to the state, by condemning said land in the same manner as is or may be provided by law for condemning land for right of way for railroads; and any damages which may be awarded to the owners of such lands, shall be paid out of the proceeds of the sale of the dam and water power for the benefit of which said land is condemned; the possession of said lands not to be taken after the condemnation until the damages are paid.

SEC. 16. This act to be in force from and after its publication in the Iowa State Register, and the Keosauqua Republican.

#### COMMISSIONER DES MOINES RIVER IMPROVEMENT.

An Act making provision for the payment of the salary of the Commissioner of the Des Moines River Improvement, and requiring the Keokuk, Fort Des Moines and Minnesota Railroad Company to pay the amount of said salary into the State Treasury.

[Passed March 24, 1860, took effect March 25, 1860; Laws of Eighth Session, Chapter 53.]

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That there be and is hereby appropriated out of the state treasury, the sum of fourteen hundred and sixty dollars, to pay the salary of William C. Drake, commissioner of the Des Moines river improvement, from the first day of January, 1859, up to the time said office was abolished, and the auditor of state is hereby directed to draw a warrant on the treasurer in favor of said Drake for said sum. \$1,460.  
Wm. C. Drake.

SEC. 2. The Keokuk, Fort Des Moines and Minnesota railroad company, are hereby required to pay into the state treasury of this state, the amount of money appropriated by the first section of this act, to pay the salary of said commissioner, with ten per cent. interest thereon from the time this act takes effect, within one year after the lands granted to said railroad company by an act entitled "an act disposing of the grant of land made by act of congress granting land to the territory of Iowa, to aid in the improvement of the navigation of the Des Moines river," approved March 22d, 1858, shall have been certified to the state of Iowa, or otherwise become the property of said company. Referred to the state.  
Salary and interest.

SEC. 3. In case said railroad company fail to pay said sum of money into the state treasury, as provided in section two of this act, then the commissioners appointed by an act entitled "an act in relation to the Des Moines river improvement, and abolishing the office of commissioner thereof," approved March third, 1860, shall proceed by the sale or mortgage of lands, as provided for in section ten of said act last named, to raise said sum and pay the same into the state treasury. R. R. Co.  
Failure to refund proceed by sale or mortgage.

SEC. 4. This act to take effect and be in force from and after its publication in the Daily Iowa State Register and Daily Iowa State Journal, anything in section twenty-one of the code to the contrary notwithstanding. Take effect.

#### DES MOINES RIVER LANDS.

An Act making provisions for the settlement of all liabilities of the State growing out of the sale of certain lands of the Des Moines River Improvement Grant as School Lands.

[Passed April 2, 1860; Laws of Eighth Session, Chapter 94.]

WHEREAS, certain contracts have been entered into between school fund

commissioners, acting under the directions of "the superintendent of public instruction," an officer of this state, and citizens of the state, for the sale and purchase of a part of the school lands of the state, known as the 500,000 acre grant, and

WHEREAS, The state of Iowa has, by a settlement with the Des Moines navigation and railroad company, conveyed said lands in whole or in part to said company; therefore,

Payment to be made to purchasers of lands sold as school lands, which were afterwards deeded by the state to the Des Moines N. and R. Co.

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That upon the presentation (or proof of in case of loss) of any contract for the sale of any of said lands situated in Webster or Hamilton county, executed by John Polman, late school fund commissioner of Webster county, or of any certificate of final payment from said school fund commissioner, or of any patent for said lands under any contract made by said school fund commissioner, to the governor of the state, with proof satisfactory to him by the affidavit of the holder of said contract certificate, or patent, as the case may be, or such other proof as he may require of the amount of money paid upon any tract or tracts of said land, he shall make a complete statement, showing the amount of money so paid, whether as principal or interest, and the time when each sum of money was paid, and upon the delivering up of any contract, certificate or patent, as the case may be, to the governor, or in case of loss, upon proper proof, he shall deliver the statement aforesaid by him signed, to the holder of said contract, certificate or patent, as the case may be.

Proof to be made to the Gov.

The Gov. delivering statement to claimant.

Auditor to issue warrant.

SEC. 2. Upon the presentation of said statement so made by the governor, as aforesaid, to the auditor of state by the holder, the auditor shall audit the amount due as shown by said statement, with ten per cent. interest upon each sum so paid on said contract, certificate or patent, from the time of payment until the time said account shall be audited as aforesaid, and shall draw his warrant on the treasurer of state for the amount so audited.

\$4,000 appropriated.

SEC. 3. There is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, the sum of four thousand dollars, or so much thereof as may be necessary to pay any claims to be audited under the provisions of this act.

Certificates to be filed in the office of the register of the state land office.

SEC. 4. The contracts, certificates or patents, or in case of loss, the proof of said contracts, certificates or patents, as returned to the governor, shall be filed in the office of the register of the state land office.

Holders of land not compelled to comply with this act.

SEC. 5. No person holding any contract, certificate or patent for any of the lands aforesaid, sold by said commissioner, shall be required to present the same as provided for under the provisions of this act; and no person presenting the same and receiving the money to be paid as herein provided, shall be prohibited, in any manner, from receiving under color of title or otherwise, for any improvements made upon said lands, included in any contract, certificate or patent, as aforesaid, and no person receiving money under the provisions of this act, shall, in any manner, have any further claim on the state by reason of said contract, certificate or patent, and the receiving of the money as aforesaid, and making settlement with the state as provided by this act, shall in no way prejudice any legal rights of the party so receiving it, which he may have against any other party, the state only excepted as aforesaid.

May dispose of improvements.

Claimant receiving pay shall have no further claim against the state.

Legal rights against other parties not affected.

May recover pay for improvements made upon lands.

SEC. 6. Any person who may have made valuable improvements upon any of said lands, patented to the Des Moines Navigation and Railroad Company by the state, and before that time sold by said school

fund commissioner, or the assignee of the person so making such improvements, may commence suit against said company, or the person claiming title under said company, for the value of said improvements, and such person shall be entitled to receive the value of said improvements made before the passage of the act, conveying said lands to said company from the party who is at the time of the commencement of such suit, the owner of said land.

SEC. 7. This act to take effect and be in force from and after its publication in the Weekly Iowa State Register and Fort Dodge Sentinel.

DES MOINES RIVER COMMISSIONERS.

An Act conferring certain powers on the Board of Commissioners appointed for the purpose of ascertaining the liabilities of the Des Moines River Improvement, and for other purposes.

[Passed April 3, 1860; Laws of Eighth Session, Chapter 147.]

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That the board of commissioners appointed and provided for by an act entitled "An act in relation to the Des Moines River Improvement, and abolishing the office of commissioner thereof," approved March 3d, 1860, shall have the power, and they are hereby authorized and directed to inquire into and examine the liabilities and obligations of all persons to said improvement, or the state on account of said improvement, arising from contracts made by any person or persons with the officers or agents of said improvement, and also all liabilities of any and all persons who may have heretofore acted as agents or officers of said improvement, and also all liabilities of any and all persons who may wrongfully withhold any money or property belonging to said improvement, or to the state on account of said improvement, or who may have wrongfully taken or trespassed on any of the property belonging to said improvement, or who may for any cause be liable in any sum to said improvement or the state for or on account of said improvement. Commissioners have full power to make settlement.

SEC. 2. Said board for that purpose may, upon their own motion, or on the petition of any other party, issue a citation or notice to any person believed to be indebted or liable in any sum to said improvement, or to the state on account of said improvement, requiring such person to appear before such commissioners at such time and place as they may, in such notice, designate, to answer to such claims, charges and liabilities as may be briefly set forth and specified in said notice. Such notice shall be served by the sheriff, as other notices, and his returns shall have the same force and validity as in other cases. Said commissioners, or any one of them may issue subpoenas for witnesses, which shall, in like manner, be served by the sheriff. May compel attendance.

SEC. 3. At the time fixed in such notice for the appearance of the person against whom the claim is made, and who may have had the notice required by the preceding section, the commissioners shall (unless, for good cause the hearing is continued,) proceed to determine the liabilities of said party so cited to said improvement, or to the state on account of said improvement, and shall render judgment for any amount due from such party, together with all costs, including the mileage and per diem of the commissioners, which judgment said commissioners May award judgment.

shall file in the office of the clerk of the district court of the county in which the board sits, and when said judgment of said commissioners is so filed in said clerk's office, it shall be entered by the clerk in the proper records, and shall have all the force and effect of a judgment rendered in said court, and no appeal shall in any case be allowed from such judgment.

**No appeal.**

**May employ counsel.** SEC. 4. Said commissioners shall have power to employ counsel to prosecute before said board any and all the claims aforesaid against any or all persons indebted or liable to said improvement, or the state on account of said improvement, or the property connected therewith, and to that end said commissioners may arrange to pay such counsel such sums or proportion of any amount recovered, as they deem right and just.

**May adopt rules.** SEC. 5. The true intent and meaning of this act is to confer on said commissioners full powers, judicial and otherwise, to enable them fully to carry out the objects and purposes of this act, and said commissioners may adopt such rules and regulations as they deem proper to aid them in carrying out the objects of this act.

**Disposition of funds.** SEC. 6. All moneys collected under the provisions of this act shall be applied as provided in section 11 of said act, approved March 3d, 1860, for the disposition of the proceeds of the sales of the dams, water-power, &c., connected with said improvement.

**Discretionary power in settlement.** SEC. 7. Said commissioners may, without the proceedings herein provided for, when practicable, proceed and settle with any party liable to said improvement, and make such provisions for the security and payment of any amounts found due, as they deem just and right.

SEC. 8. This act shall be in force and take effect from and after its publication in the Iowa State Journal and Keosauqua Republican.

IOWA LAND BILL.

A Bill making a Grant of Lands to the State of Iowa, in alternate sections, to aid in the construction of certain Railroads in said State.

**Lands granted for railroad purposes.** SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That there be and is hereby granted to the state of Iowa, for the purpose of aiding in the construction of railroads from Burlington, on the Mississippi river, to a point on the Missouri river, near the mouth of Platte river; from the city of Davenport, via Iowa City and Fort Des Moines to Council Bluffs; from Lyons City, northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa; thence on said main line, running as near as practicable to the forty-second parallel, across the said state of Iowa to the Missouri river; from the city of Dubuque to a point on the Missouri river, near Sioux City, with a branch from the mouth of the Tete Des Morts, to the nearest point on said road, to be completed as soon as the main road is completed to that point, every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or any parts thereof, granted as aforesaid, or the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said state to select, subject to the approval of the secretary of the

**Alternate sections**

**Agents appointed by governor to select lands.**

interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands (thus selected in lieu of those sold and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the state of Iowa, for the use and purpose aforesaid: *provided*, that the land to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for and on account of each of said roads: *provided further*, that the lands hereby granted for and on account of said roads severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: *and provided further*, that any and all lands heretofore reserved to the United States by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any objects of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved from the operations of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the president of the United States.

Proviso.

Same.

Same.

SEC. 2. *And be it further enacted*, That the sections and parts of sections of land, which by such grant shall remain to the United States within six miles on each side of said roads, shall not be sold for less than the double minimum price of the public lands when sold; nor shall any of said lands become subject to private entry, until the same have been first offered at public sale at the increased price.

Lands not granted, how sold.

SEC. 3. *And be it further enacted*, That the said lands hereby granted to the said state shall be subject to the disposal of the legislature thereof for the purpose aforesaid, and no other; and the said railroads shall be and remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

Legislature to dispose of lands granted to the state

SEC. 4. *And be it further enacted*, That the lands hereby granted to said state shall be disposed of by said state only in manner following: that is to say, that a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads may be sold; and when the governor of said state shall certify to the secretary of the interior, that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads, may be sold; and so from time to time until said roads are completed; and if any of said roads are not completed within ten years, no further sale shall be made and the lands unsold shall revert to the United States.

How disposed of.

SEC. 5. *And be it further enacted*, That the United States mail shall be transported over said roads, under the direction of the post office department, at such price as congress may, by law, direct: *provided*, that until such price is fixed by law, the postmaster general shall have the power to determine the same.

U. S. mail Proviso

Approved, May 15th, 1856.

## THE DECLARATION OF INDEPENDENCE.

IN CONGRESS, JULY 4, 1776.

### THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA.

WHEN, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate, that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient suffrance of these colonies; and such is now the necessity which constrains them to alter their former system of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained, and, when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature—a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies, at places unusual, uncomfortable, and distant from the repository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused for a long time after such dissolutions, to cause others



to be elected ; whereby the legislative powers, incapable of annihilation, have returned to the people at large, for their exercise ; the state remaining, in the mean time, exposed to all the dangers of invasion from without, and convulsions within.

He has endeavored to prevent the population of these states ; for that purpose obstructing the laws for naturalization of foreigners ; refusing to pass others, to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to, the civil power.

He has combined with others, to subject us to a jurisdiction, foreign to our constitution, and unacknowledged by our laws ; giving his assent to their acts of pretended legislation.

For quartering large bodies of armed troops among us :

For protecting them by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states :

For cutting off our trade with all parts of the world :

For imposing taxes on us without our consent :

For depriving us, in many cases, of the benefits of trial by jury :

For transporting us beyond seas, to be tried for pretended offenses :

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies :

For taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our governments :

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is, at this time, transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun, with circumstances of cruelty and perfidy, scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions we have petitioned for redress, in the most humble terms ; our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British brethren. We have warned them, from time to time, of attempts, by their legislature, to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity; and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connexions and correspondence. They, too, have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace friends.

We, therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world, for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connexion between them and the state of Great Britain, is, and ought to be totally dissolved; and that as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things, which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other, our lives, our fortunes, and our sacred honor.

#### JOHN HANCOCK.

*New Hampshire.*—Josiah Bartlett, William Whipple, Matthew Thornton.

*Massachusetts Bay.*—Samuel Adams, John Adams, Robert Treat Paine, Elbridge Gerry.

*Rhode Island, &c.*—Stephen Hopkins, William Ellery.

*Connecticut.*—Roger Sherman, Samuel Huntington, William Williams, Oliver Wolcott.

*New York.*—William Floyd, Philip Livingston, Francis Lewis, Lewis Morris.

*New Jersey.*—Richard Stockton, John Witherspoon, Francis Hopkinson, John Hart, Abraham Clark.

*Pennsylvania.*—Robert Morris, Benjamin Rush, Benjamin Franklin, John Morton, George Clymer, James Smith, George Taylor, James Wilson, George Ross.

*Delaware.*—Cæsar Rodney, George Read, Thomas M'Kean.

*Maryland.*—Samuel Chase, William Paca, Thomas Stone, Charles Carroll of Carrollton.

*Virginia.*—George Wythe, Richard Henry Lee, Thomas Jefferson, Benjamin Harrison, Thomas Nelson, Jun., Francis Lightfoot Lee, Carter Braxton.

*North Carolina.*—William Hooper, Joseph Hewes, John Penn.

*South Carolina.*—Edward Rutledge, Thomas Hayward, Jun., Thomas Lynch, Jun., Arthur Middleton.

*Georgia.*—Button Gwinnett, Lyman Hall, George Walton.

## ARTICLES OF CONFEDERATION.

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To all to whom these presents shall come,

We, the undersigned, delegates of the states affixed to our names, send greeting:

Whereas, the delegates of the United States of America in congress assembled, did, on the fifteenth day of November, in the year of our Lord one thousand seven hundred and seventy-seven, and in the second year of the independence of America, agree to certain articles of confederation and perpetual union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, in the words following, viz: ARTICLES OF CONFEDERATION AND PERPETUAL UNION, between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

ARTICLE 1. The style of this confederacy shall be, "THE UNITED STATES OF AMERICA."

ART. 2. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by this confederation, expressly delegated to the United States, in congress assembled.

ART. 3. The said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ART 4. SEC. 1. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively: *provided*, that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the owner is an inhabitant: *provided also*, that no imposition, duties, or restriction, shall be laid by any state on the property of the United States, or either of them.

SEC. 2. If any person guilty of, or charged with treason, felony, or other high misdemeanor in any state, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offense.

SEC. 3. Full faith and credit shall be given in each of these states

to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

ART. 5. SEC. 1. For the more convenient management of the general interests of the United States, delegates shall be annually appointed, in such manner as the legislature of each state shall direct, to meet in congress on the first Monday in November, in every year, with a power reserved to each state, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

SEC. 2. No state shall be represented in congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

SEC. 3. Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of these states.

SEC. 4. In determining questions in the United States in congress assembled, each state shall have one vote.

SEC. 5. Freedom of speech and debate in congress shall not be impeached or questioned in any court, or place out of congress, and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to, and from, and attendance on congress, except for treason, felony, or breach of the peace.

ART. 6. SEC. 1. No state, without the consent of the United States in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state; nor shall the United States in congress assembled, or any of them, grant any title of nobility.

SEC. 2. No two or more states shall enter into any treaty confederation, or alliance whatever between them, without the consent of the United States in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

SEC. 3. No state shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by congress, to the courts of France and Spain.

SEC. 4. No vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the United States in congress assembled, for the defense of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the United States in congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such state; but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp-equipage.

SEC. 5. No state shall engage in any war without the consent of the United States in congress assembled, unless such state be actually inva-

ded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the United States in congress assembled, can be consulted; nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in congress assembled, shall determine otherwise.

ART. 7. SEC. 1. When land forces are raised by any state for the common defense, all officers of or under the rank of colonel shall be appointed by the legislature of each state respectively, by whom such forces shall be raised, or in such manner as such state shall direct, and all vacancies shall be filled up by the state which first made the appointment.

ART. 8. SEC. 1. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in congress assembled, shall, from time to time, direct and appoint.

SEC. 2. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states, within the time agreed upon by the United States in congress assembled.

ART. 9. SEC. 1. The United States in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article; of sending and receiving ambassadors, entering into treaties and alliances, provided that no treaty of commerce shall be made, whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures: *provided*, that no member of congress shall be appointed a judge of any of the said courts.

SEC. 2. The United States in congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever, which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any state in controversy with another, shall present a petition to congress, stating the matter in ques-

tion, and praying for a hearing, notice thereof shall be given by order of congress, to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they can not agree, congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as congress shall direct, shall in the presence of congress be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which congress shall judge sufficient; or being present, shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to congress, and lodged among the acts of congress, for the security of the parties concerned: *provided*, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward:" *provided also*, that no state shall be deprived of territory for the benefit of the United States.

SEC. 3. All controversies concerning the private right of soil, claimed under different grants of two or more states, whose jurisdictions, as they may respect such lands, and the states which passed such grants, are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

SEC. 4. The United States in congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians, not members of any of the states: *provided*, that the legislative right of any state, within its own limits, be not infringed or violated; establishing and regulating post offices from one state to another, throughout all the United States, and exacting such postage on the papers passing through the same, as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the

service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

SEC. 5. The United States, in congress assembled, shall have authority to appoint a committee, to sit in the recess of congress, to be denominated "*A Committee of the States,*" and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside: *provided,* that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state, which requisition shall be binding; and thereupon the legislature of each state shall appoint the regimental officers, raise the men, and clothe, arm, and equip them, in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States, in congress assembled; but if the United States, in congress assembled, shall, on consideration of circumstances, judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed and equipped, in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number can not be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip, as many of such extra number as they judge can be safely spared, and the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States, in congress assembled.

SEC. 6. The United States, in congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine states assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in congress assembled.

SEC. 7. The congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state, on any question, shall be en-

tered on the journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several states.

ART. 10. The committee of the states, or any nine of them, shall be authorized to execute, in the recess of congress, such of the powers of congress as the United States, in congress assembled, by the consent of nine states, shall, from time to time, think expedient to vest them with: *provided*, that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine states, in the congress of the United States assembled, is requisite.

ART. 11. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

ART. 12. All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ART. 13. Every state shall abide by the determinations of the United States, in congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislatures of every state.

And whereas it hath pleased the great Governor of the world to incline the hearts of the legislatures we respectfully represent in congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union, Know ye, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in congress assembled, on all questions which by the said confederation are submitted to them; and that the articles thereof shall be inviolably observed by the states we respectively represent, and that the Union shall be perpetual. In witness whereof, we have hereunto set our hands, in congress.

*Done at Philadelphia, in the State of Pennsylvania, the 9th day of July, in the year of our Lord 1778, and in the third year of the Independence of America.*

*On the part and behalf of the State of New Hampshire.*—Josiah Bartlett, John Wentworth, Jun. (August 8, 1778.)

*On the part and behalf of the State of Massachusetts Bay.*—John Hancock, Samuel Adams, Elbridge Gerry, Francis Dana, James Lovell, Samuel Holten.

*On the part and behalf of the State of Rhode Island and Providence Plantations.*—William Ellery, Henry Marchant, John Collins.



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*On the part and behalf of the State of Connecticut.*—Roger Sherman, Samuel Huntington, Oliver Wolcott, Titus Hosmer, Andrew Adams.

*On the part and behalf of the State of New York.*—James Duane, Francis Lewis, William Duer, Gouv. Morris.

*On the part and behalf of the State of New Jersey.*—Jno. Witherspoon, Nath. Scudder, (November 26, 1778.)

*On the part and behalf of the State of Pennsylvania.*—Robert Morris, Daniel Roberdeau, Jona. Bayard Smith, William Clingan, Joseph Reed, (July 22, 1778.)

*On the part and behalf of the State of Delaware.*—Thomas M<sup>r</sup>Kean, (February 12, 1779,) John Dickinson, (May 5, 1779,) Nicholas Van Dyke.

*On the part and behalf of the State of Maryland.*—John Hanson, (March 1, 1781,) Daniel Carroll, (March 1, 1781.)

*On the part and behalf of the State of Virginia.*—Richard Henry Lee, John Banister, Thomas Adams, Jno. Harvie, Francis Lightfoot Lee.

*On the part and behalf of the State of North Carolina.*—John Penn, (July 21, 1778,) Corns. Harnett, Jno. Williams.

*On the part and behalf of the State of South Carolina.*—Henry Laurens, William Henry Drayton, Jno. Matthews, Richard Hutson, Thos. Heyward, Jun.

*On the part and behalf of the State of Georgia.*—Jno. Walton, (July 24, 1778,) Edwd. Telfair, Edward Langworthy.

## AN ORDINANCE,

FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES, NORTH-WEST OF THE RIVER OHIO.

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- One district. *Be it ordained by the United States, in Congress assembled,* That the said territory, for the purposes of temporary government, be one district; subject, however, to be divided into two districts, as future circumstances may, in the opinion of congress, make it expedient.
- Descent of estates. *Be it ordained by the authority aforesaid,* That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to and be distributed among their children, and the descendants of a deceased child, in equal parts; the descendants of a deceased child or grandchild, to take a share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate, shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving, in all cases, to the widow of the intestate her *third part* of the real estate for life, and one-third part of the personal estate; and this law relative to descents and *dower* shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws, as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her, in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts and registers shall be appointed for that purpose; and personal property may be transferred by delivery; saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskias, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.
- Dower. *Be it ordained by the authority aforesaid,* That there shall be appointed, from time to time, by congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.
- Wills. There shall be appointed from time to time, by congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department; and transmit authentic copies of such acts and proceedings every six months, to the secretary of con-
- Conveyances. Saving to the French their laws of descent and conveyances.
- Governor.
- Secretary.

gress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction, and reside in the district, and have each therein a freehold estate in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behaviour.

The governor and judges, or a majority of them, shall adopt and publish, in the district, such laws of the original states, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to congress from time to time; which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

The governor for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same, below the rank of general officers; all general officers shall be appointed and commissioned by congress.

Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers, in each county or township, as he shall find necessary for the preservation of peace and good order in the same. After the general assembly shall be organized, the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

For the prevention of crimes and injuries, the laws to be adopted or made, shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed from time to time, as circumstances may require, to lay out the parts of the district, in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

So soon as there shall be five thousand free male inhabitants of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: *provided*, that for every five hundred free male inhabitants, there shall be one representative, and so on progressively with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five, after which, the number and proportion of representatives shall be regulated by the legislature: *provided*, that no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years, and in either case shall likewise hold in his own right, in fee simple, two hundred acres of land within the same: *provided also*, that a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold, and two years' residence in the district shall be necessary to qualify a man as an elector of a representative.

The representative thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead, to serve for the residue of the term.

The general assembly, or legislature, shall consist of the governor,

Governor and judges to adopt laws.

Governor, commander.

Governor to appoint officers, until it is organized.

Counties, townships, &c.

When to elect representatives.

Ratio.

Qualification.

Term of representative.

General assembly, how constituted.

- Legislative council. legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by congress; any three of whom to be a quorum. And the members of the council shall be nominated and appointed in the following manner, to wit: as soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to congress; five of whom congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to congress; one of whom congress shall appoint and commission for the residue of the term. And every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to congress; five of whom congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives, shall have authority to make laws, in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly, when in his opinion it shall be expedient.
- Powers of general assembly. The governor, judges, legislative council, secretary, and such other officers as congress shall appoint in the district, shall take an oath or affirmation, of fidelity and of office; the governor before the president of congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to congress, who shall have a seat in congress, with a right of debating, but not of voting, during this temporary government.
- Bills. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said territory; to provide also for the establishment of states, and permanent governments therein, and for their admission to share in the federal councils, on an equal footing with the original states, at as early periods as may be consistent with the general interest:
- Oath of office. *It is hereby ordained and declared, by the authority aforesaid,* That the following articles shall be considered as articles of compact between the original states, and the people and states in the said territory, and forever remain unalterable, unless by common consent, to wit:
- Delegate in congress. **ARTICLE 1.** No person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.
- Preamble. **ART. 2.** The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All
- Articles of compact.
- Religion.
- Common law rights secured.

persons shall be bailable, unless for criminal offenses, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with or affect private contracts or engagements, bona fide, and without fraud previously formed.

ART. 3. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent, and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars, authorized by congress; but laws, founded in justice and humanity, shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ART. 4. The said territory, and the states which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the federal debts, contracted, or to be contracted, and a proportional part of the expenses of government, to be apportioned on them by congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district or districts, or new states, as in the original states, within the time agreed upon by the United States in congress assembled. The legislatures of those districts or new states, shall never interfere with the primary disposal of the soil by the United States in congress assembled, nor with any regulations congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands, the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.

ART. 5. There shall be formed, in the said territory, not less than three, nor more than five states; and the boundaries of the states, as soon as Virginia shall alter her act of cession, and consent to the same, shall become fixed and established as follows, to wit: the western state in the said territory shall be bounded by the Mississippi, the Ohio, and Wabash rivers; a direct line drawn from the Wabash and Post Vincents, due north to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and

Education.

The Indians.

Territory to remain part of the confederacy.

The soil.

Taxes.

Navigable waters.

New state may be formed.

Mississippi. The middle state shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami, to the said territorial line, and by the said territorial line. The eastern state shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania and the said territorial line: *provided, however, and it is further understood and declared,* That the boundaries of these three states shall be subject so far to be altered, that if congress shall hereafter find it expedient, they shall have authority to form one or two states in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted, by its delegates, into the congress of the United States, on an equal footing with the original states, in all respects whatever; and shall be at liberty to form a permanent constitution and state government: *provided,* the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the state than sixty thousand.

When to be admitted into the union.

Slavery

ART. 6. There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *provided always,* that any person escaping into the same, from whom labor or service is lawfully claimed in any of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service, as aforesaid.

Repeal.

*Be it ordained by the authority aforesaid,* That the resolutions of the twenty-third of April, one thousand seven hundred and eighty-four, relative to the subject of this ordinance, be, and the same are hereby repealed, and declared null and void.

DONE by the United States, in congress assembled, the thirteenth day of July, in the year of our Lord, one thousand seven hundred and eighty-seven, and of their sovereignty and independence the twelfth.

WILLIAM GRAYSON, *Chairman.*

CHARLES THOMPSON, *Secretary.*

## THE CONSTITUTION OF THE UNITED STATES.

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.\*

ARTICLE 1. SEC. 1. All legislative powers herein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.†

Legislative powers.

SEC. 2. The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

Members of the house of representatives, how chosen.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Qualification of.

Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty

Representation and taxation.

Census.

\* *Martin, heir at law of Fairfax v. Hunter's Lessee*, 1 Wheat., 304; 3 Cond. Rep., 575; *Briscoe et al. v. the Bank of the Commonwealth of Kentucky*, 11 Peters, 257; *McCulloch v. the State of Maryland*, 4 Wheat., 316; 4 Cond. Rep., 466; *Gibbons v. Ogden*, 9 Wheat., 1; *Barron v. the Mayor and City Council of Baltimore*, 7 Peters, 243; *Marberry v. Madison*, 1 Cranch, 237; 1 Cond. Rep., 267; *United States v. Smith*, 5 Wheat., 153; 4 Cond. Rep., 619; *Owing v. Norwood*, 5 Cranch, 344; 2 Cond. Rep., 275.

† The object of the constitution was to establish three great departments of government: the legislative, the executive, and the judicial departments. The first was to pass laws; the second to approve and execute them; the third to expound and enforce them. *Martin, heir at law of Fairfax v. Hunter's Lessee*, 1 Wheat., 304; 3 Cond. Rep., 575.

The constitution unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers were to be carried into execution. It was foreseen that that would be a perilous and difficult, if not impracticable task. The instrument was not intended merely to provide for the exigencies of a few years, but was to endure through a long lapse of ages; the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be made indispensable to effectuate the general objects of the charter; and restrictions and specifications which at present might seem salutary, might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms; leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and remodel the exercise of its own powers as its own wisdom, and the public interests should require. *Martin, &c. v. Hunter*, 1 Wheat., 304; 3 Cond. Rep., 575.

	thousand, but each state shall have at least one representative, and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.*
Vacancies.	When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.
Officers. Impeachment.	The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.
Senate.	SEC. 3. The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.
Senators classed.	Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.
Qualifications of senators.	No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not when elected, be an inhabitant of that state for which he shall be chosen.
Vice-president.	The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.
Senate to choose its officers.	The senate shall choose their other officers, and also a president <i>pro tempore</i> , in the absence of the vice-president, or when he shall exercise the office of president of the United States.
To try impeachments.	The senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.
Judgment on impeachment.	Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit, under the United States; but the party convicted

\* South Carolina adopted the constitution by a convention called in November, 1789. Rhode Island, by a convention held in May, 1790, assented to the constitution. Kentucky was admitted into the Union June 1, 1792. Vermont was admitted into the Union March 4, 1791. Tennessee was admitted into the Union June 1, 1796. Ohio was established as a state of the Union by act of April 30, 1802. Louisiana was admitted into the Union April 30, 1812. Indiana was admitted into the Union December 11, 1816. Mississippi was admitted into the Union December 10, 1817. Illinois was admitted into the Union December 3, 1818. Alabama was admitted into the Union December 14, 1819. Maine was admitted into the Union by an act of congress, passed March 3, 1820. Missouri was admitted into the Union March 2, 1821. Arkansas was admitted into the Union June 15, 1836. Michigan was admitted into the Union January 26, 1837. North Carolina became a member of the Union before June 4, 1790. Iowa and Florida were authorized to become states of the Union by act of March 3, 1845, chap: 48.



shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SEC. 4. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof, but the congress may at any time by law make or alter such regulations except as to the places of choosing senators. Election of members of congress.

The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day. Congress to meet annually.

SEC. 5. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide. Elections, how judged. Quorum.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. Rules.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question, shall, at the desire of one-fifth of those present, be entered on the journal. Journals.

Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting. Adjournment.

SEC. 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place. Compensation: privileges.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office. Exclusion from office.

SEC. 7. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills. Bills for revenue.

Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays ex-

	cepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.
Resolutions, &c., to be approved.	Every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.
Powers of congress. Taxes.	SEC. 8. The congress shall have power,* To lay and collect taxes, duties, imposts and excises,† to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;‡
Borrowing.	To borrow money on the credit of the United States;§
Commerce.	To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.§

\* Congress must possess the choice of means, and must be empowered to use any means, which are in fact conducive to the exercise of a power granted by the constitution. *United States v. Fisher et al., Assignees of Blight*, 2 Cranch's Rep., 358; 1 Cond. Rep., 421.

The powers granted to congress are not exclusive of similar powers existing in the states, unless where the constitution has expressly, in terms, given an exclusive power to congress; or the exercise of a like power is prohibited to the states; or there is a direct repugnancy, or incompatibility in the exercise of it by the states. The example of the first class is to be found in the exclusive legislation delegated to congress over places purchased by the consent of the legislature of the state in which the same shall be located for forts, arsenals, dock yards, &c.; of the second class, of the prohibition of a state to coin money, or emit bills of credit; of the third class, the power to establish a uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction. In all other cases the states retain concurrent authority with congress. *Houston v. Moore*, 5 Wheat., 1; 4 Cond. Rep., 589.

An act of congress repugnant to the constitution can not become the law of the land. *Marbury v. Madison*, 1 Cranch, 137; 1 Cond. Rep., 267.

The mere grant of power to congress does not imply a prohibition on the states to exercise the same power. Whenever the terms in which such a power is granted to congress require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act upon it. *Sturges v. Crowningshield*, 4 Wheat., 122; 4 Cond. Rep., 409.

† The power of congress to levy and collect taxes, duties, imposts, and excises, is co-extensive with the territory of the United States. *Loughborough v. Blake*, 5 Wheat., 317; 4 Cond. Rep., 660.

The power of congress to exercise exclusive legislation, in all cases whatever, within the District of Columbia, includes the power of taxing it. *Ibid.*

The authority of congress to lay and collect taxes, does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states, an exercise of any portion of the power that is granted to the United States. *Gibbons v. Ogden*, 9 Wheat., 1; 5 Cond. Rep., 562.

‡ The constitutional provision that direct taxes shall be apportioned among the several states, according to their respective numbers, to be ascertained by a census, was not intended to restrict the power of imposing direct taxes to states only. *Loughborough v. Blake*, 5 Wheat., 317; 4 Cond. Rep., 660.

§ An act of congress, laying an embargo for an indefinite period of time, is constitutional and valid. *The United States v. The William*, 2 Hall's Am. Law Jour., 255.

The power of regulating commerce extends to the regulation of navigation. *Gibbons v. Ogden*, 9 Wheat., 1; 5 Cond. Rep., 562.

The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several states.

To establish an uniform rule of naturalization,\* and uniform laws on the subject of bankruptcies throughout the United States;†

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;‡

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies; but no appropriation of money, to that use, shall be for a longer term than two years;

It does not stop at the external boundary of a state; but it does not extend to a commerce which is completely internal. *Ibid.*

The power to regulate commerce is general, and has no limitations but such as are prescribed by the constitution itself. This power, so far as it extends, is exclusively vested in congress, and no part of it can be exercised by a state. *Ibid.*

The power of regulating commerce extends to navigation carried on by vessels employed in transporting passengers. *Ibid.*

All those powers which relate to merely municipal legislation, or which may be properly called internal police, are not surrendered (by the states) or restrained, and consequently in relation to those the authority of a state is complete, unqualified and exclusive. *The City of New York v. Miln*, 11 Peters, 102.

The act of the legislature of New York, passed February, 1824, entitled "an act concerning passengers in vessels arriving in the port of New York," is not a regulation of commerce, but of police; and being so, it was passed in the exercise of a power which belonged to that state. *Ibid.*

The power to regulate commerce, includes the power to regulate navigation, as connected with the commerce with foreign nations and among the states. It does not stop at the mere boundary line of a state, nor is it confined to acts done on the waters or in the necessary course of the navigation thereof. It extends to such acts done on the land, which interfere with, obstruct or prevent the due exercise of the powers to regulate commerce and navigation with foreign nations, and among the states. Any offense which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. *The United States v. Lawrence Coombe*, 12 Peters, 72.

Persons are not the subjects of commerce, and not being imported goods, they do not fall within the meaning founded upon the constitution, of a power given to congress, to regulate commerce, and the prohibition of the states for imposing a duty on imported goods. *Ibid. Gibbons v. Ogden*, 9 Wheat., 1; 5 Cond. Rep., 562.

\* Under the constitution of the United States, the power of naturalization is exclusively in congress. *Chirac v. Chirac*, 2 Wheat., 259; 4 Cond. Rep., 111; *Houston v. Moore*, 5 Wheat., 1; 4 Cond. Rep., 589.

† The powers of Congress to establish uniform laws on the subject of bankruptcy throughout the United States, does not exclude the right of the states to legislate on the same subject, except when the power is actually exercised by congress, and the state laws conflict with those of congress. *Ogden v. Saunders*, 12 Wheat., 213; 6 Cond. Rep., 523; *Sturges v. Crowninshield*, 4 Wheat., 122; 4 Cond. Rep., 409.

Since the adoption of the constitution of the United States, a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts: and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting with such law. *Sturges v. Crowninshield*, 4 Wheat., 122; 4 Cond. Rep., 409.

‡ The act of the 3d March, 1819, chap. 76, sec. 5, referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of congress to define and punish that crime. *United States v. Smith*, 5 Wheat., 153; 4 Cond. Rep., 619. See also *United States v. Palmer*, 3 Wheat., 610; 4 Cond. Rep., 352.

Navy.	To provide and maintain a navy ;
Rules for.	To make rules for the government and regulation of the land and naval forces ;
Militia and its organization.	To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions ; To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress ;*
Exclusive authority over district	To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings. And
General authority.	To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.†
Limitation of powers. Importation of persons.	SEC. 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight ; but a tax of duty may be imposed on such importation, not exceeding ten dollars for each person.
<i>Habeas corpus.</i>	The privilege of the writ of <i>habeas corpus</i> shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.‡
Attainder, &c.	No bill of attainder or <i>ex post facto</i> law, shall be passed.§
Direct tax.	No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.
Commercial duties and preferences.	No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another ; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

\* The act of congress of February 28, 1795, to provide for the calling out the militia to execute the laws of the union, suppress insurrections, and repel invasions, is within the constitutional powers of congress. *Martin v. Mott*, 12 Wheat., 19 ; 6 Cond. Rep., 410.

† Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution. *United States v. Fisher et al.*, 2 Cranch, 358 ; 1 Cond. Rep., 421 ; *Jan Horne's Lessee v. Dorrance*, 2 Dall., 304 ; *Marbury v. Madison*, 1 Cranch, 137 ; 1 Cond. Rep., 267, 268 ; *The United States v. Bevens*, 3 Wheat., 336 ; 4 Cond. Rep., 275 ; *McCulloch v. Maryland*, 4 Wheat., 316 ; 4 Cond. Rep., 466 ; *United States v. Tingey*, 5 Peters, 115 ; *Anderson v. Dunn*, 6 Wheat., 204 ; *Dugan v. The United States*, 3 Wheat., 172 ; 4 Cond. Rep., 223 ; *The Exchange*, 7 Cranch, 116 ; 2 Cond. Rep., 439 ; *Osborn v. The Bank of the United States*, 9 Wheat., 738 ; 5 Cond. Rep., 741 ; *Harrison v. Sterry*, 5 Cranch, 289 ; 2 Cond. Rep., 260 ; *Post Master General, v. Early*, 12 Wheat., 186 ; 6 Cond. Rep., 480.

‡ *Ex parte* Burford, 3 Cranch, 448 ; *ex parte* Bollman, 4 Cranch, 75 ; 2 Cond. Rep., 33 ; *ex parte* Kearney, 7 Wheat., 38 ; 5 Cond. Rep., 225 ; *ex parte* Tobias Watkins, 3 Peters, 193 ; *ex parte* Milburn, 9 Peters, 704 ; *Martin v. Mott*, 12 Wheat., 19 ; 6 Cond. Rep., 410.

§ The prohibition of the federal constitution of *ex post facto* laws extends to penal statutes only ; and does not extend to cases affecting only the civil rights of individuals, *Calder et al. v. Bull*, 3 Dall., 386 ; 1 Cond. Rep., 172 ; *Fletcher v. Peck*, 6 Cranch, 87 ; 2 Cond. Rep., 308 ; *Ogden v. Saunders*, 12 Wheat., 213 ; 6 Cond. Rep., 523.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time. Money how drawn.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state. Titles of nobility.

SEC. 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts;\* pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.† Limitations on the states.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.‡ No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. Of commerce, war, &c.

ART. 2. SEC. 1. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows: The executive

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. Electors of.

The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the And proceedings in the choice of president.

\* *Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Peters, 257; *Craig v. The State of Missouri*, 4 Peters, 431; *Sturges v. Crowninshield*, 4 Wheat., 122; 4 Cond. Rep., 409; *Ogden v. Saunders*, 12 Wheat., 213; 6 Cond., Rep., 523; *Cooper v. Telfair*, 4 Dall., 14; 1 Cond. Rep., 211.

† If any act of the legislature is repugnant to the constitution, it is, *ipso facto*, void; and it is the duty of the court so to declare it. *Vanhorne's Lessee v. Dorrance*, 2 Dall., 304.

The constitution fixes the limits to the exercise of legislative authority, and prescribes the orbit in which it must move. Whatever may be the case in other countries, yet here there can be no doubt that any act of the legislature repugnant to the constitution is absolutely void. *Ibid. Fletcher v. Peck*, 6 Cranch, 87; 2 Cond. Rep., 308.

The legislature of a state can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable, which was not punishable when it was committed. *Ibid. Houston v. Moore*, 5 Wheat., 1; 4 Cond. Rep., 589.

The invalidity of a state law, as impairing the obligation of contracts, does not depend on the extent of the change which the law effects in the contract. *Green v. Biddle*, 8 Wheat., 1; 5 Cond. Rep., 369; *Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Peters, 257; *New Jersey v. Wilson*, 7 Cranch, 164; 2 Cond. Rep., 457; *Territ v. Taylor*, 9 Cranch, 43; 3 Cond. Rep., 254; *Trustees of Dartmouth College v. Woodward*, 4 Wheat., 518; 4 Cond. Rep., 526; *The proprietors of the Charles River Bridge v. The proprietors of the Warren Bridge*, 11 Peters, 420; *Sturges v. Crowninshield*, 4 Wheat., 122; 4 Cond. Rep., 409; *Hawkins v. Barney's Lessee*, 5 Peters, 456; *Mason v. Haile*, 12 Wheat., 370; 6 Cond. Rep., 535; *Farmer's and Mechanic's Bank v. Smith*, 6 Wheat., 131; 5 Cond. Rep., 35; *Satterlee v. Matthewson*, 2 Peters, 380; *Willkinson v. Leland*, 2 Peters, 627.

‡ *Brown v. The State of Maryland*, 12 Wheat., 419; 6 Cond. Rep., 554.

same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose, by ballot, one of them for president; and if no person have a majority, then from the five highest on the list, the said house shall, in like manner, choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors, shall be the vice president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice president.\*

Meeting of electors. The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

Qualification for presidency. No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

Vice president, when to act. In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice president, declaring what officer shall then act as president, and such officer shall accordingly, until the disability be removed, or a president shall be elected.

Compensation of president. The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive during that period any other emolument from the United States or any of them.

Oath of office. Before he enter upon the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

Powers of the president. **SEC. 2.** The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective

\* By an amendment to the constitution, a substitute for this paragraph was adopted. Amendment, Art. 12. Sec. 1. This amendment was proposed in October, 1803, and was ratified before September, 1804. See the amendment, *post*.

offices; and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. Pardons.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur;\* and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law. But the congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments.† Treaties.  
Appointment of Officers.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session. Fill vacancies.

SEC. 3. He shall from time to time give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States. Give information to congress, &c.

SEC. 4. The president, vice president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. Impeachment.

ART. 3. SEC. 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.‡ Judicial power.  
Tenure.

SEC. 2. The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state, between citizens of different states, between citizens of the same state, claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens, or subjects. Extent of judicial power.

\* The decisions of the supreme court of the United States on the powers and duties of the president of the United States have been the following: *Marbury v. Madison*, 1 Cranch, 137; 1 Cond. Rep., 267; 1 Peters, 296; 12 Peters, 524. *Williams v. The Suffolk Ins. Co.*, 13 Peters, 415.

† *Am. Ins. Co. v. Canter*, 1 Peters, 511, 517; with Mr. Justice Johnson's opinion. *Ex parte Duncan N. Hennen*, 13 Peters, 230.

‡ The decisions of the supreme court of the United States on the 1st and 2d sections of the 3d article of the constitution have been: *The State of Rhode Island v. The State of Massachusetts*, 12 Peters, 657-72. *M'Bride v. Hoey*, 11 Peters, 167. *Marbury v. Madison*, 1 Cranch, 137; 1 Cond. Rep., 267. *Ex parte Crane*, 5 Peters, 190. *Ex parte Milburn*, 9 Peters, 704. *Town of Pawlet v. Clark et al.*, 9 Cranch, 292; 3 Cond. Rep., 408. *Ex parte Kearney*, 7 Wheat., 38; 5 Cond. Rep., 225. *M'Cluny v. Silliman*, 2 Wheat., 369; 4 Cond. Rep., 162. *The United States v. Bevan*, 3 Wheat., 336; 4 Cond. Rep., 275. *United States v. Hamilton*, 3 Dall., 17.

Jurisdiction of  
supreme court.

In all cases affecting ambassadors, other public ministers and consuls,\* and those in which a state shall be a party, the supreme court shall have original jurisdiction.† In all the other cases, before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.‡

Trial by jury.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as congress may by law have directed.

Treason.

SEC. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

Attainder.

The congress shall have power to declare the punishment of treason,

*Ex parte Bollman*, 4 Cranch, 75; 2 Cond. Rep., 33. *Ex parte Tobias Watkins*, 3 Peters, 193. *Cherokee Nation v. The State of Georgia*, 5 Peters, 1. *Cohens v. The State of Virginia*, 6 Wheat., 264. *Osborn v. The Bank of the United States*, 9 Wheat., 728; 5 Cond. Rep., 741. *The United States v. Ortega*, 11 Wheat., 467; 6 Cond. Rep., 394. *Fowler v. Lindsey et al.*, 3 Dall., 411. *The United States v. Goodwin*, 7 Cranch, 108; 2 Cond. Rep., 434.

The third article of the constitution of the United States enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when any question respecting them shall assume such form that the judicial power is capable of acting on it. That power is capable of acting, only when the subject is submitted to it by a party who asserts his rights in a form prescribed by law. It then becomes a case.

*Osborn et al. v. The Bank of the United States*, 9 Wheat., 738; 5 Cond. Rep., 741.

\* An indictment under the crimes act of 1790, chap. 9, sec. 28, for infracting the law of nations by offering violence to the person of a foreign minister, is a case "affecting ambassadors and other public ministers, or consuls," within the second section of the third article of the constitution of the United States. *The United States v. Ortega*, 11 Wheat., 467; 6 Cond. Rep., 394.

† On the original jurisdiction of the supreme court, the following cases have been decided: *Ex parte Kearney*, 7 Wheat., 38; 5 Cond. Rep., 225. *McCluny v. Sullivan*, 2 Wheat., 369; 4 Cond. Rep., 162. *The Columbian Insurance Company v. Wheelwright*, 7 Wheat., 534; 5 Cond. Rep., 334. *United States v. Hamilton*, 3 Dall., 17. *Ex parte Tobias Watkins*, 3 Peters, 193. *Ex parte Crane et al.*, 5 Peters, 190. *United States v. Ravara*, 2 Dall., 297. *Cherokee Nation v. The State of Georgia*, 5 Peters, 1. *The State of New Jersey v. The State of New York*, 5 Peters, 294. *Ex parte Juan Madrazo*, 7 Peters, 627. *The State of Rhode Island v. The State of Massachusetts*, 12 Peters, 657-755. *Cohens v. The State of Virginia*, 6 Wheat., 264; 5 Cond. Rep., 90. *Osborn v. The Bank of the United States*, 9 Wheat., 738; 5 Cond. Rep., 741. *Fowler et al. v. Lindsey et al.*, 3 Dall., 411.

‡ Upon the appellate powers of the supreme court, the following cases have been decided: *United States v. Goodwin*, 7 Cranch, 108; 2 Cond. Rep., 434. *Wiscart v. Dauchy*, 3 Dall., 321; 1 Cond. Rep., 144. *United States v. Moore*, 3 Cranch, 159; 1 Cond. Rep., 480. *Osborn v. The Bank of the United States*, 9 Wheat., 738; 5 Cond. Rep., 741. *Owings v. Norwood's Lessee*, 5 Cranch, 344; 2 Cond. Rep., 275. *Martin v. Hunter's Lessee*, 1 Wheat., 304; 3 Cond. Rep., 575. *Gordon v. Caldwell*, 3 Cranch, 268; 1 Cond. Rep., 524. *Ex parte Kearney*, 7 Wheat., 38; 5 Cond. Rep., 225. *Inglee v. Coolidge*, 2 Wheat., 363; 4 Cond. Rep., 155. *Gelston et al. v. Hoyt*, 3 Wheat., 246; 4 Cond. Rep., 244. *Nicholls et al. v. Hodges' Ex'r*, 1 Peters, 562. *Buel v. Van Ness*, 8 Wheat., 312; 5 Cond. Rep., 445. *Miller v. Nicholls*, 4 Wheat., 311; 4 Cond. Rep., 465. *Matthews v. Zane et al.*, 7 Wheat., 164; 5 Cond. Rep., 265. *Houston v. Moore*, 3 Wheat., 438; 4 Cond. Rep., 286. *Williams v. Norris*, 12 Wheat., 117; 6 Cond. Rep., 462. *Montgomery v. Hernandez*, 12 Wheat., 129; 6 Cond. Rep., 475. *Gibbons v. Ogden*, 6 Wheat., 448; 5 Cond. Rep., 134. *Weston et al. v. The City Council of Charleston*, 2 Peters, 449.



but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained.

ART. 4. SEC. 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.\* Acts, records, &c, of states.

SEC. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Citizen-ship.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime. Fugitives from justice.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.† Fugitive slaves.

SEC. 3. New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress. New states.

The congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state. Territory of United States.

SEC. 4. The United States shall guaranty to every state in this union, a republican form of government, and shall protect each of them against invasion; and on application of the legislature or of the executive (when the legislature can not be convened) against domestic violence. Republican government.

ART. 5. The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or other mode of Amendments to the constitution.

\* *Mills v. Duryee*, 7 Cranch, 481; 2 Cond. Rep., 578. *Hampton v. M'Connel*, 3 Wheat., 234; 4 Cond. Rep., 243. See act of May 26, 1790, chap. 11. Act of March 27, 1804, chap. 56.

† *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters, 539. The clause in the constitution relating to fugitives from labor, manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no state law or regulation can in any way qualify, regulate, control, or restrain. Any law or regulation which interrupts, limits, delays, or postpones the rights of the owner to the immediate command of his service or labor, operates *pro tanto*, a discharge of the slave therefrom. The question can never be, how much he is discharged from; but whether he is discharged from any service by the natural and necessary operation of the state laws, or state regulations. The question is not one of quantity and degree, but of withholding or controlling the incidents of a positive right.

The owner of a fugitive slave has the same right to take him in a state to which he has escaped or fled, that he had in the state from which he escaped; and it is well known that this right to seizure or re-capture is universally acknowledged in all the slave-holding States. *Ibid.*

ratification may be proposed by the congress: *provided*, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

Former debts  
recognized.

ART. 6. All debts contracted, and engagements entered into, before the adoption of this constitution, shall be as valid against the United States, under this constitution, as under the confederation.

Supreme law.

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Oath of office.  
Religious test.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Ratification.

ART. 7. The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.

*Done in convention, by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.*

GEORGE WASHINGTON, PRESIDENT,  
*and Deputy from Virginia.*

*New Hampshire*—John Langdon, Nicholas Gilman.

*Massachusetts*—Nathaniel Gorham, Rufus King.

*Connecticut*—Wm. Samuel Johnson, Roger Sherman.

*New York*—Alexander Hamilton.

*New Jersey*—William Livingston, David Breardly, William Patterson, Jonathan Dayton.

*Pennsylvania*—Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, Gouverneur Morris.

*Delaware*—George Read, Gunning Bedford, Jr., John Dickinson, Richard Bassett, Jacob Broom.

*Maryland*—James M'Henry, Daniel of St. Thomas Jenifer, Daniel Carroll.

*Virginia*—John Blair, James Madison, Jr.

*North Carolina*—William Blount, Richard Dobbs Spaight, Hugh Williamson.

*South Carolina*—John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler.

*Georgia*—William Few, Abr. Baldwin.

Attest,

WILLIAM JACKSON, *Secretary.*

## AMENDMENTS TO THE CONSTITUTION.\*

ARTICLE 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. Religion, speech, press, and petition.

ART. 2. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. Bearing arms.

ART. 3. No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law. Quartering of soldiers.

ART. 4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.† Unreasonable searches and seizures.

ART. 5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb;‡ nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. Criminal proceedings.

ART. 6. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense. Private property taken. &c. Trial by jury in criminal proceedings.

ART. 7. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.§ Same, in suits at common law.

ART. 8. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Excessive bail

ART. 9. The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. Rights retained by the people.

\* The first ten of these amendments were proposed by congress, (with others which were not ratified by three-fourths of the legislatures of the several states,) by resolution of 1789, and were ratified before 1791. The eleventh amendment was proposed by congress by resolution of the year 1794, and was ratified before 1796. The twelfth article was proposed by congress by resolution of October, 1803, and was ratified before September, 1804.

† *Ex parte Burford*, 3 Cranch, 448; 1 Cond. Rep., 594.

‡ *United States v. Haskell and Francis*, 4 Wash. C. C. R., 402; *United States v. Gilbert*, 2 Sumner's C. C. R., 19.

§ The amendments to the constitution of the United States, by which the trial by jury was secured, may, in a just sense, be well construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the form they may assume to settle legal rights. *Parsons v. Bedford et al.*, 3 Peters, 433.

Powers not delegated, reserved.	ART. 10. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.
States not to be sued.	ART. 11. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.*
Manner of choosing president. Electors.	ART. 12. SEC. 1.† The electors shall meet in their respective states, and vote by ballot for president and vice president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate: the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president.
House of representatives.	
Vice president to act when no choice. Senate to elect vice president.	SEC. 2. The person having the greatest number of votes as vice president, shall be the vice president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice president: a quorum, for that purpose, shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.
Eligibility.	SEC. 3. But no person constitutionally ineligible to the office of president, shall be eligible to that of vice president of the United States.

\* The amendment to the constitution by which the judicial power was declared not to extend to any suit commenced or prosecuted by a citizen or citizens of another state, or by foreign subjects against a state, prevented the exercise of jurisdiction in any case past or future. *Hollingsworth v. The State of Virginia*, 3 Dall., 378; 1 Cond. Rep., 169.

† This amendment was proposed in October, 1803, and was ratified before September, 1804.

## ORGANIC LAW OF MICHIGAN.

An Act to divide the Indiana Territory into two separate Governments.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the thirtieth day of June next, all that part of the Indiana territory, which lies north of a line drawn east from the southerly bend or extreme of Lake Michigan, until it shall intersect Lake Erie, and east of a line drawn from the said southerly bend through the middle of said lake to its northern extremity, and thence due north to the northern boundary of the United States, shall, for the purpose of temporary government, constitute a separate territory, and be called Michigan. Michigan set off.

SEC. 2. *And be it further enacted,* That there shall be established within the said territory, a government in all respects similar to that provided by the ordinance of congress, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven, for the government of the territory of the United States, northwest of the river Ohio; and by an act passed on the seventh day of August, one thousand seven hundred and eighty-nine, entitled "an Act to provide for the government of the territory northwest of the river Ohio;" and the inhabitants thereof shall be entitled to, and enjoy all and singular the rights, privileges, and advantages granted and secured to the people of the territory of the United States, northwest of the river Ohio, by the said ordinance. Its government.

SEC. 3. *And be it further enacted,* That the officers for the said territory, who by virtue of this act shall be appointed by the president of the United States, by and with the advice and consent of the senate, shall respectively exercise the same powers, perform the same duties, and receive for their services the same compensations, as by the ordinance aforesaid and the laws of the United States, have been provided and established for similar officers in the Indiana territory; and the duties and emoluments of superintendent of Indian affairs, shall be united with those of governor. Powers and compensation of officers as in Indiana.

SEC. 4. *And be it further enacted,* That nothing in this act contained, shall be construed so as, in any manner, to affect the government now in force in the Indiana territory, further than to prohibit the exercise thereof within the said territory of Michigan, from and after the aforesaid thirtieth day of June next. Indiana not affected.

SEC. 5. *And be it further enacted,* That all suits, process, and proceeding, which, on the thirtieth day of June next, shall be pending in the court of any county, which shall be included within the said territory of Michigan; and also all suits, process, and proceedings, which on the said thirtieth day of June next, shall be pending in the general court of the Indiana territory, in consequence of any writ of removal or order for trial at bar, and which had been removed from any of the counties included within the limits of the territory of Michigan aforesaid, shall, in all things concerning the same, be proceeded on, and judgments and decrees rendered thereon, in the same manner as if the said Indiana territory had remained undivided. Suits pending.

SEC. 6. *And be it further enacted,* That Detroit shall be the seat of government of the said territory, until congress shall otherwise direct. Seat of government.

Approved, January 11, 1805.

## ORGANIC LAW OF WISCONSIN.

An Act establishing the Territorial Government of Wisconsin.

What country shall constitute the Wisconsin territory.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the third day of July next, the country included within the following boundaries shall constitute a separate territory, for the purposes of temporary government, by the name of Wisconsin; that is to say: Bounded on the east by a line drawn from the northeast corner of the state of Illinois, through the middle of Lake Michigan, to a point in the middle of said lake, and opposite the main channel of Green Bay, and through said channel and Green Bay to the mouth of the Menomomie river; thence through the middle of the main channel of said river, to that head of said river nearest to the Lake of the Desert; thence in a direct line to the middle of said lake; thence through the middle of the main channel of the Montreal river, to its mouth; thence with a direct line across Lake Superior, to where the territorial line of the United States last touches said lake northwest; thence on the north, with the said territorial line, to the White-earth river; on the west, by a line from the said boundary line following down the middle of the main channel of White-earth river, to the Missouri river, and down the middle of the main channel of the Missouri river to a point due west from the north-west corner of the state of Missouri; and on the south, from said point, due east to the northwest corner of the state of Missouri; and thence with the boundaries of the states of Missouri and Illinois, as already fixed by acts of congress. And after the said third day of July next, all power and authority of the government of Michigan in and over the territory hereby constituted, shall cease: *provided*, that nothing in this act contained shall be construed to impair the rights of person or property now appertaining to any Indians within the said territory, so long as such rights shall remain unextinguished by treaty between the United States, and such Indians, or to impair the obligations of any treaty now existing between the United States and such Indians, or to impair or otherwise to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, or law, or otherwise, which it would have been competent to the government to make if this act had never been passed: *provided*, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing the territory hereby established into one or more other territories, in such manner, and at such times, as congress shall, in its discretion, deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States.

Proviso

Proviso.

Appointment and powers of governor.

SEC. 2. *And be it further enacted,* That the executive power and authority in and over the said territory shall be vested in a governor, who shall hold his office for three years, unless sooner removed by the president of the United States. The governor shall reside within the said territory, shall be commander-in-chief of the militia thereof, shall perform the duties and receive the emoluments of superintendent of Indian affairs, and shall approve of all laws passed by the legislative

assembly before they shall take effect; he may grant pardons for offenses against the laws of the said territory, and reprieves for offenses against the laws of the United States, until the decision of the president can be made known thereon; he shall commission all officers who shall be appointed to office under the laws of the said territory, and shall take care that the laws be faithfully executed.

SEC. 3. *And be it further enacted,* That there shall be a secretary <sup>Secretary, his duties.</sup> of the said territory, who shall reside therein, and hold his office for four years, unless sooner removed by the president of the United States; he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and one copy of the executive proceedings on or before the first Monday in December in each year, to the president of the United States; and at the same time, two copies of the laws to the speaker of the house of representatives, for the use of congress. And in case of the death, removal, resignation, or necessary absence, of the governor from the territory, the secretary shall have, and he is hereby authorized and required to execute and perform, all the powers and duties of the governor during such vacancy or necessary absence.

SEC. 4. *And be it further enacted,* That the legislative power shall <sup>shall legislature, how constituted and elected.</sup> be vested in a governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue four years. The house of representatives shall consist of twenty-six members, possessing the same qualifications as prescribed for the members of the council, and whose term of service shall continue two years. An apportionment shall be made, as nearly equal as practicable, among the several counties, for the election of the council and representatives, giving to each section of the territory representation in the ratio of its population, Indians excepted, as nearly as may be. And the said members of the council and house of representatives shall reside in and be inhabitants of the district for which they may be elected. Previous to the first election, the governor of the territory shall cause the census or enumeration of the inhabitants of the several counties in the territory to be taken and made by the sheriffs of the said counties, respectively, and returns thereof made by said sheriffs to the governor. The first election shall be held at such time and place, and be conducted in such manner as the governor shall appoint and direct; and he shall, at the same time, declare the number of members of the council and house of representatives to which each of the counties is entitled under this act. The number of persons authorized to be elected having the greatest number of votes in each of the said counties for the council, shall be declared, by the said governor, to be duly elected to the said council; and the person or persons having the greatest number of votes for the house of representatives, equal to the number to which each county may be entitled, shall also be declared, by the governor, to be duly elected: *provided,* the governor shall order a new election when there is a tie <sup>Proviso.</sup> between two or more persons voted for, to supply the vacancy made by such tie. And the persons thus elected to the legislative assembly shall meet at such place on such day as he shall appoint; but, thereafter, the time, place and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties to the council and house of representatives, according to population, shall

be prescribed by law, as well as the day of the annual commencement of the session of the said legislative assembly; but no session, in any year, shall exceed the term of seventy-five days.

Who shall be eligible to office.

SEC. 5. *And be it further enacted,* That every free white male citizen of the United States, above the age of twenty-one years, who shall have been an inhabitant of said territory at the time of its organization, shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters at all subsequent elections shall be such as shall be determined by the legislative assembly: *provided,* that the right of suffrage shall be exercised only by citizens of the United States.

Proviso.

Powers of the legislature.

SEC. 6. *And be it further enacted,* That the legislative power of the territory shall extend to all rightful subjects of legislation; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands of other property of residents. All the laws of the governor and legislative assembly shall be submitted to, and, if disapproved by the congress of the United States, the same shall be null and of no effect.

What officers are to be elected by the people.

SEC. 7. *And be it further enacted,* That all township officers and all county officers, except judicial officers, justices of the peace, sheriffs, and clerks of courts, shall be elected by the people, in such manner as may be provided by the governor and legislative assembly. The governor shall nominate, and, by and with the advice and consent of the legislative council, shall appoint, all judicial officers, justices of the peace, sheriffs, and all militia officers, except those of the staff, and all civil officers not herein provided for. Vacancies occurring in the recess of the council shall be filled by appointments from the governor, which shall expire at the end of the next session of the legislative assembly; but the said governor may appoint, in the first instance, the aforesaid officers, who shall hold their offices until the end of the next session of the said legislative assembly.

Disqualifications for office.

SEC. 8. *And be it further enacted,* That no member of the legislative assembly shall hold or be appointed to any office created or the salary or emoluments of which shall have been increased whilst he was a member, during the term for which he shall have been elected, and for one year after the expiration of such term; and no person holding a commission under the United States, or any of its officers, except as a militia officer, shall be a member of the said council, or shall hold any office under the government of the said territory.

Judiciary

SEC. 9. *And be it further enacted,* That the judicial power of the said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate judges, any two of whom shall be a quorum, and who shall hold a term at the seat of government of the said territory, annually, and they shall hold their offices during good behavior. The said territory shall be divided into three judicial districts; and a district court or courts shall be held in each of the three districts, by one of the judges of the supreme court, at such times and places as may be prescribed by law. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of the justices of the peace, shall be as limited by law: *provided however,* that the justices of the peace shall not have jurisdiction of any matter of controversy, when the title or boundaries of land may be in dispute, or where the debt or sum claimed exceeds fifty dollars.

Proviso.



And the said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction. Each district court shall appoint its clerk, who shall keep his office at the place where the court may be held, and the said clerks shall also be the registers in chancery; and any vacancy in said office of clerk happening in the vacation of said court, may be filled by the judge of said district, which appointment shall continue until the next term of said court. And writs of error, bills of exception, and appeals in chancery causes, shall be allowed in all cases, from the final decisions of the said district courts to the supreme court, under such regulations as may be prescribed by law; but in no case removed to the supreme court, shall a trial by jury be allowed in said court. The supreme court may appoint its own clerk, and every clerk shall hold his office at the pleasure of the court by which he shall have been appointed. And writs of error and appeals from the final decisions of the said supreme court shall be allowed and taken to the supreme court of the United States, in the same manner, and under the same regulations, as from the circuit courts of the United States, where the value of the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party, shall exceed one thousand dollars. And each of the said district courts shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States. And the first six days of every term of the said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws. And writs of error, and appeals from the final decisions of the said courts, in all such cases, shall be made to the supreme court of the territory, in the same manner as in other cases. The said clerks shall receive, in all such cases, the same fees which the clerk of the district court of the United States in the northern district of the state of New York receives for similar services.

SEC. 10. *And be it further enacted,* That there shall be an attorney for the said territory appointed, who shall continue in office four years, unless sooner removed by the president, and who shall receive the same fees and salary as the attorney of the United States for the Michigan territory. There shall also be a marshal for the territory appointed, who shall hold his office for four years, unless sooner removed by the president, who shall execute all process issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States. He shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, as the marshal of the district court of the United States for the northern district of the state of New York; and shall, in addition, be paid the sum of two hundred dollars, annually, as a compensation for extra services.

Attorney to be appointed.

Marshal.

SEC. 11. *And be it further enacted,* That the governor, secretary, chief justice and associate judges, attorney and marshal, shall be nominated, and by and with the advice and consent of the senate, appointed by the president of the United States. The governor and secretary, to be appointed as aforesaid, shall before they act as such respectively take an oath or affirmation before some judge or justice of the peace in the existing territory of Michigan, duly commissioned and qualified to administer an oath or affirmation, to support the constitution of the United States, and for the faithful discharge of the duties of their respective offices; which said oaths, when so taken, shall be certified by the person before whom the same shall have been taken, and such certificate shall be received and recorded by the said secretary among the executive proceedings. And

Governor, &c., to be approved by the senate

afterwards the chief justice and associate judges, and all other civil officers in said territory, before they act as such, shall take a like oath or affirmation before the said governor or secretary, or some judge or justice of the territory who may be duly commissioned and qualified, which said oath or affirmation shall be certified and transmitted by the person taking the same to the secretary, to be by him recorded as aforesaid; and, afterwards, the like oath or affirmation shall be taken, certified, and recorded, in such manner and form as may be prescribed by law. The governor shall receive an annual salary of two thousand five hundred dollars for his services as governor and as superintendent of Indian affairs. The said chief justice and associate judges shall each receive an annual salary of eighteen hundred dollars. The secretary shall receive an annual salary of twelve hundred dollars. The said salaries shall be paid quarter-yearly, at the treasury of the United States. The members of the legislative assembly shall be entitled to receive three dollars each per day, during their attendance at the sessions thereof, and three dollars each for every twenty miles' travel in going to and returning from the said sessions, estimated according to the nearest usually traveled route. There shall be appropriated, annually, the sum of three hundred and fifty dollars, to be expended by the governor to defray the contingent expenses of the territory, and there shall also be appropriated annually, a sufficient sum, to be expended by the secretary of the territory, and upon an estimate to be made by the secretary of the treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws and other incidental expenses; and the secretary of the territory shall annually account to the secretary of the treasury of the United States for the manner in which the aforesaid sum shall have been expended.

Salaries.

Contingent expenses.

Rights, &c., under the territorial compact of July, 1787, extended to Wisconsin.

And also those secured to Michigan.

Legislative sessions, when held.

SEC. 12. *And be it further enacted*, that the inhabitants of the said territory shall be entitled to, and enjoy, all and singular the rights, privileges, and advantages, granted and secured to the people of the territory of the United States north-west of the river Ohio, by the articles of the compact contained in the ordinance for the government of the said territory, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven; and shall be subject to all the conditions and restrictions and prohibitions in said articles of compact imposed upon the people of the said territory. The said inhabitants shall also be entitled to all the rights, privileges, and immunities, heretofore granted and secured to the territory of Michigan, and to its inhabitants, and the existing laws of the territory of Michigan shall be extended over said territory, so far as the same shall not be incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed, by the governor and legislative assembly of the said territory of Wisconsin; and further, the laws of the United States are hereby extended over, and shall be in force in said territory, so far as the same, or any provisions thereof may be applicable.

SEC. 13. *And be it further enacted*, That the legislative assembly of the territory of Wisconsin shall hold its first session at such time and place in said territory as the governor thereof shall appoint and direct; and at said session, or as soon thereafter as may by them be deemed expedient, the said governor and legislative assembly shall proceed to locate and establish the seat of government for said territory, at such place as they may deem eligible, which place, however, shall thereafter be subject to be changed by the said governor and legislative assembly. And twenty thousand dollars, to be paid out of any money in the treas-

ury, not otherwise appropriated, is hereby given to the said territory, which shall be applied by the governor and legislative assembly to defray the expenses of erecting public buildings at the seat of government.

SEC. 14. *And be it further enacted,* That a delegate to the house of representatives of the United States, to serve for the term of two years, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as have been granted to the delegates from the several territories of the United States to the said house of representatives. The first election shall be held at such time and place or places, and be conducted in such manner, as the governor shall appoint and direct. The person having the greatest number of votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given to the person so elected.

Delegate to the house of representatives of the United States.

SEC. 15. *And be it further enacted,* That all suits, process, and proceedings, and all indictments and informations which shall be undetermined on the third day of July next, in the courts held by the additional judge for the Michigan territory, in the counties of Brown and Iowa; and all suits, process and proceedings, and all indictments and informations which shall be undetermined on the said day of July, in the county courts of the several counties of Crawford, Brown, Iowa, Dubuque, Milwaukee, and Des Moines, shall be transferred to be heard, tried, prosecuted and determined, in the district courts hereby established, which may include the said counties.

Provisions respecting undetermined suits.

SEC. 16. *And be it further enacted,* That all causes which shall have been or may be removed from the courts held by the additional judge for the Michigan territory, in the counties of Brown and Iowa, by appeal or otherwise, into the supreme court for the territory of Michigan, and which shall be undetermined therein on the third day of July next, shall be certified by the clerk of the said supreme court, and transferred to the supreme court of said territory of Wisconsin there to be proceeded in to final determination, in the same manner that they might have been in the said supreme court of the territory of Michigan.

SEC. 17. *And be it further enacted,* That the sum of five thousand dollars be, and the same is hereby, appropriated, out of any money in the treasury not otherwise appropriated to be expended by and under the direction of the legislative assembly of said territory, in the purchase of a library for the accommodation of said assembly, and of the supreme court hereby established.

Five thousand dollars for the purchase of a library.

Approved, April 20, 1836.

## ORGANIC LAW OF IOWA.

An Act to divide the Territory of Wisconsin, and to establish the Territorial Government of Iowa.

Iowa, July 4th,  
1838.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That from and after the third day of July next, all that part of the present territory of Wisconsin which lies west of the Mississippi river, and west of a line drawn due north from the head waters or sources of the Mississippi to the territorial line, shall, for the purposes of temporary government, be and constitute a separate territorial government, by the name of Iowa; and that, from and after the said third day of July next, the present territorial government of Wisconsin shall extend only to that part of the present territory of Wisconsin which lies east of the Mississippi river. And after the said third day of July next, all power and authority of the government of Wisconsin, in and over the territory hereby constituted, shall cease: *provided*, that nothing in this act contained shall be construed to impair the rights of person or property now appertaining to any Indians within the said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to impair the obligations of any treaty now existing between the United States and such Indians, or to impair or in anywise to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, or law, or otherwise, which it would have been competent to the government to make if this act had never been passed: *provided*, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing the territory hereby established into one or more other territories, in such manner and at such times, as congress shall, in its discretion deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States.

Rights and powers reserved.

SEC. 2. *And be it further enacted,* That the executive power and authority in and over the said territory of Iowa, shall be vested in a governor, who shall hold his office for three years, unless sooner removed by the president of the United States. The governor shall reside within the said territory, shall be commander-in-chief of the militia thereof, shall perform the duties and receive the emoluments of superintendent of Indian affairs, and shall approve of all laws passed by the legislative assembly before they shall take effect; he may grant pardons for offenses against the laws of said territory, and reprieves for offenses against the law of the United States, until the decision of the president can be made known thereon; he shall commission all officers who shall be appointed to office under the laws of the said territory, and shall take care that the laws be faithfully executed.

Secretary.

SEC. 3. *And be it further enacted,* That there shall be a secretary of the said territory, who shall reside therein, and hold his office for four years, unless sooner removed by the president of the United States, he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the

governor in his executive department; he shall transmit one copy of the laws and one copy of the executive proceedings, on or before the first Monday in December in each year, to the president of the United States; and, at the same time, two copies of the laws to the speaker of the house of representatives, for the use of congress. And in case of the death, removal, resignation, or necessary absence of the governor from the territory, the secretary shall have, and he is hereby authorized and required to execute and perform all the powers and duties of the governor during such vacancy or necessary absence, or until another governor shall be duly appointed to fill such vacancy.

To transmit laws.

To act as governor.

SEC. 4. *And be it further enacted*, That the legislative power shall be vested in the governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualifications of voters as hereinafter prescribed, whose term of service shall continue two years. The house of representatives shall consist of twenty-six members, possessing the same qualifications as prescribed for the members of the council, and whose term of service shall continue one year. An apportionment shall be made as nearly equal as practicable among the several counties, for the election of the council and representatives, giving to each section of the territory representation in the ratio of its population, Indians excepted, as nearly as may be. And the said members of the council and house of representatives shall reside in, and be inhabitants of the district for which they may be elected. Previous to the first election, the governor of the territory shall cause the census or enumeration of the inhabitants of the several counties in the territory, to be taken and made by the sheriffs of the said counties respectively, unless the same shall have been taken within three months previous to the third day of July next, and returns thereof made by said sheriffs to the governor. The first election shall be held at such time and place, and be conducted in such manner as the governor shall appoint and direct; and he shall at the same time, declare the number of members of the council and house of representatives to which each of the counties or districts are entitled under this act. The number of persons authorized to be elected having the greatest number of votes in each of the said counties or districts for the council, shall be declared by the said governor to be duly elected to the said council; and the person or persons having the greatest number of votes for the house of representatives, equal to the number to which each county may be entitled, shall also be declared by the governor to be duly elected: *provided*, the governor shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by such tie. And the persons thus elected to the legislative assembly shall meet at such place and on such day as he shall appoint; but thereafter, the time, place, and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties to the council and house of representatives, according to population, shall be prescribed by law, as well as the day of the annual commencement of the session of the said legislative assembly; but no session in any year, shall exceed the term of seventy-five days.

Legislative power

Council.

House of representatives.

Census.

Elections, &amp;c. to be regulated by law.

Right of suffrage.

SEC. 5. *And be it further enacted*, That every free white male citizen of the United States, above the age of twenty-one years, who shall have been an inhabitant of said territory at the time of its organization shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters, at all

- subsequent elections, shall be such as shall be determined by the legislative assembly: *provided*, that the right of suffrage shall be exercised only by citizens of the United States.
- Legislative power, extent of. SEC. 6. *And be it further enacted*, That the legislative power of the territory shall extend to all rightful subjects of legislation; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws of the governor and legislative assembly shall be submitted to, and if disapproved by the congress of the United States, the same shall be null and of no effect.
- Elective officers. SEC. 7. *And be it further enacted*, That all township officers, and all county officers except judicial officers, justices of the peace, sheriffs, and clerks of courts, shall be elected by the people, in such manner as is now prescribed by the laws of the territory of Wisconsin, or as may, after the first election, be provided by the governor and legislative assembly of Iowa territory. The governor shall nominate, and, by and with the advice and consent of the legislative council, shall appoint all judicial officers, justices of the peace, sheriffs, and all militia officers, except those of the staff, and all civil officers not herein provided for. Vacancies occurring in the recess of the council, shall be filled by appointments from the governor, which shall expire at the end of the next session of the legislative assembly; but the said governor may appoint, in the first instance, the aforesaid officers, who shall hold their offices until the end of the next session of the said legislative assembly.
- Judicial, &c. Ineligibility. SEC. 8. *And be it further enacted*, That no member of the legislative assembly shall hold, or be appointed to, any office created, or the salary or emoluments of which shall have been increased whilst he was a member, during the term for which he shall have been elected, and for one year after the expiration of such term; and no person holding a commission or appointment under the United States, or any of its officers, except as a militia officer, shall be a member of the said council or house of representatives, or shall hold any office under the government of the said territory.
- Judicial power. SEC. 9. *And be it further enacted*, That the judicial power of the said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate judges, any two of whom shall be a quorum, and who shall hold a term at the seat of government of the said territory annually; and they shall hold their offices during the term of four years. The said territory shall be divided into three judicial districts; and a district court or courts shall be held in each of the three districts, by one of the judges of the supreme court, at such times and places as may be prescribed by law; and the said judges shall, after their appointment, respectively, reside in the districts which shall be assigned to them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of the justices of the peace, shall be as limited by law: *provided however*, that justices of the peace shall not have jurisdiction of any matter of controversy, when the title or boundaries of land may be in dispute, or where the debt or sum claimed exceeds fifty dollars. And the said supreme and district courts, respectively, shall possess a chancery as well as a common law jurisdiction. Each district court shall appoint its clerk, who shall keep his office at the place where the court may be held, and the said clerks shall also be the registers in chancery; and any vacancy in
- Districts, and the courts thereof.
- Jurisdiction
- at common law and chancery.
- Clerks.

said office of clerk, happening in the vacation of said court, may be filled by the judge of said district, which appointment shall continue until the next term of said court. And writs of error, bills of exception, and appeals in chancery causes, shall be allowed in all cases, from the final decisions of the said district courts to the supreme court, under such regulations as may be prescribed by law; but in no case, removed to the supreme court, shall trial by jury be allowed in said court. The supreme court may appoint its own clerk, and every clerk shall hold his office at the pleasure of the court by which he shall have been appointed. And writs of error and appeals from the final decision of the said supreme court shall be allowed and taken to the supreme court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party, shall exceed one thousand dollars. And each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States. And the first six days of every term of the said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said constitution and laws. And writs of error and appeals from the final decisions of the said courts, in all such cases, shall be made to the supreme court of the territory, in the same manner as in other cases. The said clerk shall receive in all such cases, the same fees which the clerks of the district courts of Wisconsin territory now receive for similar services.

Writs of error,  
&c.

SEC. 10. *And be it further enacted,* That there shall be an attorney for the said territory appointed, who shall continue in office four years, unless sooner removed by the president, and who shall receive the same fees and salary as the attorney of the United States for the present territory of Wisconsin. There shall also be a marshal for the territory appointed, who shall hold his office for four years, unless sooner removed by the president, who shall execute all process issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States. He shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees as the marshal of the district court of the United States for the present territory of Wisconsin; and shall, in addition, be paid the sum of two hundred dollars annually as a compensation for extra services.

Attorney

Marshal.

SEC. 11. *And be it further enacted,* That the governor, secretary, chief justice and associate judges, attorney, and marshal, shall be nominated, and, by and with the advice and consent of the senate, appointed by the president of the United States. The governor and secretary, to be appointed as aforesaid, shall, before they act as such, respectively take an oath or affirmation, before some judge or justice of the peace in the existing territory of Wisconsin, duly commissioned and qualified to administer an oath or affirmation, or before the chief justice or some associate justice of the supreme court of the United States, to support the constitution of the United States, and for the faithful discharge of the duties of their respective offices; which said oaths, when so taken, shall be certified by the person before whom the same shall have been taken, and such certificate shall be received and recorded by the said secretary among the executive proceedings. And, afterwards, the chief justice and associate judges, and all other civil officers in said territory, before they act as such, shall take a like oath, or affirmation, before said

Appointments by  
president

Oath of office.

- governor, or secretary, or some judge or justice of the territory, who may be duly commissioned and qualified, which said oath or affirmation shall be certified and transmitted, by the person taking the same, to the secretary, to be by him recorded as aforesaid; and, afterwards, the like oath or affirmation shall be taken, certified, and recorded in such manner and form as may be prescribed by law. The governor shall receive an annual salary of fifteen hundred dollars as governor, and one thousand dollars as superintendent of Indian affairs. The said chief judge and associate justices shall each receive an annual salary of fifteen hundred dollars. The secretary shall receive an annual salary of twelve hundred dollars. The said salaries shall be paid quarter yearly, at the treasury of the United States. The members of the legislative assembly shall be entitled to receive three dollars each, per day, during their attendance at the session thereof, and three dollars each for every twenty miles travel in going to, and returning from the said sessions, estimated according to the nearest usually traveled route. There shall be appropriated annually the sum of three hundred and fifty dollars to be expended by the governor to defray the contingent expenses of the territory; and there shall also be appropriated annually a sum sufficient to be expended by the secretary of the territory, and upon an estimate to be made by the secretary of the treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses; and the secretary of the territory shall annually account to the secretary of the treasury of the United States for the manner in which the aforesaid sum shall have been expended.
- Fundamental rights.** SEC. 12. *And be it further enacted,* That the inhabitants of the said territory shall be entitled to all the rights, privileges and immunities heretofore granted and secured to the territory of Wisconsin, and to its inhabitants; and the existing laws of the territory of Wisconsin shall be extended over said territory, so far as the same be not incompatible with the provisions of this act, subject, nevertheless, to be altered, modified, or repealed by the governor and legislative assembly of the said territory of Iowa; and, further, the laws of the United States are hereby extended over, and shall be in force in said territory, so far as the same, or any provisions thereof, may be applicable.
- Sessions of legislature.** SEC. 13. *And be it further enacted,* That the legislative assembly of the territory of Iowa shall hold its session at such time and place, in said territory, as the governor thereof shall appoint and direct; and at said session, or as soon thereafter as may by them be deemed expedient, the said governor and legislative assembly shall proceed to locate and establish the seat of government for said territory, at such place as they may deem eligible, which place, however, shall thereafter be subject to be changed by the governor and legislative assembly. And the sum of twenty thousand dollars, out of any money in the treasury not otherwise appropriated, is hereby granted to the said territory of Iowa, which shall be applied by the governor and legislative assembly thereof, to defray the expenses of erecting public buildings at the seat of government.
- Delegate to congress.** SEC. 14. *And be it further enacted,* That a delegate to the house of representatives of the United States, to serve for the term of two years, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as have been granted to the delegates from the several territories of the United States to the said house of representatives. The first election shall be held at such time and place or places, and be conducted in such
- Salary of governor, judges, and secretary.**
- Pay of members of legislature.**
- Laws of Wisconsin.**



manner as the governor shall appoint and direct. The person having the greatest number of votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given to the person so elected.

SEC. 15. *And be it further enacted,* That all suits, process, and proceedings, and all indictments and informations, which shall be undetermined on the third day of July next, in the district courts of Wisconsin territory, west of the Mississippi river, shall be transferred to be heard, tried, prosecuted and determined in the district courts hereby established, which may include the said counties. Legal proceedings pending.

SEC. 16. *And be it further enacted,* That all justices of the peace, constables, sheriffs, and all other executive and judicial officers, who shall be in office on the third day of July next, in that portion of the present territory of Wisconsin, which will then, by this act, become the territory of Iowa, shall be, and are hereby authorized and required to continue to exercise and perform the duties of their respective offices, as officers of the territory of Iowa, temporarily, and until they or others shall be duly appointed to fill their places by the territorial government of Iowa, in the manner herein directed: *provided,* that no officer shall hold or continue in office by virtue of this provision, over twelve months from the said third day of July next. Officers to continue in office.

SEC. 17. *And be it further enacted,* That all causes which shall have been or may be removed from the courts held by the present territory of Wisconsin, in the counties west of the Mississippi river, by appeal or otherwise, into the supreme court for the territory of Wisconsin, and which shall be undetermined therein on the third day of July next, shall be certified by the clerk of the said supreme court, and transferred to the supreme court of said territory of Iowa, there to be proceeded in to final determination, in the same manner that they might have been in the said supreme court of the territory of Wisconsin. Causes pending in supreme court of Wisconsin transferred to supreme court of Iowa.

SEC. 18. *And be it further enacted,* That the sum of five thousand dollars be, and the same is hereby appropriated, out of any money in the treasury not otherwise appropriated, to be expended by, and under the direction of the governor of said territory of Iowa, in the purchase of a library, to be kept at the seat of government, for the accommodation of the governor, legislative assembly, judges, secretary, marshal, and attorney of said territory, and such other persons as the governor and legislative assembly shall direct. Appropriation for library.

SEC. 19. *And be it further enacted,* That from and after the day named in this act for the organization of the territory of Iowa, the term of the members of the council and house of representatives of the territory of Wisconsin shall be deemed to have expired, and an entirely new organization of the council and house of representatives of the territory of Wisconsin, as constituted by this act, shall take place as follows: As soon as practicable, after the passage of this act, the governor of the territory of Wisconsin shall apportion the thirteen members of the council, and twenty-six members of the house of representatives, among the several counties or districts comprised within said territory, according to their population, as nearly as may be, (Indians excepted.) The first election shall be held at such time as the governor shall appoint and direct, and shall be conducted, and returns thereof made in all respects according to the provisions of the laws of said territory, and the governor shall declare the person having the greatest number of votes to be elected, and shall order a new election when there is a tie between two or more persons voted for, to supply the vacancy made by Re-organization of legislature of Wisconsin.

such tie. The persons thus elected shall meet at Madison, the seat of government, on such day as he shall appoint, but thereafter, the apportioning of the representation in the several counties to the council and house of representatives, according to population, the day of their election, and the day for the commencement of the session of the legislative assembly, shall be prescribed by law.

Temporary arrangements in Iowa.

SEC. 20. *And be it further enacted*, That temporarily, and until otherwise provided by law of the legislative assembly, the governor of the territory of Iowa may define the judicial districts of said territory, and assign the judges who may be appointed for said territory, to the several districts, and also appoint the time for holding courts in the several counties in each district, by proclamation to be issued by him; but the legislative assembly, at their first, or any subsequent session, may organize, alter, or modify such judicial districts, and assign the judges, and alter the times of holding the courts, or any of them.

Approved, June 12, 1838.

#### AMENDMENTS TO THE ORGANIC LAW.

An Act to alter and amend the Organic Law of the Territories of Wisconsin and Iowa.

Acts to be approved by governor. &c.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every bill which shall have passed the council and house of representatives of the territories of Iowa and Wisconsin shall, before it become a law, be presented to the governor of the territory; if he approve he shall sign it, but if not, he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of that house it shall become a law. But, in all such cases, the votes of both houses shall be determined by yeas and nays; and the names of the persons voting for and against the bill shall be entered on the journals of each house respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the assembly by adjournment prevent its return, in which case it shall not be a law.

Power of congress not affected

SEC. 2. *And be it further enacted*, That this act shall not be so construed as to deprive congress of the right to disapprove of any law passed by the said legislative assembly, or in any way to impair or alter the power of congress over laws passed by said assembly.

Approved, March 3d, 1839.

An Act to authorize the election or appointment of certain officers in the Territory of Iowa, and for other purposes.

Certain officers may be elected.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the

legislative assembly of the territory of Iowa, shall be, and are hereby authorized to provide by law for the election or appointment of sheriffs, judges of probate, justices of the peace, and county surveyors, within the said territory, in such way or manner, and at such times and places as to them may seem proper; and after a law shall have been passed by the legislative assembly for that purpose, all elections or appointments of the above named officers thereafter to be had or made shall be in pursuance of such law.

SEC. 2. *And be it further enacted,* That the term of service of the present delegate for said territory of Iowa shall expire on the twenty-seventh day of October, eighteen hundred and forty; and the qualified electors of said territory may elect a delegate to serve from the said twenty-seventh day of October to the fourth day of March thereafter, at such time and place as shall be prescribed by law by the legislative assembly, and thereafter a delegate shall be elected, at such time and place as the legislative assembly may direct, to serve for a congress, as members of the house of representatives are now elected.

Approved, March 3d, 1839.

## FORT MADISON, BURLINGTON, etc.

An Act for laying off the towns of Fort Madison and Burlington, in the county of Des Moines, and the towns of Belleview, Dubuque, and Peru, in the county of Dubuque, territory of Wisconsin, and for other purposes.

Towns of Fort Madison, Burlington, Belleview, Dubuque and Peru, Wisconsin territory.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the tracts of land in the territory of Wisconsin including the towns of Fort Madison and Burlington, in the county of Des Moines; Belleview, Dubuque, and Peru, in the county of Dubuque; and Mineral Point, in the county of Iowa, shall, under the direction of the surveyor general of the public lands, be laid off into town lots, streets, avenues, and the lots for public use called the public squares, and into out-lots having regard to the lots and streets already surveyed, in such manner and of such dimensions as he may think proper for the public good and the equitable rights of the settlers and occupants of the said towns: *provided*, the tracts of land so to be laid off into town-lots, &c., shall not exceed the quantity of one entire section, nor the town-lots one-half of an acre; nor shall the out-lots exceed the quantity of four acres each. When the survey of the lots shall be completed, a plat thereof shall be returned to the secretary of the treasury, and within six months thereafter the lots shall be offered to the highest bidder, at public sale, under the direction of the president of the United States, and at such other times as he shall think proper: *provided*, that no town-lot shall be sold for a sum less than five dollars. *And provided further*, that a quantity of land of proper width, on the river banks, at the towns of Fort Madison, Belleview, Burlington, Dubuque and Peru, and running with the said rivers the whole length of said towns, shall be reserved from sale, (as shall also the public squares) for public use, and remain for ever for public use, as public highways, and for other public uses.

Proviso.

Surveyor to class the lots.

SEC. 2. *And be it further enacted,* That it shall be the duty of the said surveyor to class the lots already surveyed in the said towns of Fort Madison, Burlington, Belleview, Dubuque, Peru and Mineral Point, into three classes, according to the relative value thereof, on account of situation and eligibility for business, without regard however to the improvements made thereon; and previous to the sale of said lots as aforesaid, each and every person or persons, or his, her, or their legal representatives, who shall heretofore have obtained from the agent of the United States a permit to occupy any lot or lots in the said towns, or who shall have, by building or inclosure, actually occupied or improved any lot or lots in the said towns, or within the tracts of land hereby authorized to be laid off into town lots, shall be permitted to purchase such lot or lots by paying therefor, in cash, if the same fall within the first class as aforesaid, at the rate of forty dollars per acre; if within the second class, at the rate of twenty dollars per acre; and if within the third class at the rate of ten dollars per acre: *provided*, that no one of the persons aforesaid shall be permitted to purchase, by authority of this section, more than one acre of ground to embrace improvements already made.

Proviso.

SEC. 3. *And be it further enacted,* That the sum of three thousand dollars be, and the same is hereby appropriated, to be paid out of any money in the treasury not otherwise appropriated, to defray the expenses of surveying the lands covering the said towns of Fort Madison, Burlington, Belleview, Dubuque, Peru and Mineral Point.

Approved, July 2, 1836.

An Act to amend an Act entitled "an Act for laying off the towns of Fort Madison and Burlington, in the county of Des Moines, and the towns of Belleview, Dubuque and Peru, in the county of Dubuque, and Mineral Point in the county of Iowa, territory of Wisconsin, and for other purposes," approved July second, eighteen hundred and thirty six.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all acts and duties required to be done and performed by the surveyor for the territory of Wisconsin, under the act to which this is an amendment, shall be done by a board of commissioners of three in number, any two of whom shall be a quorum to do business; said commissioners to be appointed by the president of the United States, and shall, previous to their entering upon the discharge of their duties, take an oath or affirmation to perform the same faithfully and impartially: *provided,* that the action of the commissioners appointed under the present act shall not interfere with any of the acts performed by the surveyor general, prior to the time of the passage hereof, in pursuance of instructions under the act to which this is amendatory.

SEC. 2. *And be it further enacted,* That the said commissioners shall have power to hear evidence and determine all claims to lots arising under the act to which this is an amendment; and for this purpose the said commissioners are authorized to administer all oaths that may be necessary, and reduce to writing all the evidence in support of claims to pre-emption presented for their consideration; and when all the testimony shall have been heard and considered, the said commissioners shall file with the proper register and receiver for the district within which the towns are situated respectively, the testimony in each case, together with a certificate in favor of each person having the right of pre-emption under the provisions of the act of which this is amendatory; and upon making payment to the proper receiver of public moneys for the lot or lots to which such person is entitled, the receiver shall grant a receipt therefor, and the register issue certificates of purchase, to be transmitted to the commissioner of the general land office, as in other cases of the sale of public lands.

SEC. 3. *And be it further enacted,* That the proper register and receiver of public moneys, after the board of commissioners have heard and determined all the cases of pre-emption under the act to which this is an amendment, shall expose the residue of the lots to public sale to the highest bidder, after advertising the same in three public newspapers at least three months prior to the day of sale, in the same manner as is provided for the sale of public lands in other cases; and after paying the commissioners the compensation hereafter allowed them, and all other expenses incident to the said survey and sale, the receiver of the land office shall pay over the residue of the money he may have received from the sale of lots aforesaid, by pre-emption as well as at public auction, into the hands of the trustees of the respective towns aforesaid, to be expended by them in the erection of public buildings,

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the construction of suitable wharves, and the improvement of the streets in the said towns of Fort Madison, Burlington, Belleview, Dubuque, Peru and Mineral Point.

Commissioners'  
pay.

SEC. 4. *And be it further enacted*, That the commissioners appointed to carry this act into effect, shall be paid by the receiver of public moneys, of the proper land district, six dollars each, per day, for their services for every day they are necessarily employed.

Approved, March 3, 1837.

## ADMISSION OF IOWA.

An Act for the admission of the States of Iowa and Florida into the Union.

WHEREAS, the people of the territory of Iowa did, on the seventh day of Preamble.

October, eighteen hundred and forty-four, by a convention of delegates called and assembled for that purpose, form for themselves a constitution and state government; and whereas, the people of the territory of Florida did, in like manner, by their delegates, on the eleventh day of January, eighteen hundred and thirty-nine, form for themselves a constitution and state government, both of which said constitutions are republican; and said conventions having asked the admission of their respective territories into the union as states, on equal footing with the original states:

Act of March 3,  
1845, ch. 75, and  
ch. 76

SECTION. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the states of Iowa and Florida be, and the same are hereby declared to be states of the United States of America, and are hereby admitted into the union on equal footing with the original states, in all respects whatsoever.

Iowa and Florida  
admitted.

SEC. 2. *And be it further enacted,* That the following shall be the boundaries of the said state of Iowa, to wit: beginning at the mouth of the Des Moines river, at the middle of the Mississippi, thence by the middle of the channel of that river to a parallel of latitude passing through the mouth of the Mankato, or Blue-earth river, thence west along the said parallel of latitude to a point where it is intersected by a meridian line, seventeen degrees and thirty minutes west of the meridian of Washington city, thence due south to the northern boundary line of the state of Missouri, thence eastwardly following that boundary to the point at which the same intersects the Des Moines river, thence by the middle of the channel of that river to the place of beginning.

Boundaries of  
Iowa.

SEC. 3. *And be it further enacted,* That the said state of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same: such rivers to be common to both; and that the said river Mississippi, and the navigable waters leading into the same, shall be common highways, and forever free as well to the inhabitants of said state, as to all other citizens of the United States, without any tax, duty, impost, or toll therefor, imposed by the said state of Iowa.

Iowa to have con-  
current jurisdic-  
tion on the Mis-  
sissippi and other  
rivers.

SEC. 4. *And be it further enacted,* That it is made and declared to be a fundamental condition of the admission of said state of Iowa into the union, that so much of this act as relates to the said state of Iowa shall be assented to by a majority of the qualified electors at their township elections, in the manner and at the time prescribed in the sixth section of the thirteenth article of the constitution adopted at Iowa city the first day of November, anno Domini eighteen hundred and forty-four, or by the legislature of said state. And so soon as such assent shall be given, the president of the United States shall announce the same by proclamation; and therefrom without further proceedings on the part of

Assent of people  
of Iowa to this  
act necessary.

congress the admission of the said state of Iowa into the union, on an equal footing in all respects whatever with the original states, shall be considered as complete.

Boundaries of Florida.

SEC. 5. *And be it further enacted,* That said state of Florida shall embrace the territories of East and West Florida, which by the treaty of amity, settlement and limits between the United States and Spain, on the twenty-second day of February, eighteen hundred and nineteen, were ceded to the United States.

Each one representative in congress.

SEC. 6. *And be it further enacted,* That until the next census and apportionment shall be made, each of said states of Iowa and Florida shall be entitled to one representative in the house of representatives of the United States.

Not to interfere with or tax the public lands.

SEC. 7. *And be it further enacted,* That said states of Iowa and Florida are admitted into the union on the express condition that they shall never interfere with the primary disposal of the public lands lying within them, nor levy any tax on the same whilst remaining the property of the United States: *provided,* that the ordinance of the convention that formed the constitution of Iowa, and which is appended to the said constitution, shall not be deemed or taken to have any effect or validity, or to be recognized as in any manner obligatory upon the government of the United States.

Ordinance of the convention of Iowa not obligatory on United States.

Approved, March 3, 1845.

An Act supplemental to the Act for the admission of the States of Iowa and Florida into the Union.

Application of United States laws to Iowa.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the state of Iowa as elsewhere within the United States.

District court.

SEC. 2. *And be it further enacted,* That the said state shall be one district, and be called the district of Iowa; and a district court shall be held therein, to consist of one judge, who shall reside in the said district, and be called a district judge. He shall hold, at the seat of government of the said state, two sessions of the said district court annually, on the first Monday in January, and he shall, in all things, have and exercise the same jurisdiction and powers which were by law given to the judge of the Kentucky district, under an act entitled "an act to establish the judicial courts of the United States." He shall appoint a clerk for the said district, who shall reside and keep the records of the said court at the place of holding the same; and shall receive, for the services performed by him, the same fees to which the clerk of the Kentucky district is by law entitled for similar services.

Jurisdiction.

Act of September 24, 1789, ch. 20, sec 10.

Compensation of the judge.

SEC. 3. *And be it further enacted,* That there shall be allowed to the judge of the said district court the annual compensation of fifteen hundred dollars, to commence from the date of his appointment, to be paid quarterly at the treasury of the United States.

United States attorney to be appointed.

SEC. 4. *And be it further enacted,* That there shall be appointed in the said district, a person learned in the law, to act as attorney for the United States; who shall, in addition to his stated fees, be paid annually by the United States two hundred dollars, as a full compensation for all extra services: the said payments to be made quarterly, at the treasury of the United States.



SEC. 5. *And be it further enacted*, That a marshal shall be appointed for the said district, who shall perform the same duties, be subject to the same regulations and penalties, and be entitled to the same fees, as are prescribed and allowed to marshals in other districts; and shall, moreover, be entitled to the sum of two hundred dollars annually, as a compensation for all extra services.

United States marshal to be appointed.

Compensation.

SEC. 6. *And be it further enacted*, That in lieu of the propositions submitted to the congress of the United States, by an ordinance passed on the first day of November, eighteen hundred and forty-four, by the convention of delegates at Iowa city, assembled for the purpose of making a constitution for the state of Iowa, which are hereby rejected, the following propositions be, and the same are hereby, offered to the legislature of the state of Iowa, for their acceptance or rejection; which, if accepted, under the authority conferred on the said legislature, by the convention which framed the constitution of the said state, shall be obligatory upon the United States.

Propositions to be submitted to the legislature of Iowa.

1. That section numbered sixteen in every township of the public lands, and, where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the state for the use of schools.

Grant of lands for the use of schools.

2. That the seventy-two sections of land set apart and reserved for the use and support of a university, by an act of congress approved on the twentieth day of July, eighteen hundred and forty, entitled "An act granting two townships of land for the use of a university in the territory of Iowa," are hereby granted and conveyed to the state, to be appropriated solely to the use and support of such university, in such manner as the legislature may prescribe.

Grant of lands for the use of a university Act of July 20, 1840, chap 90.

3. That five entire sections of land to be selected and located under the direction of the legislature, in legal divisions of not less than one quarter section, from any of the unappropriated lands belonging to the United States within the said state, are hereby granted to the state for the purpose of completing the public buildings of the said state, or for the erection of public buildings at the seat of government of the said state, as the legislature may determine and direct.

Grant of lands for completing the public buildings

4. That all salt-springs within the state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to the said state for its use; the same to be selected by the legislature thereof, within one year after the admission of said state, and the same, when so selected, to be used on such terms, conditions, and regulations, as the legislature of the state shall direct: *provided*, that no salt-spring, the right whereof is now vested in any individual or individuals, or which may hereafter be confirmed or adjudged to any individual or individuals, shall, by this section be granted to said state: *and provided also*, that the general assembly shall never lease or sell the same, at any one time, for a longer period than ten years, without the consent of congress.

Salt springs granted to the state.

Proviso.

Further proviso.

5. That five per cent. of the net proceeds of sales of all public lands lying within the said state, which have been or shall be sold by congress, from and after the admission of said state, after deducting all the expenses incident to the same, shall be appropriated for making public roads and canals within the said state, as the legislature may direct: *provided*, that the five foregoing propositions herein offered are on the condition that the legislature of the said state, by virtue of the powers conferred upon it by the convention which framed the constitution of the said state, shall provide by an ordinance, irrevocable without the consent of the

Five per cent. of net proceeds of public lands appropriated for roads and canals.

Proviso.

Iowa not to interfere with disposal of public lands, &c.  
U. S. lands not to be taxed. Non-residents not to be taxed higher than residents.  
Bounty lands exempt from taxation for three years.

United States, that the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof; and that no tax shall be imposed upon lands the property of the United States; and that in no case shall non-resident proprietors be taxed higher than residents; and that the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees or their heirs, remain exempt from any tax laid by order or under the authority of the state, whether for state, county, township, or any other purpose, for the term of three years from and after the date of the patents, respectively.

Approved, March 3, 1845.

## CONSTITUTION OF THE STATE OF IOWA.

WE, THE PEOPLE OF THE TERRITORY OF IOWA, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the STATE OF IOWA, the boundaries whereof shall be as follows :

Beginning in the middle of the main channel of the Mississippi river, at a point due east of the middle of the mouth of the main channel of the Des Moines river; thence up the middle of the main channel of the said Des Moines river, to a point on said river where the northern boundary line of the state of Missouri—as established by the constitution of that state, adopted June 12th, 1820—crosses the said middle of the main channel of the said Des Moines river; thence westwardly along the said northern boundary line of the state of Missouri, as established at the time aforesaid, until an extension of said line intersect the middle of the main channel of the Missouri river; thence up the middle of the main channel of the said Missouri river to a point opposite the middle of the main channel of the Big Sioux river, according to Nicollett's map; thence up the main channel of the said Big Sioux river, according to said map, until it is intersected by the parallel of forty-three degrees and thirty minutes north latitude; thence east along said parallel of forty-three degrees and thirty minutes until said parallel intersects the middle of the main channel of the Mississippi river; thence down the middle of the main channel of said Mississippi river to the place of beginning.

### ARTICLE I.—BILL OF RIGHTS.

1. All men are, by nature, free and independent, and have certain unalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

2. All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it.

3. The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry.

4. No religious test shall be required as a qualification for any office or public trust, and no person shall be deprived of any of his rights, privileges or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion.

5. Any citizen of this state who may hereafter be engaged, either directly or indirectly, in a duel, either as principal or accessory before the

- fact, shall forever be disqualified from holding any office under the constitution and laws of this state.
- Laws uniform.** 6. All laws of a general nature shall have a uniform operation.
- Liberty of speech and of the press.** 7. Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appear to the jury that the matter charged as libellous was true, and was published with good motives and for justifiable ends, the party shall be acquitted.
- Personal security.** 8. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the papers and things to be seized.
- Trial by jury.** 9. The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts.
- Rights of persons accused.** 10. In all criminal prosecutions, the accused shall have a right to a speedy trial by an impartial jury; to be informed of the accusation against him; to be confronted with the witnesses against him; to have compulsory process for his own witnesses, and to have the assistance of counsel.
- Indictment.** 11. No person shall be held to answer for a criminal offense, unless on presentment or indictment by a grand jury, except in cases cognizable before a justice of the peace, or arising in the army or navy, or in the militia, when in actual service, in time of war or public danger.
- Twice tried. Bail.** 12. No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great.
- Habeas corpus.** 13. The writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety may require it.
- Military** 14. The military shall be subordinate to the civil power. No standing army shall be kept up by the state in time of peace; and in time of war, no appropriation for a standing army shall be for a longer time than two years.
- Quartering soldiers.** 15. No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war except in the manner prescribed by law.
- Treason.** 16. Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason unless on the evidence of two witnesses to the same overt act, or confession in open court.
- Bail.** 17. Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted.
- Punishments. Property.** 18. Private property shall not be taken for public use without just compensation.
- Imprisonment for debt.** 19. No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in case of fraud; and no person shall be imprisoned for a militia fine in time of peace.
- Petition.** 20. The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives, and to petition for a redress of grievances.

21. No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts shall ever be passed. Attainder.

22. Foreigners who are or who may hereafter become residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens. Aliens hold property.

23. Neither slavery nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this state. Slavery.

24. This enumeration of rights shall not be construed to impair or deny others, retained by the people. Reservation.

#### ARTICLE 2.—RIGHT OF SUFFRAGE.

1. Every white male citizen of the United States of the age of twenty-one years, who shall have been a resident of the state six months next preceding the election, and the county in which he claims his vote twenty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law. Electors.

2. Electors shall, in all cases except treason, felony or breach of the peace, be privileged from arrest on the days of election, during their attendance at such election, going to and returning therefrom. Privilege.

3. No elector shall be obliged to perform militia duty on the day of election, except in time of war or public danger. Same.

4. No person in the military, naval or marine service of the United States, shall be considered a resident of this state by being stationed in any garrison, barrack, or military or naval place or station within this state. "Resident."

5. No idiot or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector. Exception.

6. All elections by the people shall be by ballot. Ballot.

#### ARTICLE 3.—OF THE DISTRIBUTION OF POWERS.

1. The powers of the government of Iowa shall be divided into three separate departments—the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted. Departments of the government.

##### LEGISLATIVE DEPARTMENT.

1. The legislative authority of this state shall be vested in a senate and house of representatives, which shall be designated the general assembly of the state of Iowa; and the style of their laws shall commence in the following manner: "*Be it enacted by the General Assembly of the State of Iowa.*" Legislative authority.

2. The sessions of the general assembly shall be biennial, and shall commence on the first Monday of December next ensuing the election of its members; unless the governor of the state shall, in the interim, convene the general assembly by proclamation. Sessions.

3. The members of the house of representatives shall be chosen every second year, by the qualified electors of their respective districts, on the first Monday in August; whose term of office shall continue two years from the day of the general election. Members of the house of representatives.

4. No person shall be a member of the house of representatives who shall not have attained the age of twenty-one years; be a free white male citizen of the United States, and have been an inhabitant of this Eligibility.

- state or territory one year next preceding his election ; and at the time of his election, have an actual residence of thirty days in the county or district he may be chosen to represent.
- Senators. 5. Senators shall be chosen for the term of four years, at the same time and place as representatives ; they shall be twenty-five years of age, and possess the qualifications of representatives as to residence and citizenship.
- Same, and  
classified 6. The number of senators shall not be less than one-third, nor more than one-half the representative body ; and at the first session of the general assembly, after this constitution takes effect, the senators shall be divided by lot, as equally as may be, into two classes ; the seats of the senators of the first class shall be vacated at the expiration of the second year, so that one-half shall be chosen every two years.
- Same. 7. When the number of senators is increased, they shall be annexed by lot to one of the two classes, so as to keep them as nearly equal in number as practicable.
- Elections deter-  
mined. 8. Each house shall choose its own officers and judge of the qualification, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law.
- Quorum. 9. A majority of each house shall constitute a quorum to do business ; but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as each house may provide.
- Authority of the  
houses. 10. Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same ; determine its rules of proceedings, punish members for disorderly behavior, and with the consent of two-thirds, expel a member, but not a second time for the same offense ; and shall have all other powers necessary for a branch of the general assembly of a free and independent state.
- Protest. 11. Every member of the general assembly shall have the liberty to dissent from, or protest against, any act or resolution which he may think injurious to the public or an individual, and have the reasons for his dissent entered on the journals ; and the yeas and nays of the members of either house, on any question, shall, at the desire of any two members present, be entered on the journals.
- Privilege 12. Senators and representatives, in all cases, except treason, felony, or breach of the peace, shall be privileged from arrest during the session of the general assembly, and in going to and returning from the same.
- Vacancies. 13. When vacancies occur in either house, the governor, or the person exercising the functions of governor, shall issue writs of election to fill such vacancies.
- Doors open. 14. The doors of each house shall be open, except on such occasions as, in the opinion of the house, may require secrecy.
- Adjournments. 15. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.
- Bills. 16. Bills may originate in either house, except bills for revenue, which shall always originate in the house of representatives, and may be amended, altered, or rejected by the other ; and every bill having passed both houses, shall be signed by the speaker and president of their respective houses.
- To be approved,  
&c. 17. Every bill which shall have passed the general assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it ; but if not, he shall return it with his objections, to the

house in which it originated, which shall enter the same upon the journal and proceed to reconsider it; if after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house present, it shall become a law notwithstanding the governor's objections. If any bill shall not be returned within three days after it shall have been presented to him, Sunday excepted, the same shall be a law in like manner as if he had signed it, unless the general assembly, by adjournment, prevent such return.

18. An accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws, at every regular session of the general assembly. Receipts, &c.

19. The house of representatives shall have the sole power of impeachment, and all impeachments shall be tried by the senate. When sitting for that purpose, the senators shall be upon oath or affirmation; and no person shall be convicted without the concurrence of two-thirds of the members present. Impeachment

20. The governor, secretary of state, auditor, treasurer, and judges of the supreme and district courts, shall be liable to impeachment for any misdemeanor in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust, or profit, under this state; but the party convicted or acquitted shall nevertheless be liable to indictment, trial and punishment, according to law. All other civil officers shall be tried for misdemeanors in office in such manner as the general assembly may provide. Who liable to and judgment.

21. No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which shall have been increased, during such term, except such offices as may be filled by elections by the people. Members not appointed to office

22. No person holding any lucrative office under the United States, or this state, or any other power, shall be eligible to the general assembly: *provided*, that offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmasters whose compensation does not exceed one hundred dollars per annum, shall not be deemed lucrative. Disqualification

23. No person who may hereafter be a collector or holder of public moneys, shall have a seat in either house of the general assembly, or be eligible to any office of trust or profit under this state, until he shall have accounted for and paid into the treasury all sums for which he may be liable. Same.

24. No money shall be drawn from the treasury but in consequence of appropriations made by law. Money drawn

25. Each member of the general assembly shall receive a compensation to be fixed by law, for his services, to be paid out of the treasury of the state. Such compensation shall not exceed two dollars per day for the period of fifty days from the commencement of the session, and shall not exceed the sum of one dollar per day for the remainder of the session: when convened in extra session by the governor, they shall receive such sums as shall be fixed for the first fifty days of the ordinary session. They shall also receive two dollars for every twenty miles they travel, in going to and returning from their place of meeting, on the most usual route: *provided however*, that the members of the first general assembly under this constitution shall receive two dollars per day for their services during the entire session. Compensation of members

26. Every law shall embrace but one object, which shall be expressed in the title. Laws.

- Published.** 27. No law of the general assembly, of a public nature, shall take effect until the same shall be published and circulated in the several counties of this state, by authority. If the general assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state.
- Divorce.** 28. No divorce shall be granted by the general assembly.
- Lotteries.** 29. No lottery shall be authorized by this state; nor shall the sale of lottery tickets be allowed.
- Oath of members.** 30. Members of the general assembly shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear, or affirm, (as the case may be,) that I will support the constitution of the United States, and the constitution of the state of Iowa, and that I will faithfully discharge the duties of senator, (or representative, as the case may be,) according to the best of my ability." And members of the general assembly are hereby empowered to administer to each other the said oath or affirmation.
- Census.** 31. Within one year after the ratification of this constitution, and within every subsequent term of two years, for the term of eight years, an enumeration of all the white inhabitants of this state shall be made, in such manner as shall be directed by law. The number of senators and representatives shall, at the first regular session of the general assembly, after such enumeration, be fixed by law, and apportioned among the several counties according to the number of white inhabitants in each; and [the general assembly] shall also, at every subsequent regular session, apportion the house of representatives; and every other regular session the senate, for eight years; and the house of representatives shall never be less than twenty-six, nor greater than thirty-nine, until the number of white inhabitants shall be one hundred and seventy-five thousand; and after that event, at such ratio that the whole number of representatives shall never be less than thirty-nine nor exceeding seventy-two.
- Apportionment.**
- Districts.** 32. When a congressional, senatorial, or representative district shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial, or representative district.
- Elections by general assembly.** 33. In all elections by the general assembly, the members thereof shall vote *viva voce*, and the votes shall be entered on the journal.
- Salaries.** 34. For the first ten years after the organization of the government, the annual salary of the governor shall not exceed one thousand dollars; secretary of state, five hundred dollars; treasurer, four hundred dollars; auditor, six hundred dollars; judges of the supreme and district courts, each one thousand dollars.

#### ARTICLE 4.—EXECUTIVE DEPARTMENT.

- Governor.** 1. The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled the Governor of the State of Iowa.
- Election and term.** 2. The governor shall be elected by the qualified electors at the time and place of voting for members of the general assembly, and shall hold his office four years from the time of his installation, and until his successor shall be qualified.
- Eligibility.** 3. No person shall be eligible to the office of governor, who has not been a citizen of the United States, and a resident of the state two years



next preceding the election, and attained the age of thirty years, at the time of said election.

4. The returns of every election for governor shall be sealed up and transmitted to the seat of government, directed to the speaker of the house of representatives, who shall, during the first week of the session, open and publish them in presence of both houses of the general assembly. The person having the highest number of votes shall be governor; but in case any two or more have an equal and the highest number of votes, the general assembly shall, by joint vote, choose one of said persons so having an equal and the highest number of votes, for governor.

Returns of election.

5. The governor shall be commander-in-chief of the militia, the army and navy of this state.

Commander.

6. He shall transact all executive business with the officers of government, civil and military, and may require information in writing from the officers of the executive department, upon any subject relating to the duties of their respective offices.

Duties.

7. He shall see that the laws are faithfully executed.

Same.

8. When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the general assembly, or at the next election by the people.

Vacancies.

9. He may, on extraordinary occasions, convene the general assembly, by proclamation, and shall state to both houses, when assembled, the purpose for which they shall have been convened.

Convening assembly.

10. He shall communicate by message to the general assembly at every session, the condition of the state, and recommend such matters as he shall deem expedient.

Message.

11. In case of disagreement between the two houses, with respect to the time of adjournment, the governor shall have power to adjourn the general assembly to such time as he may think proper: *provided*, it be not beyond the time fixed for the meeting of the next general assembly.

Adjournment.

12. No person shall, while holding any other office under the United States, or this state, execute the office of governor, except as hereinafter expressly provided.

Disqualification.

13. The governor shall have power to grant reprieves and pardons, and commute punishments after conviction, except in cases of impeachment.

Pardons, &c.

14. The governor shall, at stated times, receive for his services, a compensation which shall neither be increased nor diminished during the time for which he shall have been elected.

Compensation.

15. There shall be a seal of this state, which shall be kept by the governor, and used by him officially, and shall be called the Great Seal of the State of Iowa.

Seal of state.

16. All grants and commissions shall be in the name and by the authority of the people of the state of Iowa, sealed with the great seal of this state, signed by the governor and countersigned by the secretary of state.

Commissions, &c.

17. A secretary of state, auditor of public accounts, and treasurer, shall be elected by the qualified electors, who shall continue in office two years. The secretary of state shall keep a fair register of all the official acts of the governor, and shall, when required, lay the same, together with all papers, minutes and vouchers relative thereto, before either

Secretary, auditor and treasurer.

- branch of the general assembly, and shall perform such other duties as shall be assigned him by law.
- Secretary acts as governor. 18. In case of the impeachment of the governor, his removal from office, death, resignation, or absence from the state, the powers and duties of the office shall devolve upon the secretary of state, until such disability shall cease, or the vacancy be filled.
- Farther vacancies provided for. 19. If, during the vacancy of the office of governor, the secretary of state shall be impeached, displaced, resign, die, or be absent from the state, the powers and duties of the office of governor shall devolve upon the president of the senate; and should a vacancy occur by impeachment, death, resignation, or absence from the state of the president of the senate, the speaker of the house of representatives shall act as governor till the vacancy be filled.

#### ARTICLE 5.—JUDICIAL DEPARTMENT.

- Courts. 1. The judicial power shall be vested in a supreme court, district courts, and such inferior courts as the general assembly may from time to time establish.
- Supreme court. 2. The supreme court shall consist of a chief justice and two associates, two of whom shall be a quorum to hold court.
- Judges elected. 3. The judges of the supreme court shall be elected by joint vote of both branches of the general assembly, and shall hold their courts at such time and place as the general assembly may direct, and hold their offices for six years, and until their successors are elected and qualified, and shall be ineligible to any other office during the term for which they may be elected. The supreme court shall have appellate jurisdiction only in all cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe. The supreme court may have power to issue all writs and process necessary to do justice to parties, and exercise a supervisory control over all inferior judicial tribunals, and the judges of the supreme court shall be conservators of the peace throughout the state.
- District judge elected. 4. The district court shall consist of a judge, who shall be elected by the qualified voters of the district in which he resides, at the township election, and hold his office for the term of five years, and until his successor is elected and qualified, and shall be ineligible to any other office during the term for which he may be elected. The district court shall be a court of law and equity, and have jurisdiction in all civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law. The judges of the district courts shall be conservators of the peace in their respective districts. The first session of the general assembly shall divide the state into four districts, which may be increased as the exigencies require.
- Jurisdiction of district court. 5. The qualified voters of each county, shall at the general election elect one prosecuting attorney and one clerk of the district court, who shall be residents therein, and who shall hold their several offices for the term of two years and until their successors are elected and qualified.
- Prosecuting attorney. Clerk of district court. 6. The style of all process shall be, "The State of Iowa," and all prosecutions shall be conducted in the name and by the authority of the same.
- Style of process.

#### ARTICLE 6.—MILITIA.

- Who constitute. 1. The militia of the state shall be composed of all able bodied white male

citizens between the ages of eighteen and forty-five years, except such as are or may hereafter be exempt by the laws of the United States, or of this state, and shall be armed, equipped, and trained, as the general assembly may provide by law.

2. No person or persons conscientiously scrupulous of bearing arms shall be compelled to do militia duty in time of peace: *provided*, that such person or persons shall pay an equivalent for such exemption in the same manner as other citizens. Qualification

3. All commissioned officers of the militia, (staff officers excepted,) shall be elected by the persons liable to perform military duty, and shall be commissioned by the governor. Officers.

#### ARTICLE 7.—STATE DEBTS.

1. The general assembly shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate, with any previous debts or liabilities, exceed the sum of one hundred thousand dollars, except in case of war, to repel invasion, or suppress insurrection, unless the same shall be authorized by some law for some single object or work to be distinctly specified therein; which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within twenty years of the time of the contracting thereof, and shall be irrevocable until the principal and the interest thereon shall be paid and discharged: but no such law shall take effect, until at a general election it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law, shall be applied only to the specific object therein stated, or to the payment of the debt thereby created; and such law shall be published in at least one newspaper in each judicial district, if one is published therein, throughout the state, for three months preceding the election at which it is submitted to the people. Limitation of state indebtedness.

#### ARTICLE 8.—INCORPORATIONS.

1. No corporate body shall hereafter be created, renewed or extended, with the privilege of making, issuing, or putting in circulation, any bill, check, ticket, certificate, promissory note, or other paper, or the paper of any bank, to circulate as money. The general assembly of this state shall prohibit, by law, any person or persons, association, company or corporation, from exercising the privileges of banking, or creating paper to circulate as money. Banking prohibited.

2. Corporations shall not be created in this state by special laws, except for political or municipal purposes; but the general assembly shall provide by general laws, for the organization of all other corporations, except corporations with banking privileges, the creation of which is prohibited. The stockholders shall be subject to such liabilities and restrictions as shall be provided by law. The state shall not directly or indirectly become a stockholder in any corporation. Corporations.

#### ARTICLE 9.—EDUCATION AND SCHOOL LANDS.

1. The general assembly shall provide for the election by the people, of a superintendent of public instruction, who shall hold his office for three years, and whose duties shall be prescribed by law, and who shall receive such compensation as the general assembly may direct. Superintendent of public instruction.

School fund.

2. The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement. The proceeds of all lands that have been or hereafter may be granted by the United States to this state, for the support of schools, which shall hereafter be sold or disposed of, and the five hundred thousand acres of land granted to the new states, under an act of congress distributing the proceeds of the public lands among the several states of the Union, approved A. D. 1841, and all estates of deceased persons, who may have died without leaving a will or heir; and also such per cent. as may be granted by congress on the sale of lands in this state, shall be and remain a perpetual fund, the interest of which, together with all the rents of the unsold lands, and such other means as the general assembly may provide, shall be inviolably appropriated to the support of common schools throughout the state.

System of common schools.

3. The general assembly shall provide for a system of common schools, by which a school shall be kept up and supported in each school district, at least three months in every year; and any school district neglecting to keep up and support such a school may be deprived of its proportion of the interest of the public fund during such neglect.

Fines, &c., appropriated.

4. The money which shall be paid by persons as an equivalent for exemption from military duty, and the clear proceeds of all fines collected in the several counties for any breach of the penal laws, shall be exclusively applied, in the several counties in which such money is paid or fine collected, among the several school districts of said counties, in the proportion to the number of inhabitants in such districts, to the support of common schools, or the establishment of libraries, as the general assembly shall, from time to time, provide by law.

University fund.

5. The general assembly shall take measures for the protection, improvement, or other disposition of such lands as have been or may hereafter be reserved or granted by the United States, or any person or persons, to this state, for the use of a university; and the funds accruing from the rents or sale of such lands, or from any other source, for the purpose aforesaid, shall be and remain a permanent fund, the interest of which shall be applied to the support of said university, with such branches as the public convenience may hereafter demand, for the promotion of literature, the arts, and sciences, as may be authorized by the terms of such grant. And it shall be the duty of the general assembly, as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said university.

#### ARTICLE 10.—AMENDMENTS TO THE CONSTITUTION.

Amendments.

1. If at any time the general assembly shall think it necessary to revise or amend this constitution, they shall provide by law for a vote of the people for or against a convention, at the next ensuing election for members of the general assembly. In case a majority of the people vote in favor of a convention, said general assembly shall provide for an election of delegates to a convention, to be held within six months after the vote of the people in favor thereof.

#### ARTICLE 11.—MISCELLANEOUS.

Jurisdiction of justices of the peace.

1. The jurisdiction of justices of the peace shall extend to all civil cases, (except cases in chancery, and cases where the question of title to any real estate may arise,) where the amount in controversy does not exceed one hundred dollars, and by the consent of parties may be extended to any amount not exceeding five hundred dollars.

2. No new county shall be laid off hereafter, nor old county reduced to less contents than four hundred and thirty-two square miles.

3. The general assembly shall not locate any of the public lands which have been or may be granted by congress to this state, and the location of which may be given to the general assembly, upon lands actually settled, without the consent of the occupant. The extent of the claim of such occupant, so exempted, shall not exceed three hundred and twenty acres.

#### ARTICLE 12.—SCHEDULE.

1. That no inconvenience may arise from the change of a territorial government to a permanent state government, it is declared that all writs, actions, prosecutions, contracts, claims and rights shall continue as if no change had taken place in this government; and all process which may, before the organization of the judicial department under this constitution, be issued under the authority of the territory of Iowa, shall be as valid as if issued in the name of the state.

2. All the laws now in force in this territory, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the general assembly of this state.

3. All fines, penalties and forfeitures accruing to the territory of Iowa, shall accrue to the use of the state.

4. All recognizances heretofore taken, or which may hereafter be taken, before the organization of the judicial department under this constitution, shall remain valid, and shall pass to and may be prosecuted in the name of the state. And all bonds executed to the governor of this territory, or to any other officer in his official capacity, shall pass over to the governor of the state or other proper state authority, and to their successors in office, for the uses therein respectively expressed, and may be sued for and recovered accordingly. All criminal prosecutions and penal actions which may have arisen, or may arise, before the organization of the judicial department under this constitution, and which shall then be pending, may be prosecuted to judgment and execution in the name of the state.

5. All officers, civil and military, now holding their offices and appointments in this territory, under the authority of the United States, or under the authority of this territory, shall continue to hold and execute their respective offices and appointments until superseded under this constitution.

6. The first general election under this constitution shall be held at such time as the governor of the territory, by proclamation, may appoint, within three months after its adoption, for the election of a governor, two representatives in the congress of the United States, (unless congress shall provide for the election of one representative,) members of the general assembly, and one auditor, treasurer, and secretary of state. Said election shall be conducted in accordance with the existing laws of this territory; and said governor, representatives in the congress of the United States, auditor, treasurer, and secretary of state, duly elected at said election, shall continue to discharge the duties of their respective offices for the time prescribed by this constitution, and until their successors are elected and qualified. The returns of said election shall be made in conformity to the existing laws of this territory.

7. Until the first enumeration of the inhabitants of this state, as directed by this constitution, the following shall be the apportionment of the general assembly:

The county of Lee shall be entitled to two senators and five representatives;

The county of Van Buren, two senators and four representatives;

The counties of Davis and Appanoose, one senator and one representative, jointly;

The counties of Wapello and Monroe, one senator jointly and one representative each;

The counties of Marion, Polk, Dallas, and Jasper, one senator and two representatives, jointly;

The county of Des Moines, two senators and four representatives;

The county of Henry, one senator and three representatives;

The county of Jefferson, one senator and three representatives;

The counties of Louisa and Washington, one senator jointly, and one representative each;

The counties of Keokuk and Mahaska, one senator jointly, and one representative each;

The counties of Muscatine, Johnson, and Iowa, one senator and one representative jointly, and Muscatine one representative, and Johnson and Iowa one representative jointly;

The counties of Scott and Clinton, one senator jointly, and one representative each;

The counties of Cedar, Linn, and Benton, one senator jointly; the county of Cedar one representative, and the counties of Linn and Benton one representative jointly;

The counties of Jackson and Jones, one senator and two representatives;

The counties of Dubuque, Delaware, Clayton, Fayette, Buchanan, and Blackhawk, two senators and two representatives jointly;

And any county attached to any county for judicial purposes shall, unless otherwise provided for, be considered as forming part of such county, for election purposes.

First session.

8. The first meeting of the general assembly under this constitution shall be at such time as the governor of the territory may by proclamation appoint, within four months after its ratification by the people, at Iowa city, in Johnson county, which place shall be the seat of government of the state of Iowa, until removed by law.

Done in convention, at Iowa city, this eighteenth day of May, in the year of our Lord one thousand eight hundred and forty-six, and of the independence of the United States of America the seventieth.

In testimony whereof, we have hereunto subscribed our names:

ENOS LOWE, *President.*

Thomas Dibble, Erastus Hoskin, David Galland, Sulifand S. Ross, Shepherd Leffler, Curtis Bates, Wm. G. Coop, John Ronalds, Samuel A. Bissell, Soerates H. Tryon, Wareham G. Clark, William Hubbel, John J. Selman, George Berry, John Conrey, Josiah Kent, Joseph H. Hedrick, Sylvester G. Matson, S. B. Shelledy, James Grant, George Hobson, H. P. Haun, Stewart Goodrell, Sanford Harned, David Olmstead, G. W. Bowie, Alvin Saunders, William Steele, T. McCraney, F. K. O'Ferrall, J. Scott Richman.

Attest,

WM. THOMPSON, *Secretary.*

## ACCEPTING PROPOSITIONS OF CONGRESS.

An Act and Ordinance accepting the proposition made by Congress on the admission of Iowa into the Union as a State.

SECTION 1. *Be it enacted and ordained by the General Assembly of the State of Iowa,* That the propositions to the state of Iowa on her admission into the union, made by the act of congress, entitled "an act supplemental to the act for the admission of the states of Iowa and Florida into the union," approved March 3, 1845, and which are contained in the sixth section of that act, are hereby accepted in lieu of the propositions submitted to congress by an ordinance, passed on the first day of November, eighteen hundred and forty-four, by the convention of delegates which assembled at Iowa city on the first Monday of October, eighteen hundred and forty-four, for the purpose of forming a constitution for said state, and which were rejected by congress: *provided,* the general assembly shall have the right, in accordance with the provisions of the second section of the tenth article of the constitution of Iowa, to appropriate the five per cent. of the net proceeds of sales of all public lands lying within the state which have been or shall be sold by congress from and after the admission of said state, after deducting all expenses incident to the same, to the support of common schools.

Propositions of congress accepted.

Proviso.

SEC. 2. *And be it further enacted and ordained,* As conditions of the grants specified in the propositions first mentioned in the foregoing section, irrevocable and unalterable without the consent of the United States, that the state of Iowa will never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof, and that no tax shall be imposed on lands, the property of the United States; and that in no case shall non-resident proprietors be taxed higher than residents; and that the bounty lands granted, or hereafter to be granted, for military services during the late war with Great Britain, shall, while they continue to be held by the patentees or their heirs, remain exempt from any tax laid by order or under the authority of the state, whether for state, county, township, or other purposes, for the term of three years from and after the dates of the patents respectively.

State not to interfere with the primary disposal of the soil

SEC. 3. It is hereby made the duty of the secretary of state, after the taking effect of this act, to forward one copy of the same to each of our senators and representatives in congress, who are hereby required to procure the consent of congress to the diversion of the five per cent. fund indicated in the proviso to the first section of this act.

Duty of secretary.

SEC. 4. This act shall take effect from and after its publication in the weekly newspapers printed in Iowa City.

Take effect.

Approved, January 15, 1849.

## NATURALIZATION OF ALIENS.

Act of 14th April,  
1802, as affected  
by subsequent  
acts.

Previous declara-  
tion of alien.

Renunciation of  
allegiance.

Residence, &c.

Exception as to  
residents in U. S.  
before 29th Jan.,  
1795

SECTION 1. Any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise:

1. That he shall have declared, on oath or affirmation, before the supreme, superior, district, or circuit court, of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States, or before the clerk of either of such courts,\* two† years at least, before his admission; that it was *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, whatever, and particularly, by name, the prince, potentate, state, or sovereignty, whereof such alien may, at the time, be a citizen or subject.

2. That he shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatsoever, and particularly, by name, the prince, potentate, state, or sovereignty whereof he was a citizen or subject; which proceedings shall be recorded by the clerk of the court.

3. That the court admitting such alien shall be satisfied that he has resided within the United States five years at least, and within the state or territory where such court is at the time held, one year at least; and it shall further appear to their satisfaction, that during that time, he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same: *provided*, that the oath of the applicant shall, in no case, be allowed to prove his residence.

Any alien who was residing within the limits, and under the jurisdiction of the United States, before the twenty-ninth day of January, one thousand seven hundred and ninety-five, may be admitted to become a citizen on due proof made to some one of the courts aforesaid, that he has resided two years at least, within and under the jurisdiction of the United States, and one year at least, immediately preceding his application, within the state or territory where such court is at the time held; and on his declaring on oath, or affirmation, that he will support the constitution of the United States and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty whereof he was before a citizen or subject; and, moreover, on its appearing to the satisfaction of the court, that, during the said term of two years, he has behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same; and

\* Act May 26, 1824, sec. 3.

† *Ibid.* sec. 4.



where the alien, applying for admission to citizenship, shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, on his moreover making in the court an express renunciation of his title or order of nobility, before he shall be entitled to such admission; all of which proceedings, required in this proviso to be performed in the court, shall be recorded by the clerk thereof.

Any alien, being a free white person, who was residing within the limits and under the jurisdiction of the United States, at any time between the eighteenth day of June, one thousand seven hundred and ninety-eight, and the fourteenth day of April, one thousand eight hundred and two, and who has continued to reside within the same, may be admitted to become a citizen of the United States, without a compliance with the first condition specified in the first section of the act, entitled "an act to establish an uniform rule of naturalization, and to repeal the acts heretofore passed on that subject."\*

Provision relating to the foregoing.

Nothing in the first section of the act 22d of March, 1816† shall be construed to exclude from admission to citizenship, any free white person who was residing within the limits and under the jurisdiction of the United States at any time between the eighteenth day of June, one thousand seven hundred and ninety-eight, and the fourteenth day of April, one thousand eight hundred and two, and who, having continued to reside therein without having made any declaration of intention before a court of record as aforesaid, may be entitled to become a citizen of the United States according to act 26th of March, 1804. Whenever any person without a certificate of such declaration of intention, as aforesaid, shall make application to be admitted a citizen of the United States, it shall be proved to the satisfaction of the court, that the applicant was residing within the limits and under the jurisdiction of the United States, before the fourteenth day of April, one thousand eight hundred and two, and has continued to reside within the same, or he shall not be so admitted. And the residence of the applicant within the limits and under the jurisdiction of the United States for at least five years immediately preceding the time of such application, shall be proved by the oath or affirmation of citizens of the United States; which citizens shall be named in the record as witnesses. And such continued residence within the limits and under the jurisdiction of the United States, when satisfactorily proved, and the place or places where the applicant has resided for at least five years, as aforesaid, shall be stated and set forth, together with the names of such citizens, in the record of the court admitting the applicant; otherwise the same shall not entitle him to be considered and deemed a citizen of the United States.‡

Residents between 18th June, 1798, and 14th April, 1802.

Any alien, being a free white person, who was residing within the limits, and under the jurisdiction of the United States, between the fourteenth day of April, one thousand eight hundred and two, and the eighteenth day of June, one thousand eight hundred and twelve, and who has continued to reside within the same, may be admitted to become a citizen of the United States, without having made any previous declaration of his intention to become a citizen: *provided*, that when-

Provision as to residents between 14th April, 1802, and 18th June, 1812.

\* Act of March 26th, 1804, section 1.

† The first section of the act 22d March, 1816, was repealed by act 24th of May, 1828.

‡ Act 22d March, 1816, sec. 2.

ever any person, without a certificate of such declaration of intention, shall make application to be admitted a citizen of the United States, it shall be proved to the satisfaction of the court, that the applicant was residing within the limits, and under the jurisdiction of the United States, before the eighteenth day of June, one thousand eight hundred and twelve, and has continued to reside within the same, or he shall not be so admitted; and the residence of the applicant within the limits, and under the jurisdiction of the United States, for at least five years immediately preceding the time of such application, shall be proved by the oath or affirmation of citizens of the United States; which citizens shall be named in the record as witnesses, and such continued residence within the limits and under the jurisdiction of the United States, when satisfactorily proved, and the place or places where the applicant has resided for at least five years, as aforesaid, shall be stated and set forth, together with the names of such citizens, in the record of the court admitting the applicant; otherwise the same shall not entitle him to be considered and deemed a citizen of the United States.\*

Minors

Any alien, being a free white person and a minor, under the age of twenty-one years, who shall have resided in the United States three years next preceding his arrival at the age of twenty-one years, and who shall have continued to reside therein to the time he may make application to be admitted to a citizen thereof, may, after he arrives at the age of twenty-one years, and after he shall have resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of the first section of the act to which this is in addition three years previous to his admission: *provided*, such alien shall make the declaration required therein at the time of his or her admission; and shall further declare on oath, and prove to the satisfaction of the court, that, for three years next preceding, it has been the *bona fide* intention of such alien to become a citizen of the United States; and shall, in all other respects, comply with the laws in regard to naturalization.†

In case the alien, applying to be admitted to citizenship shall have borne any hereditary title, or been of any of the orders of nobility, in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility, in the court to which his application shall be made, which renunciation shall be recorded in the said court: *provided*, that no alien, who shall be a native citizen, denizen or subject, of any country, state, or sovereign, with whom the United States shall be at war, at the time of his application, shall be then admitted to be a citizen of the United States.

What courts competent.

SEC. 3.‡ And whereas, doubts have arisen whether certain courts of record in some of the states, are included within the description of district or circuit courts: Be it further enacted, that every court of record in any individual state having common law jurisdiction, and a seal and clerk or prothonotary, shall be considered as a district court within the meaning of this act; and every alien who may have been naturalized in any such court, shall enjoy, from and after the passage

\* Act May 24, 1828, sec. 2.

† Act May 26, 1824, sec. 1.

‡ Section 2 was repealed by the act of May 24th, 1828. It provided for the registry of aliens.

of this act, the same rights and privileges, as if he had been naturalized in a district or circuit court of the United States.

SEC. 4. The children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: The right of citizenship shall not descend to persons whose fathers have never resided within the United States: And no person heretofore prescribed by any state, or who has been legally convicted of having joined the army of Great Britain during the war of the revolution, shall be admitted a citizen without the consent of the legislature of the state in which such person was proscribed. Children of persons naturalized before the fourteenth of April, 1802, under age at the time of their parents' naturalization, were, if dwelling in the United States on the fourteenth of April, 1802, to be considered as citizens of the United States.

Children of citizens and persons naturalized.

When any alien who shall have complied with the first condition specified in the first section of the said original act [of 14th April, 1802], and who shall have pursued the directions prescribed in the second\* section of the said act, may die before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law.†

Widow and children of aliens.

No person who shall arrive in the United States after February the seventeenth, 1815, shall be admitted to become a citizen of the United States, who shall not, for the continued term of five years, next preceding his admission, have resided within the United States, without being at any time during the said five years, out of the territory of the United States.‡§

Continued residence of five years.

\* Repealed by act of 24th of May, 1828.

† Act of 26th March, 1804, sec. 2.

‡ Act March 3d, 1813, sec. 12.

§ The oath of naturalization, when taken, confers the rights of a citizen. It is not necessary that there should be an order of court admitting the alien to become a citizen. *Campbell v. Gordon*, and al. 6 Cr., 176. Nor that it should appear by the record of naturalization that all the requisites prescribed by law for the admission of aliens have been complied with. *Starke v. Chesapeake Ins. Com.*, 7 Cr., 520.

The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Con. art. 4, sec. 2.

Citizens of the United States have a right to expatriate themselves in time of war as well as of peace, until restrained by congress. Such right is subject to the control of the legislature, and to render the exercise of it valid, there must be an entire departure from the United States for a purpose which is not illegal, nor in fraud of the duties at home of the emigrant. *Talbot v. Jansen*, 3 Dall., 133; *Santissima Trinidad*, 7 Wheat., 548; see *United States v. Williams*, 4 Hall's Law Journal, 461; *United States v. Gillies*, 1 Pet., 161.

A citizen of the United States by becoming a citizen of another country, does not thereby cease to be a citizen of the United States, nor is he absolved from his original allegiance; *ibid.* He may acquire in a foreign country the commercial privileges attached to his domicile, and be exempted from the operation of commercial acts embracing only persons resident in the United States or under its protection. *Murray v. Charming Betsey*, 2 Cranch, 120.

## AUTHENTICATION OF ACTS, RECORDS, etc.

An Act to prescribe the mode in which the Public Acts, Records and Judicial Proceedings in each state, shall be authenticated so as to take effect in every other state.

Legislative acts, records, and judicial proceedings of the several states, how to be authenticated, and the effect thereof.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: that the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.\*

Approved, May 26, 1790.

An Act supplementary to the act entitled "an Act to prescribe the mode in which the Public Acts, Records and Judicial Proceedings in each state shall be authenticated so as to take effect in every other state."

Authentication of office records.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from

\* Art. 4, sec. 1, Constitution of the United States.—The decisions of the courts of the United States upon this statute, and on the introduction of evidence of the "acts, records, and judicial proceedings of the states," have been:

Under the 4th article and 1st section of the constitution of the United States, and the act of 26th May, 1790, if a judgment has the effect of record evidence in the courts of the state from which it is taken, it has the same effect in the courts of every other state; and the plea of *nil debet* is not a good plea to an action brought upon such judgment in the court of another state. *Mills v. Duryee*, 7 Cranch, 483; 2 Cond. Rep., 578; see *Leland v. Wilkinson*, 6 Peters, 317; *United States v. Johns*, 4 Dall., 412; *Ferguson v. Harwood*, 7 Cranch, 408; 2 Cond. Rep., 548; *Drummond's administrators v. Magruder's trustees*, 9 Cranch, 122; 3 Cond. Rep., 303.

Under the act of May 26, 1790, prescribing the mode in which the public records in each state shall be authenticated, so as to take effect in every other state, copies of the legislative acts of the several states, authenticated by having the seal of the state affixed thereto, are conclusive evidence of such acts in every other state. No other formality is required, than the annexation of the seal, and in the absence of all contrary proof, it must be presumed to have been done by an officer having custody thereof, and competent authority to do the act. *United States v. Amedy*, 11 Wheat., 392; 6 Cond. Rep., 362.

The record of a judgment in one state is conclusive in another, although it appears that the suit in which it was rendered was commenced by an attachment of property, the defendant having afterwards appeared and taken defense. *Mayhew v. Thatcher*, 6 Wheat., 129; 5 Cond. Rep., 34.

In an action upon a judgment, in another state, the defendant can not plead any fact in bar which contradicts the record on which the suit is brought. *Field v. Gibbs*, Peters' C. C. R., 155; see *Green v. Sarmiento*, Peters' C. C. R., 74; *Blount v. Darrah*, 4 Wash. C. C. R., 657; *Turner v. Washington*, 3 Wash. C. C. R., 126.

and after the passage of this act, all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the secretary of state, the chancellor or the keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be farther authenticated by the clerk or prothonotary of the said court, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same are, or shall be taken.

SEC. 2. *And be it further enacted,* That all the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, courts and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and offices of the several states.

To what acts the provisions of this law shall apply.

Approved, March 27, 1804.

## NEW CONSTITUTION.\*

- Preamble.** WE, THE PEOPLE OF THE STATE OF IOWA, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the STATE OF IOWA, the boundaries whereof shall be as follows:
- Boundaries.** Beginning in the middle of the main channel of the Mississippi river, at a point due east of the middle of the mouth of the main channel of the Des Moines river; thence up the middle of the main channel of the said Des Moines river, to a point on said river where the northern boundary line of the state of Missouri—as established by the constitution of that state, adopted June 12th, 1820—crosses the said middle of the main channel of the said Des Moines river; thence westwardly along the said northern boundary line of the state of Missouri, as established at the time aforesaid, until an extension of said line intersects the middle of the main channel of the Missouri river; thence up the middle of the main channel of the said Missouri river to a point opposite the middle of the main channel of the Big Sioux river, according to Nicollet's map; thence up the main channel of the said Big Sioux river, according to the said map, until it is intersected by the parallel of forty-three degrees and thirty minutes north latitude; thence east along said parallel of forty-three degrees and thirty minutes, until said parallel intersects the middle of the main channel of the Mississippi river; thence down the middle of the main channel of the said Mississippi river to the place of beginning.

### ARTICLE 1.—BILL OF RIGHTS.

- Rights of persons.** SECTION 1. All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.
- Political power.** SEC. 2. All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and

\* Whereas, an instrument known as the "New Constitution of the State of Iowa," adopted by the Constitutional Convention of said state on the fifth day of March, A. D. 1857, was submitted to the qualified electors of said state at the annual election held on Monday, the third day of August, 1857, for their approval or rejection.

And whereas, an official canvass of the votes cast at said election, shows that there were forty thousand three hundred and eleven votes cast for the adoption of said constitution, and thirty-eight thousand six hundred and eighty-one votes were cast against its adoption, leaving a majority of sixteen hundred and thirty votes in favor of its adoption.

Now, therefore, I, James W. Grimes, governor of said state, by virtue of the authority conferred upon me, do hereby declare the said New Constitution to be adopted, and proclaim it to be the supreme law of the state of Iowa.

[L. s.] In testimony whereof, I have herewith set my hand and caused to be affixed the great seal of the state of Iowa.

Done at Iowa City, this third day of September, A. D. 1857, of the Independence of the United States, the eighty-second, and of the state of Iowa the eleventh. By

JAMES W. GRIMES.  
ELIJAH SELLS, Secretary of State.

they have the right, at all times, to alter or reform the same, whenever the public good may require it.

SEC. 3. The general assembly shall make no law respecting an es-  
tablishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or the maintenance of any minister or ministry. Religion.

SEC. 4. No religious test shall be required as a qualification for any office of public trust, and no person shall be deprived of any of his rights, privileges or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person, not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law. Religious test.

SEC. 5. Any citizen of this state who may hereafter be engaged, either directly or indirectly, in a duel, either as principal or accessory before the fact, shall forever be disqualified from holding any office under the constitution and laws of this state. Dueling.

SEC. 6. All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens. Laws uniform.

SEC. 7. Every person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appear to the jury that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the party shall be acquitted. Liberty of speech and the press.

SEC. 8. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized. Personal security.

SEC. 9. The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property, without due process of law. Trial by jury.

SEC. 10. In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him; to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and to have the assistance of counsel. Rights of persons accused.

SEC. 11. All offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offense, unless on presentment or indictment by a grand jury, except in cases arising in the army or navy, or in the militia, when in actual service, in time of war or public danger. Without indictment.  
By indictment.

Twice tried.	SEC. 12. No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, beailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption great.
Bail.	
Habeas corpus.	SEC. 13. The writ of habeas corpus shall not be suspended, or refused when application is made as required by law, unless in case of rebellion or invasion, the public safety may require it.
Military.	SEC. 14. The military shall be subordinate to the civil power. No standing army shall be kept up by the state in time of peace; and in time of war, no appropriation for a standing army shall be for a longer time than two years.
Quartering soldiers.	SEC. 15. No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war except in the manner prescribed by law.
Treason.	SEC. 16. Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open court.
Bail.	SEC. 17. Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.
Punishments.	SEC. 18. Private property shall not be taken for public use without just compensation first being made, or secured to be made, to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.
Property.	
Imprisonment for debt.	SEC. 19. No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in case of fraud; and no person shall be imprisoned for a military fine in time of peace.
Petition.	SEC. 20. The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives, and to petition for a redress of grievances.
Attainder.	SEC. 21. No bill of attainder, <i>ex-post-facto</i> law, or law impairing the obligation of contracts, shall ever be passed.
Aliens hold property.	SEC. 22. Foreigners who are, or may hereafter become re-idents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and descent of property, as native born citizens.
Slavery.	SEC. 23. There shall be no slavery in this state; nor shall there be involuntary servitude, unless for the punishment of crime.
Reservation.	SEC. 24. No lease or grant of agricultural lands, reserving any rent or service of any kind, shall be valid for a longer period than twenty years.
	SEC. 25. The enumeration of rights shall not be construed to impair or deny others, retained by the people.

## ARTICLE 2.—RIGHT OF SUFFRAGE.

Electors.	SECTION 1. Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law.
Privilege	SEC. 2. Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest on the days of election, during their attendance at such elections, going to and returning therefrom.
Same.	SEC. 3. No elector shall be obliged to perform military duty on the day of election, except in time of war or public danger.



SEC. 4. No person in the military, naval, or marine service of the "Resident." United States shall be considered a resident of this state by being stationed in any garrison, barrack, or military or naval place or station within this state.

SEC. 5. No idiot or insane person, or person convicted of any in- Exception. famous crime, shall be entitled to the privilege of an elector.

SEC. 6. All elections by the people shall be by ballot. Ballot.

### ARTICLE 3.—OF THE DISTRIBUTION OF POWERS.

SECTION 1. The powers of the government of Iowa shall be divided into three separate departments: the legislative, the executive and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted. Departments of the government.

#### LEGISLATIVE DEPARTMENT.

SECTION 1. The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives; and the style of every law shall be—"Be it enacted by the General Assembly of the State of Iowa." Legislative authority.

SEC. 2. The sessions of the general assembly shall be biennial, and shall commence on the second Monday in January next ensuing the election of its members; unless the governor of the state shall, in the meantime, convene the general assembly by proclamation. Sessions.

SEC. 3. The members of the house of representatives shall be chosen every second year, by the qualified electors of their respective districts, on the second Tuesday in October, except the years of the presidential election, when the election shall be on the Tuesday next after the first Monday in November; and their term of office shall commence on the first day of January next after their election, and continue two years, and until their successors are elected and qualified. Members of the house of representatives.

SEC. 4. No person shall be a member of the house of representatives who shall not have attained the age of twenty-one years, be a free white male citizen of the United States, and shall have been an inhabitant of this state one year next preceding his election, and at the time of his election shall have had an actual residence of sixty days in the county or district he may have been chosen to represent. Eligibility.

SEC. 5. Senators shall be chosen for the term of four years, at the same time and place as representatives; they shall be twenty-five years of age, and possess the qualifications of representatives as to residence and citizenship. Senators.

SEC. 6. The number of senators shall not be less than one-third nor more than one-half the representative body; and shall be so classified by lot, that one class being as nearly one-half as possible, shall be elected every two years. When the number of senators is increased, they shall be annexed by lot to one or the other of the two classes, so as to keep them as nearly equal in numbers as practicable. Same, and classed.

SEC. 7. Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law. Elections determined.

SEC. 8. A majority of each house shall constitute a quorum to transact business; but a smaller number may adjourn from day to day, Quorum.

- and may compel the attendance of absent members in such manner and under such penalties as each house may provide.
- Authority of the houses.** SEC. 9. Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same; determine its rules of proceedings, punish members for disorderly behavior, and, with the consent of two-thirds, expel a member, but not a second time for the same offense; and shall have all other powers necessary for a branch of the general assembly of a free and independent state.
- Protest.** SEC. 10. Every member of the general assembly shall have the liberty to dissent from or protest against any act or resolution which he may think injurious to the public or an individual, and have the reasons for his dissent entered on the journals; and the yeas and nays of the members of either house, on any question, shall, at the desire of any two members present, be entered on the journals.
- Privilege.** SEC. 11. Senators and representatives, in all cases except treason, felony, or breach of the peace, shall be privileged from arrest during the session of the general assembly, and in going to and returning from the same.
- Vacancies.** SEC. 12. When vacancies occur in either house, the governor, or the person exercising the functions of governor, shall issue writs of election to fill such vacancies.
- Doors open.** SEC. 13. The doors of each house shall be open, except on such occasions as, in the opinion of the house, may require secrecy.
- Adjournments.** SEC. 14. Neither house shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which they may be sitting.
- Bills.** SEC. 15. Bills may originate in either house, and may be amended, altered, or rejected by the other; and every bill having passed both houses, shall be signed by the speaker and president of their respective houses.
- To be approved, &c.** SEC. 16. Every bill which shall have passed the general assembly, shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it with his objections, to the house in which it originated, which shall enter the same upon their journal, and proceed to reconsider it; if, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within three days after it shall have been presented to him, (Sunday excepted,) the same shall be a law in like manner as if he had signed it, unless the general assembly, by adjournment, prevent such return. Any bill submitted to the governor for his approval during the last three days of a session of the general assembly, shall be deposited by him in the office of the secretary of state within thirty days after the adjournment, with his approval if approved by him, and with his objections if he disapproves thereof.
- Same.** SEC. 17. No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the general assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered upon the journal.
- Receipts, &c.** SEC. 18. An accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws at every regular session of the general assembly.
- Impeachment.** SEC. 19. The house of representatives shall have the sole power of impeachment, and all impeachments shall be tried by the senate. When

sitting for that purpose, the senators shall be upon oath or affirmation; and no person shall be convicted without the concurrence of two-thirds of the members present.

SEC. 20. The governor, judges of the supreme and district courts, and other state officers, shall be liable to impeachment for any misdemeanor or malfeasance in office; but judgment in such cases shall extend only to removal from office, and disqualification to hold any office of honor, trust or profit under this state; but the party convicted or acquitted shall nevertheless be liable to indictment, trial, and punishment according to law. All other civil officers shall be tried for misdemeanors and malfeasance in office, in such manner as the general assembly may provide.

Who liable to, and judgment.

SEC. 21. No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office of profit under this state, which shall have been created, or the emoluments of which shall have been increased during such term, except such offices as may be filled by elections by the people.

Members not appointed to office.

SEC. 22. No person holding any lucrative office under the United States, or this state, or any other power, shall be eligible to hold a seat in the general assembly. But offices in the militia, to which there is attached no annual salary, or the office of justice of the peace, or postmaster, whose compensation does not exceed one hundred dollars per annum, or notary public, shall not be deemed lucrative.

Disqualification.

SEC. 23. No person who may hereafter be a collector or holder of public moneys, shall have a seat in either house of the general assembly, or be eligible to hold any office of trust or profit in this state, until he shall have accounted for and paid into the treasury all sums for which he may be liable.

Same.

SEC. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law.

Money drawn

SEC. 25. Each member of the first general assembly under this constitution shall receive three dollars per diem while in session; and the further sum of three dollars for every twenty miles traveled in going to and returning from the place where such session is held, by the nearest traveled route; after which they shall receive such compensation as shall be fixed by law; but no general assembly shall have the power to increase the compensation of its members. And when convened in extra session they shall receive the same mileage and per-diem compensation as fixed by law for the regular session, and none other.

Compensation of members.

SEC. 26. No law of the general assembly, passed at a regular session, of a public nature, shall take effect until the fourth day of July next after the passage thereof. Laws passed at a special session shall take effect ninety days after the adjournment of the general assembly by which they were passed. If the general assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state.

Laws.

Publication

SEC. 27. No divorce shall be granted by the general assembly.

Divorce.

SEC. 28. No lottery shall be authorized by this state; nor shall the sale of lottery tickets be allowed.

Lotteries.

SEC. 29. Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.

Acts

SEC. 30. The general assembly shall not pass local or special laws in the following cases:

Local or special laws.

For the assessment and collection of taxes for state, county, or road purposes ;

For laying out, opening, and working roads or highways ;

For changing the names of persons ;

For the incorporation of cities and towns ;

For vacating roads, town plats, streets, alleys, or public squares ;

For locating or changing county seats.

In all the cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state ; and no law changing the boundary lines of any county shall have effect until upon being submitted to the people of the counties affected by the change, at a general election, it shall be approved by a majority of the votes in each county, cast for and against it.

Extra compensation.

SEC. 31. No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into ; nor shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation or claim, be allowed by two-thirds of the members elected to each branch of the general assembly.

Oath of members.

SEC. 32. Members of the general assembly shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation : "I do solemnly swear, (or affirm, as the case may be,) that I will support the constitution of the United States, and the constitution of the state of Iowa, and that I will faithfully discharge the duties of senator. (or representative, as the case may be,) according to the best of my ability." And members of the general assembly are hereby empowered to administer to each other the said oath or affirmation.

Census.

SEC. 33. The general assembly shall, in the years one thousand eight hundred and fifty-nine, one thousand eight hundred and sixty-three, one thousand eight hundred and sixty-five, one thousand eight hundred and sixty-seven, one thousand eight hundred and sixty-nine, and one thousand eight hundred and seventy-five, and every ten years thereafter, cause an enumeration to be made of all the white inhabitants of the state.

Apportionment.

SEC. 34. The number of senators shall, at the next session following each period of making such enumeration, and the next session following each United States census, be fixed by law, and apportioned among the several counties according to the numbers of white inhabitants in each.

Districts.

SEC. 35. The senate shall not consist of more than fifty members, nor the house of representatives of more than one hundred ; and they shall be apportioned among the several counties and representative districts of the state according to the number of white inhabitants in each, upon ratios to be fixed by law ; but no representative district shall contain more than four organized counties, and each district shall be entitled to at least one representative. Every county and district which shall have a number of inhabitants equal to one-half of the ratio fixed by law, shall be entitled to one representative : and any one county containing in addition to the ratio fixed by law one-half of that number, or more, shall be entitled to one additional representative. No floating district shall hereafter be formed.

Ratio of representation.

SEC. 36. At its first session under this constitution, and at every sub-

sequent regular session, the general assembly shall fix the ratio of representation, and also form into representative districts those counties which will not be entitled singly to a representative.

SEC. 37. When a congressional, senatorial, or representative district Districts. shall be composed of two or more counties, it shall not be entirely separated by any county belonging to another district; and no county shall be divided in forming a congressional, senatorial or representative district.

SEC. 38. In all elections by the general assembly, the members Elections by general assembly. thereof shall vote viva-voce; and the votes shall be entered on the journal.

#### ARTICLE 4.—EXECUTIVE DEPARTMENT.

SECTION 1. The supreme executive power of this state shall be Governor. vested in a chief magistrate, who shall be styled the governor of the state of Iowa.

SEC. 2. The governor shall be elected by the qualified electors at Election and term. the time and place of voting for members of the general assembly, and shall hold his office two years, from the time of his installation, and until his successor is elected and qualified.

SEC. 3. There shall be a lieutenant governor, who shall hold his office Eligibility. two years, and be elected at the same time as the governor. In voting for governor and lieutenant governor, the electors shall designate for whom they vote as governor, and for whom as lieutenant governor. The returns of every election for governor, and lieutenant governor, shall be sealed up and transmitted to the seat of government of the state, directed to the speaker of the house of representatives, who shall open and publish them in the presence of both houses of the general assembly.

SEC. 4. The persons respectively having the highest number of Returns of elections. votes, for governor and lieutenant governor, shall be declared duly elected; but in case two or more persons shall have an equal, and the highest number of votes for either office, the general assembly shall, by joint vote, forthwith proceed to elect one of said persons governor, or lieutenant governor, as the case may be.

SEC. 5. Contested elections for governor, or lieutenant governor, Contested elections. shall be determined by the general assembly in such manner as may be prescribed by law.

SEC. 6. No person shall be eligible to the office of governor, or lieutenant governor, who shall not have been a citizen of the United States, and a resident of the state two years next preceding the election, and attained the age of thirty years at the time of said election.

SEC. 7. The governor shall be commander-in-chief of the militia, Commander. the army, and navy of this state.

SEC. 8. He shall transact all executive business with the officers of Duties. government, civil and military, and may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices.

SEC. 9. He shall take care that the laws are faithfully executed. Same.

SEC. 10. When any office shall, from any cause, become vacant, and Vacancies. no mode is provided by the constitution and laws for filling such vacancy, the governor shall have power to fill such vacancy, by granting a commission, which shall expire at the end of the next session of the general assembly, or at the next election by the people.

SEC. 11. He may, on extraordinary occasions, convene the general Convening assembly.

- assembly by proclamation, and shall state to both houses, when assembled, the purpose for which they shall have been convened.
- Message.** SEC. 12. He shall communicate, by message, to the general assembly, at every regular session, the condition of the state, and recommend such matters as he shall deem expedient.
- Adjournment.** SEC. 13. In case of disagreement between the two houses with respect to the time of adjournment, the governor shall have power to adjourn the general assembly to such time as he may think proper; but no such adjournment shall be beyond the time fixed for the regular meeting of the next general assembly.
- Disqualification.** SEC. 14. No person shall, while holding any office under the authority of the United States, or this state, execute the office of governor, or lieutenant governor, except as hereinafter expressly provided.
- Two years.** SEC. 15. The official term of the governor, and lieutenant governor, shall commence on the second Monday of January next after their election, and continue for two years, and until their successors are elected and qualified. The lieutenant governor, while acting as governor, shall receive the same pay as provided for governor; and while presiding in the senate, shall receive as compensation therefor, the same mileage and double the per-diem pay provided for a senator, and none other.
- Pardons, &c.** SEC. 16. The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the general assembly at its next meeting, when the general assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the general assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and the reason therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted.
- Lieutenant act as governor.** SEC. 17. In case of the death, impeachment, resignation, removal from office, or other disability of the governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the lieutenant governor.
- Further vacancies provided for.** SEC. 18. The lieutenant governor shall be president of the senate, but shall only vote when the senate is equally divided; and in case of his absence, or impeachment, or when he shall exercise the office of governor, the senate shall choose a president pro tempore.
- Same.** SEC. 19. If the lieutenant governor, while acting as governor, shall be impeached, displaced, resign, or die, or otherwise become incapable of performing the duties of the office, the president pro tempore of the senate shall act as governor until the vacancy is filled, or the disability removed; and if the president of the senate, for any of the above causes, shall be rendered incapable of performing the duties pertaining to the office of governor, the same shall devolve upon the speaker of the house of representatives.
- Seal of state.** SEC. 20. There shall be a seal of this state, which shall be kept by the governor, and used by him officially, and shall be called the great seal of the state of Iowa.
- Commissions, &c.** SEC. 21. All grants and commissions shall be in the name and by the authority of the people of the state of Iowa, sealed with the great

seal of the state, signed by the governor, and countersigned by the secretary of state.

SEC. 22. A secretary of state, auditor of state, and treasurer of state, shall be elected by the qualified electors, who shall continue in office two years, and until their successors are elected and qualified; and perform such duties as may be required by law.

#### ARTICLE V.—JUDICIAL DEPARTMENT.

SECTION 1. The judicial power shall be vested in a supreme court, district court, and such other courts, inferior to the supreme court, as the general assembly may, from time to time, establish.

SEC. 2. The supreme court shall consist of three judges, two of whom shall constitute a quorum to hold court.

SEC. 3. The judges of the supreme court shall be elected by the qualified electors of the state, and shall hold their court at such time and place as the general assembly may prescribe. The judges of the supreme court so elected, shall be classified so that one judge shall go out of office every two years; and the judge holding the shortest term of office under such classification, shall be chief justice of the court during his term, and so on in rotation. After the expiration of their terms of office, under such classification, the term of each judge of the supreme court shall be six years, and until his successor shall have been elected and qualified. The judges of the supreme court shall be ineligible to any other office in the state, during the term for which they have been elected.

SEC. 4. The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals throughout the state.

SEC. 5. The district court shall consist of a single judge, who shall be elected by the qualified electors of the district in which he resides. The judge of the district court shall hold his office for the term of four years, and until his successor shall have been elected and qualified; and shall be ineligible to any other office, except that of judge of the supreme court, during the term for which he was elected.

SEC. 6. The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and have jurisdiction in civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law.

SEC. 7. The judges of the supreme and district courts shall be conservators of the peace throughout the state.

SEC. 8. The style of all process shall be "The State of Iowa," and all prosecutions shall be conducted in the name and by the authority of the same.

SEC. 9. The salary of each judge of the supreme court shall be two thousand dollars per annum; and that of each district judge one thousand six hundred dollars per annum, until the year eighteen hundred and sixty; after which time they shall severally receive such compensation as the general assembly may, by law, prescribe; which compensation shall not be increased or diminished during the term for which they shall have been elected.

SEC. 10. The state shall be divided into eleven judicial districts; and after the year eighteen hundred and sixty, the general assembly may re-organize the judicial districts, and increase or diminish the num-

ber of districts, or the number of judges of the said court, and may increase the number of judges of the supreme court; but such increase or diminution shall not be more than one district, or one judge of either court, at any one session; and no re-organization of the districts, or diminution of the number of judges, shall have the effect of removing a judge from office. Such re-organization of the districts, or any change in the boundaries thereof, or increase or diminution of the number of judges, shall take place every four years thereafter, if necessary, and at no other time.

**When chosen.** SEC. 11. The judges of the supreme and district courts shall be chosen at the general election; and the term of office of each judge shall commence on the first day of January next after his election.

**Attorney general.** SEC. 12. The general assembly shall provide, by law, for the election of an attorney general by the people, whose term of office shall be two years, and until his successor shall have been elected and qualified.

**Elected.** SEC. 13. The qualified electors of each judicial district shall, at the time of the election of district judge, elect a district attorney, who shall be a resident of the district for which he is elected, and who shall hold his office for the term of four years, and until his successor shall have been elected and qualified.

**Qualifications.** SEC. 14. It shall be the duty of the general assembly to provide for the carrying into effect of this article, and to provide for a general system of practice in all the courts of this state.

#### ARTICLE 6.—MILITIA.

**Who constitute.** SECTION 1. The militia of this state shall be composed of all able-bodied white male citizens, between the ages of eighteen and forty-five years, except such as are or may hereafter be exempt by the laws of the United States, or of this state; and shall be armed, equipped, and trained, as the general assembly may provide by law.

**Qualification.** SEC. 2. No person or persons conscientiously scrupulous of bearing arms shall be compelled to do military duty in time of peace: *provided*, that such person or persons shall pay an equivalent for such exemption in the same manner as other citizens.

**Officers.** SEC. 3. All commissioned officers of the militia (staff officers excepted) shall be elected by the persons liable to perform military duty, and shall be commissioned by the governor.

#### ARTICLE 7.—STATE DEBTS.

**Limitation of state indebtedness.** SECTION 1. The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the state shall never assume, or become responsible for, the debts or liabilities of any individual, association, or corporation, unless incurred in time of war for the benefit of the state.

**Same.** SEC. 2. The state may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the general assembly, or at different periods of time, shall never exceed the sum of two hundred and fifty thousand dollars; and the money arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

**Losses to school funds audited.** SEC. 3. All losses to the permanent, school, or university fund of this state, which shall have been occasioned by the defalcation, mismanage-



ment, or fraud of the agents or officers controlling and managing the same, shall be audited by the proper authorities of the state. The amount so audited shall be a permanent funded debt against the state, in favor of the respective fund, sustaining the loss, upon which not less than six per cent. annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized by the second section of this article.

SEC. 4. In addition to the above limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or defend the state in war; but the money arising from the debts so contracted shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

For what other purposes state may contract debt.

SEC. 5. Except the debts hereinbefore specified in this article, no debt shall be hereafter contracted by, or on behalf of this state, unless such debt shall be authorized by some law for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax, sufficient to pay the interest on such debt, as it falls due, and also to pay and discharge the principal of such debt, within twenty years from the time of the contracting thereof; but no such law shall take effect until at a general election it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; and all money raised by authority of such law, shall be applied only to the specific object therein stated, or to the payment of the debt created thereby; and such law shall be published in at least one newspaper in each county, if one is published therein, throughout the state, for three months preceding the election at which it is submitted to the people.

Other debts to be authorized by special law.

Submitted to the people.

SEC. 6. The legislature may, at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time forbid the contracting of any further debt, or liability, under such law; but the tax imposed by such law, in proportion to the debt or liability which may have been contracted in pursuance thereof, shall remain in force and be irrevocable, and be annually collected, until the principal and interest are fully paid.

Legislature may repeal.

SEC. 7. Every law which imposes, continues, or revives a tax, shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

Tax imposed, distinctly stated.

#### ARTICLE 8.—CORPORATIONS.

SECTION 1. No corporation shall be created by special laws; but the general assembly shall provide by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided.

Corporations how created.

SEC. 2. The property of all corporations for pecuniary profit, shall be subject to taxation, the same as that of individuals.

Property taxable.

SEC. 3. The state shall not become a stockholder in any corporation, nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the state.

State not to be a stockholder

SEC. 4. No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly.

Corporation not to be a stockholder.

SEC. 5. No act of the general assembly, authorizing or creating corporations or associations with banking powers, nor amendments thereto, shall take effect, or in any manner be in force, until the same shall have been submitted, separately, to the people, at a general or special election,

Act creating corporations submitted to the people.

- as provided by law, to be held not less than three months after the passage of the act, and shall have been approved by a majority of all the electors voting for and against it at such election.
- State bank.** SEC. 6. Subject to the provisions of the foregoing section, the general assembly may also provide for the establishment of a state bank with branches.
- Founded on specie basis.** SEC. 7. If a state bank be established, it shall be founded on an actual specie basis, and the branches shall be mutually responsible for each other's liabilities upon all notes, bills and other issues intended for circulation as money.
- General banking law to provide for.** SEC. 8. If a general banking law shall be enacted, it shall provide for the registry and countersigning, by an officer of state, of all bills, or paper credit designed to circulate as money, and require security to the full amount thereof, to be deposited with the state treasurer, in United States stocks, or in interest paying stocks of states in good credit and standing, to be rated at ten per cent. below their average value in the city of New York, for the thirty days next preceding their deposit; and in case of a depreciation of any portion of such stocks, to the amount of ten per cent. on the dollar, the bank or banks owning said stocks shall be required to make up said deficiency by depositing additional stocks; and said law shall also provide for the recording of the names of all stockholders in such corporations, the amount of stock held by each, the time of any transfer, and to whom.
- Stockholders responsible.** SEC. 9. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all of its liabilities, accruing while he or she remains such stockholder.
- Bill holders to have preference.** SEC. 10. In case of the insolvency of any banking institution, the bill holders shall have a preference over its other creditors.
- Suspension of specie payments.** SEC. 11. The suspension of specie payments by banking institutions shall never be permitted or sanctioned.
- General assembly may amend or repeal by two-thirds vote.** SEC. 12. Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted.

## ARTICLE 9.—EDUCATION AND SCHOOL LANDS.

### 1.—*Education.*

- Board of education.** SECTION 1. The educational interest of the state, including common schools and other educational institutions, shall be under the management of a board of education, which shall consist of the lieutenant governor, who shall be the presiding officer of the board, and have the casting vote in case of a tie, and one member to be elected from each judicial district in the state.
- Who eligible.** SEC. 2. No person shall be eligible as a member of said board who shall not have attained the age of twenty-five years, and shall have been one year a citizen of the state.
- How elected.** SEC. 3. One member of said board shall be chosen by the qualified electors of each district, and shall hold the office for the term of four years, and until his successor is elected and qualified. After the first election under this constitution, the board shall be divided, as nearly as

practicable, into two equal classes, and the seats of the first class shall be vacated after the expiration of two years; and one half of the board shall be chosen every two years thereafter. Iow divided.

SEC. 4. The first session of the board of education shall be held at the seat of government, on the first Monday of December, after their election; after which the general assembly may fix the time and place of meeting. First session held.

SEC. 5. The session of the board shall be limited to twenty days, and but one session shall be held in any one year, except upon extraordinary occasions, when, upon the recommendation of two-thirds of the board, the governor may order a special session. Limited to twenty days.

SEC. 6. The board of education shall appoint a secretary, who shall be the executive officer of the board, and perform such duties as may be imposed upon him by the board, and the laws of the state. They shall keep a journal of their proceedings, which shall be published and distributed in the same manner as the journals of the general assembly. Secretary.

SEC. 7. All rules and regulations made by the board shall be published and distributed to the several counties, townships, and school districts, as may be provided for by the board, and when so made, published, and distributed, they shall have the force and effect of law. Rules and regulations of board.

SEC. 8. The board of education shall have full power and authority to legislate and make all needful rules and regulations in relation to common schools, and other educational institutions, that are instituted, to receive aid from the school or university fund of this state; but all acts, rules, and regulations of said board may be altered, amended, or repealed by the general assembly; and when so altered, amended, or repealed, they shall not be re-enacted by the board of education. Power to make, &c. General assembly may repeal, &c.

SEC. 9. The governor of the state, shall be, *ex-officio*, a member of said board. Governor ex-officio a member.

SEC. 10. The board shall have no power to levy taxes, or make appropriations of money. Their contingent expenses shall be provided for by the general assembly. Contingent.

SEC. 11. The state university shall be established at one place without branches at any other place, and the university fund shall be applied to that institution, and no other. State university.

SEC. 12. The board of education shall provide for the education of all the youths of the state, through a system of common schools, and such schools shall be organized and kept in each school district at least three months in each year. Any district failing, for two consecutive years, to organize and keep up a school, as aforesaid, may be deprived of their portion of the school fund. Board of education to provide for education of youths of the state.

SEC. 13. The members of the board of education shall each receive the same per diem during the time of their session, and mileage going to and returning therefrom, as members of the general assembly. Compensation.

SEC. 14. A majority of the board shall constitute a quorum for the transaction of business; but no rule, regulation, or law, for the government of common schools or other educational institutions shall pass without the concurrence of a majority of all the members of the board, which shall be expressed by the yeas and nays on the final passage. The style of all acts of the board shall be, "Be it enacted by the board of education of the state of Iowa." Quorum. Style of acts.

SEC. 15. At any time after the year one thousand eight hundred and sixty-three, the general assembly shall have power to abolish or reorganize said board of education, and provide for the educational inter- When board may be abolished.

est of the state in any other manner that to them shall seem best and proper.

## 2.—SCHOOL FUNDS AND SCHOOL LANDS.

- Under control of general assembly.** SECTION 1. The educational and school funds and lands, shall be under the control and management of the general assembly of this state.
- Permanent fund.** SEC. 2. The university lands, and the proceeds thereof, and all moneys belonging to said fund shall be a permanent fund for the sole use of the state university. The interest arising from the same shall be annually appropriated for the support and benefit of said university.
- Lands appropriated to educational purposes.** SEC. 3. The general assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. The proceeds of all lands that have been, or hereafter may be, granted by the United States to this state, for the support of schools, which may have been or shall hereafter be sold, or disposed of, and the five hundred thousand acres of land granted to the new states, under an act of congress, distributing the proceeds of the public lands among the several states of the Union, approved in the year of our Lord one thousand eight hundred and forty-one, and all estates of deceased persons who may have died without leaving a will or heir, and also such per cent. as has been or may hereafter be granted by congress, on the sale of lands in this state, shall be, and remain a perpetual fund, the interest of which, together with all rents of the unsold lands, and such other means as the general assembly may provide, shall be inviolably appropriated to the support of common schools throughout the state.
- Fines, &c., how appropriated.** SEC. 4. The money which may have been or shall be paid by persons as an equivalent from exemption from military duty, and the clear proceeds of all fines collected in the several counties for any breach of the penal laws, shall be exclusively applied, in the several counties in which such money is paid, or fine collected, among the several school districts of said counties, in proportion to the number of youths subject to enumeration in such districts, to the support of common schools, or the establishment of libraries, as the board of education shall from time to time provide.
- Lands reserved, or granted, or funds accruing from sale thereof to be a permanent fund.** SEC. 5. The general assembly shall take measures for the protection, improvement, or other disposition of such lands as have been, or may hereafter be reserved, or granted by the United States, or any person or persons, to this state, for the use of the university, and the funds accruing from the rents or sale of such lands, or from any other source for the purpose aforesaid, shall be, and remain, a permanent fund, the interest of which shall be applied to the support of said university, for the promotion of literature, the arts and sciences, as may be authorized by the terms of such grant. And it shall be the duty of the general assembly as soon as may be, to provide effectual means for the improvement and permanent security of the funds of said university.
- Interest applied.** SEC. 6. The financial agents of the school funds shall be the same, that by law, receive and control the state and county revenue, for other civil purposes, under such regulations as may be provided by law.
- Who agents of school funds.** SEC. 7. The money subject to the support and maintenance of common schools shall be distributed to the districts in proportion to the number of youths, between the ages of five and twenty-one years, in such manner as may be provided by the general assembly.
- Money to be distributed.**

## ARTICLE X.—AMENDMENTS TO THE CONSTITUTION.

SECTION 1. Any amendment or amendments to this constitution may be proposed in either house of the general assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published, as provided by law, for three months previous to the time of making such choice; and if, in the general assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to, by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people in such manner, and at such time as the general assembly shall provide; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the general assembly, voting thereon, such amendment or amendments shall become a part of the constitution of this state.

Amendments.

SEC. 2. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately.

More than one.

SEC. 3. At the general election to be held in the year one thousand eight hundred and seventy, and in each tenth year thereafter, and also at such times as the general assembly may, by law, provide, the question, "Shall there be a convention to revise the constitution, and amend the same?" shall be decided by the electors qualified to vote for members of the general assembly; and in case a majority of the electors so qualified, voting at such election for and against such proposition, shall decide in favor of a convention for such purpose, the general assembly, at its next session, shall provide by law for the election of delegates to such convention.

Convention.

## ARTICLE XI.—MISCELLANEOUS.

SECTION 1. The jurisdiction of justices of the peace shall extend to all civil cases, (except cases in chancery, and cases where the question of title to real estate may arise,) where the amount in controversy does not exceed one hundred dollars, and by the consent of parties may be extended to any amount not exceeding three hundred dollars.

Jurisdiction of justices of the peace.

SEC. 2. No new county shall be hereafter created containing less than four hundred and thirty-two square miles; nor shall the territory of any organized county be reduced below that area; except the county of Worth, and the counties west of it along the northern boundary of this state, may be organized without additional territory.

Counties.

SEC. 3. No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation—to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness.

To what amount county may become indebted.

SEC. 4. The boundaries of the state may be enlarged, with the consent of congress and the general assembly.

Boundaries.

SEC. 5. Every person elected or appointed to any office, shall, before entering upon the duties thereof, take an oath or affirmation to support

Oath of office.

	the constitution of the United States, and of this state, and also an oath of office.
How vacancies filled	SEC. 6. In all cases of elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and all persons appointed to fill vacancies in office, shall hold until the next general election, and until their successors are elected and qualified.
How lands granted may be located.	SEC. 7. The general assembly shall not locate any of the public lands which have been, or may be granted by congress to this state, and the location of which may be given to the general assembly, upon lands actually settled, without the consent of the occupant. The extent of the claim of such occupant so exempted, shall not exceed three hundred and twenty acres.
Seat of government.	SEC. 8. The seat of government is hereby permanently established, as now fixed by law, at the city of Des Moines, in the county of Polk; and the state university at Iowa city, in the county of Johnson.

## ARTICLE 12.—SCHEDULE.

Supreme court of the state.	SECTION 1. The constitution shall be the supreme law of the state, and any law inconsistent therewith, shall be void. The general assembly shall pass all laws necessary to carry this constitution into effect.
Laws in force.	SEC. 2. All laws now in force, and not inconsistent with this constitution, shall remain in force until they shall expire or be repealed.
Legal process not affected.	SEC. 3. All indictments, prosecutions, suits, pleas, complaints, process, and other proceedings pending in any of the courts, shall be prosecuted to final judgment and execution; and all appeals, writs of error, <i>certiorari</i> , and injunctions, shall be carried on in the several courts, in the same manner as now provided by law, and all offenses, misdemeanors and crimes that may have been committed before the taking effect of this constitution, shall be subject to indictment, trial, and punishment, in the same manner as they would have been had not this constitution been made.
Fines, &c, inure to the state.	SEC. 4. All fines, penalties, or forfeitures due, or to become due, or accruing to the state, or to any county therein, or to the school fund, shall inure to the state, county, or school fund, in the manner prescribed by law.
Bonds in force.	SEC. 5. All bonds executed to the state, or to any officer in his official capacity, shall remain in force and inure to the use of those concerned.
First election. Governor and lieutenant governor.	SEC. 6. The first election under this constitution shall be held on the second Tuesday in October, in the year one thousand eight hundred and fifty-seven, at which time the electors of the state shall elect the governor and lieutenant governor. There shall also be elected at such election, the successors of such state senators as were elected at the August election, in the year one thousand eight hundred and fifty-four, and members of the house of representatives, who shall be elected in accordance with the act of apportionment, enacted at the session of the general assembly which commenced on the first Monday of December one thousand eight hundred and fifty-six.
Same. Secretary, auditor, &c.	SEC. 7. The first election for secretary, auditor, and treasurer of state, attorney general, district judges, members of the board of Education, district attorneys, members of congress, and such state officers as shall be elected at the April election, in the year one thousand eight hundred and fifty-seven, (except the superintendent of public instruction,) and such county officers as were elected at the August election,

in the year one thousand eight hundred and fifty-six, except prosecuting attorneys, shall be held on the second Tuesday of October, one thousand eight hundred and fifty-eight: *provided*, that the time for which any district judge or other state or county officer elected at the April election in the year one thousand eight hundred and fifty-eight, shall not extend beyond the time fixed for filling like offices at the October election, in the year one thousand eight hundred and fifty-eight.

SEC. 8. The first election for judges of the supreme court, and such county officers as shall be elected at the August election, in the year one thousand eight hundred and fifty-seven, shall be held on the second Tuesday of October, in the year one thousand eight hundred and fifty-nine. Same Judges of supreme court.

SEC. 9. The first regular session of the general assembly shall be held in the year one thousand eight hundred and fifty-eight commencing on the second Monday of January of said year. First session general assembly.

SEC. 10. Senators elected at the August election, in the year one thousand eight hundred and fifty-six, shall continue in office until the second Tuesday of October, in the year one thousand eight hundred and fifty-nine, at which time their successors shall be elected as may be prescribed by law. Senators.

SEC. 11. Every person elected by popular vote, by a vote of the general assembly, or who may hold office by executive appointment, which office is continued by this constitution, and every person who shall be so elected or appointed to any such office, before the taking effect of this constitution, (except as in this constitution otherwise provided) shall continue in office until the term for which such person has been or may be elected or appointed shall expire; but no such person shall continue in office after the taking effect of this constitution, for a longer period than the term of such office, in this constitution prescribed. Offices not vacated by new constitution.

SEC. 12. The general assembly, at the first session under this constitution, shall district the state into eleven judicial districts, for district court purposes; and shall also provide for the apportionment of the members of the general assembly in accordance with the provisions of this constitution. State to be districted.

SEC. 13. This constitution shall be submitted to the electors of the state at the August election, in the year one thousand eight hundred and fifty-seven, in the several election districts in this state. The ballots at such election shall be written or printed as follows: those in favor of the constitution, "new constitution—yes." Those against the constitution, "new constitution—no." The election shall be conducted in the same manner as the general elections of the state, and the poll-books shall be returned and canvassed as provided in the twenty-fifth chapter of the code, and abstracts shall be forwarded to the secretary of state, which abstracts shall be canvassed in the manner provided for the canvass of state officers. And if it shall appear that a majority of all the votes cast at such election for and against this constitution are in favor of the same, the governor shall immediately issue his proclamation stating that fact, and such constitution shall be the constitution of the state of Iowa, and shall take effect from and after the publication of said proclamation. Constitution to be voted for, August, 1857.

SEC. 14. At the same election that this constitution is submitted to the people for its adoption or rejection, a proposition to amend the same by striking out the word "white," from the article on the "right of suffrage," shall be separately submitted to the electors of this state for adoption or rejection, in the manner following, viz: a separate ballot may be given by every person having a right to vote at said election, to Proposition to strike out the word "white."

be deposited in a separate box. And those given for the adoption of such proposition shall have the words, "shall the word 'white' be stricken out of the article on the 'right of suffrage?' yes." And those given against the proposition shall have the words "shall the word 'white' be stricken out of the article on the 'right of suffrage?' no." And if at said election the number of ballots cast in favor of said proposition, shall be equal to a majority of those cast for and against this constitution, then said word "white" shall be stricken from said article and be no part thereof.

SEC. 15. Until otherwise directed by law, the county of Mills shall be in and a part of the sixth judicial district of this state.

Done in convention at Iowa City, this fifth day of March, in the year of our Lord one thousand eight hundred and fifty-seven, and of the independence of the United States of America, the eighty-first.

In testimony whereof, we have hereunto subscribed our names:

TIMOTHY DAY,  
S. G. WINCHESTER,  
DAVID BUNKER,  
D. P. PALMER,  
GEO. W. ELLS,  
J. C. HALL,  
JOHN H. PETERS,  
WM. H. WARREN,  
H. W. GRAY,  
ROBT. GOWER,  
H. D. GIBSON,  
THOMAS SEELEY,  
A. H. MARVIN,  
J. H. EMERSON,  
R. L. B. CLARKE,  
JAMES A. YOUNG,  
D. H. SOLOMON,

M. W. ROBINSON,  
LEWIS TODD HUNTER,  
JOHN EDWARDS,  
J. C. TRAEER,  
JAMES F. WILSON,  
AMOS HARRIS,  
JNO. T. CLARKE,  
S. AYRES,  
HARVEY J. SKIFF,  
J. A. PARVIN,  
W. PENN CLARK,  
JERE. HOLLINGSWORTH,  
WM. PATTERSON,  
D. W. PRICE,  
ALPHEUS SCOTT,  
GEORGE GILLASPY,  
EDWARD JOINSTONE,  
FRANCIS SPRINGER, *President.*

ATTEST:

TH. J. SAUNDERS, *Secretary.*

E. N. BATES, *Assistant Secretary.*



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